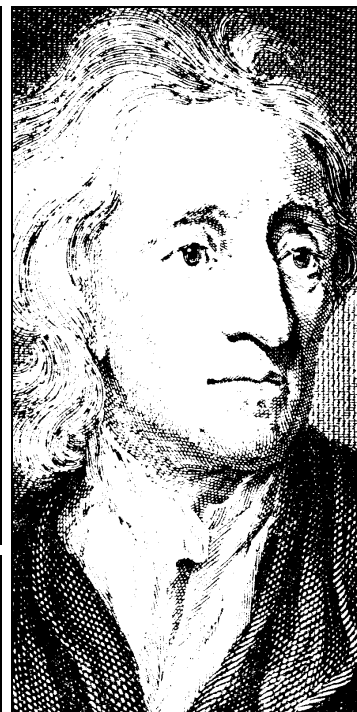


THE RIGHT TO REVOLUTION:

TOLERATION, LIBERTY AND THE STATE IN THE THOUGHT OF JOHN LOCKE AND THE EARLY LIBERALS



BARRY
MACLEOD-CULLINANE



IN CONGRESS, JULY 4, 1776

Unanimous Declaration of the thirteen united States of America

When in the Course of human Events, it becomes necessary for one People to dissolve the political Bands which have connected them, the Reason and Justice which ought to govern them, should appear, as a solemn Appeal to the Supreme Judge of the World for the Rectitude of their Intentions. — It is the Law of self-preservation, that all Men are created equal, that they are entitled to Liberty and the pursuit of Happiness — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, and whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem best, so that their Safety and Liberty may be secured. — Nor is it the Reason of the People, that they should be always bound to oblige themselves to submit to the former, when it is necessary to alter it, in order to secure them from Want of Liberty, and the Pursuit of Happiness. — But when a long Train of Abuses and Misuses has connected themselves, and every Form of Government has become destructive of the Ends for which they are instituted, it is their Right, it is their Duty, it is their Duty, to throw off such Government, and to provide new Guards for their future Liberties; and justly to say, we have a right to alter our former Systems of Government. — This history of injuries and usurpations, all having in direct or indirect Tendency to establish an absolute Tyranny over these States. — It is the Duty of the People to declare the Rights of the Colonies, and to insist on their being observed, and when they are refused, to declare the Colonies to be free and independent States, absolved from all Allegiance to the British Crown, and to assume the Powers and Jurisdictions of a free and independent State. — It is the Duty of the People to declare the Colonies to be free and independent States, absolved from all Allegiance to the British Crown, and to assume the Powers and Jurisdictions of a free and independent State. — It is the Duty of the People to declare the Colonies to be free and independent States, absolved from all Allegiance to the British Crown, and to assume the Powers and Jurisdictions of a free and independent State.

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FOR LIFE,
LIBERTY
AND
PROPERTY

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TOLERATION, LIBERTY AND THE STATE IN THE THOUGHT OF JOHN LOCKE AND THE EARLY LIBERALS

BARRY MACLEOD-CULLINANE

... That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government ... in such form, as to them shall most likely to effect their safety and happiness. ...

American Declaration of Independence, 1776.

I. Introduction

When read as a tract of political philosophy, the *American Declaration of Independence* is perhaps the finest exposition of the radical whig¹ tradition's theory of resistance and revolution, a theory pertaining to how individuals may act to secure toleration and liberty in the face of encroachments by the magistrate (or ruler).² Indeed, the American Revolution represents the apogee of a tradition that "... proudly claimed ... kinship with luminaries of republican thought like Milton, Harrington, Sidney and others. In the eighteenth century the majority of the ruling oligarchy and the greater part of their fellow countrymen emphatically denied any continuity or connection between the innovators and Levellers of the Puritan Revolution (1641-1660), and the philosophers and Whiggish statesmen of the struggle (1679-1710) to exclude James Stuart and secure the Glorious Revolution. ... in general all talk of '41 alarmed Englishmen as much or more than the sight of Jacobite toasts 'over the water'. Any proposed tampering with the fabric of the church and state produced dismal recollections and dire predictions.³

In the now famous Jefferson-Adams correspondence, after both had left office and settled their differences, Thomas Jefferson and John Adams reflected upon the meaning of the American Revolution. Writing from Quincy, 24 August 1815, John Adams asked:

What do we mean by the Revolution? The War? That was no part of the Revolution; it was only a consequence of it. The Revolution was in the minds of the people, and this was effected from 1760 to 1775, in the course of fifteen years before a drop of blood was shed at Lexington.⁴

Almost by way of definition, of the nature of this ideological revolution, is the view bequeathed by the radical whig tradition and articulated most eloquently in 1792, by James Madison.

In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty. This revolution in the practice of the world may, with an honest praise, be pronounced the most triumphant epoch of its history and the most consoling presage of its happiness.⁵

Though the words of John Locke, expressed in his *Two Treatises on Government*⁶ (hereafter, *Two Treatises*) of the previous century, form the vocabulary of men like Thomas Jefferson he was, as Clinton Rossiter notes, just one star in their firmament of thinkers.⁷ However,

If Locke looms above the other great men of this ancient school [of natural-law philosophy] ... it is probably because of one very practical rather than philosophical reason: He was a famous, almost unassailable English philosopher who had glorified a rebellion of Englishmen against an English king. Despite his inconsistencies and omissions, despite his failure to give the ancient line any really new twist, he was therefore the most popular source of Revolutionary ideas. As such he was *primus inter pares*, not the lonely oracle of the American consensus.⁸

First, this paper traces the relationship between religious toleration, liberty and resistance rights expounded by radical whigs during the seventeenth century before arguing that Locke's *Two Treatises* should be read as a development of this tradition. It then examines Locke's formulation of pol-

itical obligation, the proper role and limits of magisterial power, and the conditions justifying resort to resistance and revolution. Lastly, it considers toleration and liberty when the State is clearly not bound by a Lockean social contract but is the product of imposed violence, i.e., its relevance for today.

II. Toleration and the Right to Resist

Locke's *Two Treatises* reflect the abiding concerns of an age of political turmoil and social upheaval: the establishment of legitimate political authority as the foundation for peace and security, and, with it, toleration, and the rule of law. Though the ideas expressed by Locke were not new, nor was his exposition without error, they nevertheless are representative of the commonwealthman tradition's emphasis upon the possession of resistance rights to tyranny.

(A) Toleration, Law, & Revolution

As Harold J. Berman writes, in his masterful *Law and Revolution*:

The Western legal tradition has been transformed in the course of its history by six great revolutions.... the English Revolution, was first called a revolution (the Glorious Revolution) only when it was coming to an end in 1688-89; in its initial stage (1640-1660) it was called the Great Rebellion by its enemies and a 'restoration of freedom' by its friends, the second stage (1660-1685) was called the Restoration at the time.¹

So that, overall, the concept of 'revolution' meant "a turn[ing] of the wheel back to an earlier system of government."² And, "[t]hus what most historians now call the English Revolution consisted of three successive 'restorations'."³ Berman's stress of how individuals perceived their actions during the English Revolution (used here in his wider sense of the term) reflects the conception of revolution held by the radical whigs and commonwealthmen: they were not so much revolutionaries or innovators but conservators of an older, established order of rights and liberties jeopardized by the 'rebellious' acts of ministers and King in seeking to aggrandize their power. As the 'revolution' of the planets along their orbits around the sun returned them to their starting place, so the term 'revolution' was used in human affairs to signify the return to that state of affairs which had earlier prevailed.⁴ Thus, as historian Robert Thomas argues, the Civil War was fought, in large part, for

a constitutional ideal which was conservative in its resistance to innovation but also, in the context of its time, libertarian in its objection to central government control and taxation, its belief in the sanctity of individual property, and its championing of the peaceful operation of civil society. Both sides in the war took up arms to defend aspects of this ideal. [But] the violent and revolutionary methods employed by Royalist and Parliamentarian partisans were, however, destructive of the very constitutional settlement they sought to preserve.⁵

Not only was the Civil War a terrible catastrophe, extinguishing some 185,000 lives,⁶ massively dislocating economic activity, and consuming vast resources; it also led to the imposition of arbitrary government in the form of Oliver

Cromwell's military dictatorship, The Protectorate.⁷ But this violent shattering of the institutional framework also led to the temporary breakdown of the state's control or licensing of the press and a permanent weakening of its ability to enforce religious conformity.

In his superb study of "Intellectual Property"⁸ Tom Palmer explains how these issues were bound up with the origins of copyright. The latter "emerges from the exercise of state power, rather than from a concern with the property rights of authors",⁹ and is exemplified by "the Crown's grants of printing monopolies, its efforts to suppress heretical or seditious writings, and to exercise censorship control over all publications."¹⁰ Before the English Revolution, the press had been formed into the Company of Stationers by Queen Mary in 1557 to exert political control of published output, "with the particular purpose of suppressing Protestantism".¹¹ As with all mercantilist arrangements, the State's regulation carried with it a grant of monopoly to those already established in the business:¹² "in 1637, the company of Stationers was authorized by a Star Chamber decree to seize and destroy unauthorized books and presses, eliminating both economic competition and threats to the established order at one blow."¹³ But, "with the abolition of the Star Chamber by the Long Parliament in 1641, the basis for this monopolistic system of control was temporarily removed"¹⁴ releasing a veritable deluge of writings.

Yet, within this tide, of radical religious and political philosophy, ran counter elements, such as the Presbyterians, whose aim was to use Parliament to re-establish powers and officers to enforce their own brand of religious censorship. With "a series of licensing acts, beginning in 1643" they sought to restrict this new, enlarged freedom of the press, and "[a]s one legal scholar has commented, the only real change was in the 'political and religious biases of the licensers'."¹⁵

In his much celebrated defence of a free press and the freedom to exchange ideas, *Areopagitica* (1644),¹⁶ John Milton attacked this intolerance and resurrection of licensing laws. Arguing that censorship, even though founded upon apparently good intentions (for instance, to secure man's immortal soul from damnation by denying individuals the opportunity to encounter ideas that might provoke sin or deceive them with falsehoods), would serve to erect a totalitarian nightmare where even laughter would be regulated by the keeper of public morals.¹⁷ For, once the premise of 'protection for their own good' was granted, more and more restrictions and interventions would be necessary to constrain both ruled and ruler to avoid further moral deviations.^{18,19} Instead, for Milton, "as different beliefs compete in a marketplace of ideas, truth (or its closest approximation) will eventually emerge triumphant. ... If a man believes he possesses the truth, then let him convince others by argument, not compel them by threats."²⁰ Thus,

[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew the truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing.²¹

Early confirmation of the accuracy of Milton's predictions of the likely, deleterious results stemming from cen-

sorship of religious expression came when the Puritan elements in Parliament “started to attack the more fundamental aspects of Anglican ritual (such as the use of the Prayer Book, and the observation of traditional festivals such as Christmas and Easter).”²² Even with fines, use of the Prayer Book continued in London and Essex which formed the core areas of Puritan support. Such spontaneous resistance, as well as that which arose against the imposition of state ‘approved’ ministers upon parishioners,²³ effectively defeated Puritan drives for religious conformity in those areas most sympathetic to Parliament during the Civil War, whilst in the most pro-Royalist regions such designs met with even less success.²⁴

(B) Toleration and Social Harmony

From this breakdown in the enforcement of conformity and censorship arose calls for, and practice of, greater toleration between individuals of different beliefs. For

the term ‘Puritan’ is misleading, because it suggests a uniformity of opinion that was by no means present. Revolutionaries included the intolerant Presbyterians and the more tolerant Independents (later called Congregationalists), who stressed the voluntary nature of church membership ... [and] the ‘sectaries,’ a bewildering array of fringe groups. These included Ranters, Seekers, Quakers, Muggletonians, Socinians, Anabaptists, Brownists, Fifth-Monarchy Men — the list seems endless,²⁵ and whose creeds “were often steeped in mysticism and millenarism, [whilst] ... some of their political beliefs flirted with anarchism.”²⁶

Such groups did not try to enforce their creeds by State coercion. This secularization, or separation of state and religion, effected through greater tolerance a move towards peace in the commonwealth. For, “since the state did not impose one religion on everyone, it wasn’t important for religious groups to fight for control of the state.”²⁷ John Locke expounds this secular view, that religion falls beyond the rightful bounds of the magistrate’s authority, when he announces in *A Letter Concerning Toleration* (1689) that

The care of every man’s soul belongs unto himself. But what if he neglect the care of his soul? I answer, what if he neglect the care of his health, or of his estate; which things are nearer related to the government of the magistrate than the other? Will the magistrate provide by an express law, that such an one shall not become poor or sick? Laws provide, as much as is possible, that the goods and health of subjects be not injured by the fraud or violence of others; they do not guard them from the negligence or ill-husbandry of the possessors themselves. No man can be forced to be rich or healthful, whether he will or no. Nay God himself will not save men against their wills.²⁸

Furthermore, Locke and other radical whigs (such as Henry Neville in *Plato Redivivus*) counselled that the principles of toleration should be extended to loyal Catholics since this would reduce strife and dissent directed towards the civil magistrate, “instead of making them, by the severity of penal laws, real or potential conspirators against parliament.”²⁹ The popular association of Catholicism and tyranny would be sustained only as long as there was substantial gains to be made in violent seizure and restructuring of the political organs. Locke writes,

Some enter into company for trade and profit: others, for want of business, have their clubs for claret. Neighbourhood joins some, and religion others. But there is one thing only which gathers people into seditious commotions, and that is oppression.³⁰

More importantly such pro-tolerationist writers stressed the need to confirm the right of liberty of conscience in law.

[I]f the law of toleration were once so settled, that all churches were obliged to lay down toleration as the foundation of their own liberty; and teach that liberty of conscience is every man’s natural right, equally belonging to dissenters as to themselves; and that nobody ought to be compelled in matters of religion either by law or force ... this one thing would take away all ground of complaints and tumults upon account of conscience. ... there would remain nothing in these assemblies ... less apt to produce disturbance of state, than in any other meetings. ...³¹

A major component of this transition from religious liberty to political liberty was the growth of Natural Rights theory, which overlays all the radical Whig writings of this time. The concept of self-ownership, which appears at first in calls for freedom of worship, when, for instance, groups such as the Quakers asserted their belief to being guided by the “inner light of conscience”, is widened in the Leveller Tracts to “self-proprietty” or, as Locke would later term it, “property in one’s own person” and comes to encompass many areas of life beyond merely religious matters. The implication of the development of such a doctrine was political and revolutionary. As George H. Smith explains,

The religious establishment, whether Anglican or Presbyterian, responded to dissent with predictable handwringing. Of course, the issue here was as much political as religious, because a state church was supposed to instill the virtue of passive obedience ... [and,] in the words of an astute observer, “The state pays the clergy, and thus they have dependence upon the state.” To challenge the state religion was to challenge the political status quo.³²

(C) The Right to Tyrannicide and the Social Contract

One of the foremost groups instigating such a challenge to the political *status quo* was that organisation of politically active soldiers and civilians known as the Levellers.³³ Though their name is suggestive of proto-socialist aims, the Levellers were, in fact, extreme individualists with a firm belief in private property.

[They were] concerned with the realm of each person’s individuality or self-proprietty, as they termed it. Although they never explicitly used the term self-ownership, self-proprietty had the same connotation: the right of each person to control his or her own body and soul free of coercive molestation. During a period of bitter religious strife, the Levellers stressed religious freedom — the right of each person to worship (or not to worship) as he or she chose.³⁴

Furthermore, the Levellers argued that conscription, religious persecution, and various class or monopoly privileges erected by the use of state power should be abolished so as to establish equality of all before the law, for to do other-

wise was a violation of natural law. As Richard Overton wrote in *An Arrow Against All Tyrants*,

[t]o every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for every one as is himself, so he hath a self propriety, else could he not be himself, and on this no second [person] may presume to deprive any if, without manifest violation and affront to the very principle of nature, and of the Rules of equity and justice between man and man. ...³⁵

The origin of government, for Overton, lay in an agreement of the people to establish a commonwealth, or civil society, that would serve to protect their natural rights to self-proprietty,

[f]or effecting whereof, we possessed you [the elected representatives of the commonwealth] with the same Power that was in our selves, to have done the same.³⁶

He then cautions them that:

ye are to remember, this was only of us but a Power of trust (which is ever revokable, and cannot be otherwise,) and to be employed to no other end, than our own well-being. ... We are your Principals, and you our Agents; it is a Truth which you cannot but acknowledge; For if you or any other assume, or exercise any Power, that is not derived from our Trust and choice thereunto, that Power is no less than usurpation and Oppression, from which we expect to be freed, in whomsoever we find it; it being altogether inconsistent with the nature of just freedom, which ye also very well understand.³⁷

Thus, the limits on legitimate government action, established in the social contract, for the Levellers enabled the identification of, and resistance to, oppression and arbitrary government. In their view, it was not the King but a tyrant that was overthrown by Parliament: by exceeding his duly constituted authority Charles I had effectively de-throned himself, thus placing himself outside civil society into the position of a wild beast which, to protect civil society, might be justly resisted.³⁸

Arguments in favour of tyrannicide were not new in the seventeenth century. Quentin Skinner refers to the fact that

Oliver Cromwell had already found it quite sufficient (according to Burnet's report) to reassure himself about the lawfulness of executing Charles I by engaging in 'a long discourse' about 'the nature of regal power, according to the principles of Mariana and Buchanan'.³⁹

The radicalism of certain Protestant and Catholic scholars, justifying recourse to revolution and tyrannicide, is highlighted in the writings of the Jesuit, Mariana, who regarded it as legitimate for one individual to remove a tyrant. In his *The King and the Education of the King* (1599),⁴⁰ he sets forth his defence of revolution rights. As Skinner explains, Mariana

goes on to argue, in a passage that became notorious, that 'if you ask what can be done if the power of the public meeting is laid aside', the answer is that 'anyone who is inclined to heed the prayers of the people may attempt to destroy' a tyrant, and 'can hardly be said to have acted wrongly' in making such an attempt to serve as an instrument of justice. There

is thus said to be an ultimate right of tyrannicide 'which can be exercised by any private person whatsoever (*cuicumque privato*) who may wish to come to the aid of the commonwealth'.⁴¹

Because the king, for Mariana, was little more than a salaried and elected official, he thus "takes it to be obvious that any one of the citizens, or all of them together, must retain the right to remove and even kill him."⁴² Skinner further notes that these revolutionary arguments, drawing from scholastic and Calvinist origins, had, by the start of the seventeenth century, become effectively fused and, independent of particular religious overtones, were "thus available to be used by all parties in the coming constitutional struggles of the seventeenth century."⁴³ And, it is in this light, that the revolutionary context and aim of Locke's most famous writing will now be examined.

III The Revolutionary Context of the *Two Treatises*

Published in the wake of the Glorious Revolution, Locke's *Two Treatises* (1690) are often presented as an *ex post*, after the fact, whiggish justification of the enthronement of William and Mary, allegedly written between February and August 1689. Locke, himself, gives substance to such a reading:

These, which remain, I hope are sufficient to establish the Throne of our Great Restorer, Our present King William; 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: And to justifie to the world, the people of England, whose love of their just and Natural Rights, with their resolution to preserve them, saved their the nation when it was on the very brink of Slavery and Ruine.¹

However, upon tracing Locke's movements, access to particular books, and the course of his association with the first Earl of Shaftesbury, Anthony Ashley Cooper (whom Oliver Cromwell dismissively called that "little man with three names"²) and other Whig activists, Laslett concludes that the *Two Treatises* were composed much earlier.³ Moreover, the fact that the *Second Treatise* does not, more than superficially, refer to the *First Treatise* has led him to suggest that it was composed first. He further relates its composition to the events of the Exclusion Crisis:

The issue of political obligation as such did not arise in an urgent form until 1679, when Shaftesbury found himself in need of a general, theoretical argument to justify a change in the constitution. There can be little doubt that Locke was summoned back from France early in 1679 to help his master. Shaftesbury was temporarily in office once again, trying to use the national scare over the Popish Plot to force on King Charles II the exclusion from the succession of his brother and heir apparent, the Catholic James, Duke of York.⁴

In their campaign against their Whig opponents, the Tories had enlisted the shade of Sir Robert Filmer to provide an intellectual justification for their political programme of enlarging State power and to confirm its investment in the institution of the monarchy. Filmer, in

Patriarcha and in other writings (such as *The Anarchy of a Limited or Mixed Monarchy* and *The Necessity of the Absolute Power of all Kings*⁵), defended an absolute, divinely anointed ruler, beyond the bounds of law, whose subjects had no rights to restrain him.⁶

Filmer's significance, as a champion of absolutism being republished by Tory supporters of French despotism, is confirmed by the extensive and careful refutations advanced by John Locke, Algernon Sidney in his *Discourses Concerning Government*,⁷ and James Tyrell in *Patriarcha non Monarcha*.⁸

Locke, by early 1681, in addition to refuting Filmer theoretically, was actively helping the radical whigs prepare for the contingency of armed resistance in the event of the Exclusion Bill's failure. On the 15th September 1682 he and Shaftesbury went to Cassiobury, seat of the Earl of Essex, at the height of the Insurrection Plot, before Locke returned (on 24th April 1683) at the time of the Assassination or Rye House Plot.⁹ A consequence of the latter was the arrest, 'show trial', and public execution of Algernon Sidney for treason; the prosecution using suspect and vindictive procedures founded its 'case' largely upon Sidney's unpublished *Discourses*.¹⁰ By this time Locke was suspected of treasonable activity, and was soon in exile. Though nothing was proved, Locke was suspected of having authored, like Sidney, an attack upon the government.¹¹

This manuscript Laslett identifies as *Tractatus de Morbo Gallico*. Though its title might have suggested a paper concerning syphilis (the French disease) about which Locke could, with his training as a physician, have held a legitimate interest, there is another, much more subversive connotation. Locke had recently been in France, at the behest of Shaftesbury, observing the nature of French government in preparation of a theoretical case against that form and attempts to erect a similar 'order' in Britain.¹²

That the cautious Locke should be caught up in revolution needs some explanation. Locke's intellectual development from the position expounded in his earlier and, then, still unpublished *Two Tracts of Government*, whilst owing much to the influence of his patron, Shaftesbury,¹³ can also be explained as an outgrowth reflecting further examination of Natural Law theory.¹⁴ Thus, his arguments concerning the establishment of legitimate political authority and the protection of civil society appear as a logical continuation of the subject of his debates with Bagshot in the *Two Tracts*.¹⁵

Locke's *Two Treatises* should therefore be read as a theoretical defence for recourse to revolution against attempts to erect arbitrary government. For, as Locke acknowledges, at the start of the *Second Treatise*, whatever the errors of his case, with its blunders and misquotations, Filmer's justification of absolutism requires that

he that will not give just occasion, to think that all Government in the World is the product only of Force and Violence, and that Men live together by no other Rules but that of Beasts, where the strongest carries it, and so lay a Foundation for perpetual Disorder and Mischief, Tumult, Sedition and Rebellion, (things that the followers of that Hypothesis so loudly cry out against) must of necessity find out another rise of Government, another Original of Political Power, and

another way of designing and knowing the Persons that have it, then what Sir Robert F. hath taught us.¹⁶

How Locke derives the foundation of political authority will be the concern of the next section which, as a corollary, necessitates description of the bounds he places upon political authority and what form responses to abuse might take.

IV Locke on Obligation and Resistance

It has already been shown that the radical whigs' view of government emerging from a social compact carried with it a defence of resistance rights that, in their continued retention by the people, legitimated political power within civil society promoting the ends of toleration and the rule of law. Perhaps the most famous and well-known articulation of this consensual theory of government is that of John Locke in the *Second Treatise*. Yet, as this section will show, Locke's introduction of the doctrine of tacit consent provides a very shaky foundation for his conjectural history of the "rise of government".

(A) State of Nature Theory, Social Contract, and the Rise of Government

An earlier, succinct summary of the reasons for, and the ends of, government is expressed eloquently by John Locke in the *Letter*:

But forasmuch as men entering into societies, grounded upon their mutual compacts of assistance, for the defence of their temporal goods, may nevertheless be deprived of them, either by rapine and fraud of their fellow-citizens, or by hostile violence of foreigners: the remedy of this evil consists in arms, riches, and multitudes of citizens: the remedy of others in laws: and the care of all other things relating both to the one and the other is committed by the society to the civil magistrate. This is the original, this is the use, and these are the bounds of the legislative, which is the supreme power in every commonwealth.¹

At the start of the *Second Treatise*, Locke returns to the origin of government: the state of nature. Here men find themselves in

a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other Man.²

Moreover, the state of nature is also one of equality, that due to man's nature as man means that they "should also be equal one amongst another without Subordination or Subjection."³

Law is not absent from the state of nature:

though this be a *State of Liberty*, yet it is *not a State of Licence*, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, yet he has not Liberty to destroy himself. ...⁴

Likewise, since each person is God's creation, initiation of force would be an affront to God. And, in a manner reminiscent of Pufendorf, Locke describes how the Law of Na-

ture may be discovered through the use of reason.⁵ Further, in the state of nature

the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its violation.⁶

This power is not only limited in extent, reflecting the nature and extent of the transgression committed, but is also victim orientated, with special emphasis upon restitution by the aggressor. Such transgressors are regarded as wild beasts. By

Transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity, which is that measure God has set to the actions of Men, for their mutual security: and so he becomes dangerous to Mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him.⁷

It is Locke's concern to establish reliable procedures⁸ of justice that leads him to propose that men in the state of nature would find it in their interest to submit themselves, with others, to the dictates of reason, i.e., the rule of law.⁹ This would bind even the magistrate who "hath the common right of punishing put into his hands".¹⁰ Civil Society arises, for Locke, through voluntary, unanimous contract. But,

'tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one Community, and make one Body Politick, other Promises and Compacts, Men may make one with another, and yet still be in the State of Nature.¹¹

As Ruth Grant emphasizes, Locke's use of "political power" conveys the conception that there has been a voluntary grant of certain powers by the principals to the magistrate. In this manner arbitrary or usurping government cannot exercise "political power", i.e., be legitimate, and is thus referred to by Locke as "despotic power".¹² Tyranny is thus characterized by Locke as betokening a state of war between people and prince.¹³

(B) From Resistance to Revolution

By setting the commonwealth's origins in a social contract enjoying unanimous consent, Locke introduces limits upon the extent of toleration and liberty of conscience permitted individuals for the preservation of peace. He considers when an individual objects to a specific action of the magistrate. Though he suggests that "if government be faithfully administered, and the counsels of the magistrate be indeed directed to the public good, this will seldom happen," he does find that in such instances

such a private person is to abstain from the actions that he judges unlawful; and he is to undergo the punishment, which is not unlawful for him to bear; for the private judgement of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.¹⁴

Similarly, he asks in the *Two Treatises*,

May the *Commands* then of a Prince be opposed? May he be resisted as often as any one shall find himself aggrieved, and but imagine he has not Right done him? This will unhinge and overturn all Politie, and instead of Government and Order, leave nothing but Anarchy and Confusion.¹⁵

Essentially, Locke's argument recognises the fallibility of the magistrate. However, he urges that individuals should bear this burden on public good criteria, since the assertion of self-preservation rights at each wrong, or perceived wrong, would destroy not only that particular arrangement of government, but return the polity to the state of nature. Locke argues that history supports this proposition for

such *Revolutions* happen not upon every little mismanagement in publick affairs. *Great mistakes* in the ruling part, many wrong and inconvenient Laws, and all the *slips* of humane frailty will be *born by the People*, without mutiny or murmur.¹⁶

However, he does draw a distinction between alienable rights and inalienable rights to judge the legitimacy of the magistrate's actions, and so determine when resistance and, ultimately, revolution might rightfully be endorsed. Only resistance is applicable if the magistrate's actions merely restrict the exercise of alienable rights, i.e., a particular property right. If, instead, the magistrate's actions were to undermine the very existence of property *qua* concept, i.e., of inalienable rights, then no longer is it a matter of resistance but one of revolution.

(C) The Role of Conspiracy in Whig Revolutionary Theory

The reason underlying this distinction is that control of the former might have been transferred to the magistrate in the social contract. But no-one could, or would, concede the magistrate control of inalienable rights since, in Locke's terms, this would conflict with the Law of Nature.¹⁷

The radical whigs developed an elaborate conspiracy theory of government expansion to determine whether a particular action represented an abridgement of alienable rights or assaulted the concept of inalienable rights. As Locke puts it,

But if a long train of Abuses, Prevarications, and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel, what they lie under, and see, whither they are going; 'tis not to be wonder'd, that they should then rouse themselves, and endeavour to put the rule into such hands, which may secure to them the ends for which Government was at first erected.¹⁸

... thereby reflecting the whig conception of revolution as a return to first principles. A century later, Thomas Jefferson incorporated Locke's exposition in defending recourse to revolution:

But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.¹⁹

The consequences of revolution had earlier been considered by Locke asking: "what if the magistrate believes

that he has a right to make such laws, and that they are for the public good; and his subjects believe the contrary?"²⁰ For, "[w]ho shall be judge between them? I answer, God alone; for there is no judge upon earth between the supreme magistrate and the people,"²¹ thereby placing mankind in a state of war for control of the State — suggesting that revolution is not to be lightly entered into.

(D) Tacit Consent and Locke's Theory of Political Obligation

As Locke rightly asserts,

[f]or a Man, not having the Power of his own Life, *cannot*, by Compact, or his own Consent, *enslave himself* to any one, nor put himself under the Absolute, Arbitrary Power of another.²²

But can it be shown that individuals are not under an obligation to 'good' governments?

In his excellent review of Locke's derivation of political obligation, John Simmons²³ explains that Locke articulated a theory of tacit consent for, with the origins of the social contract in antiquity,²⁴ express consent was impractical. For tacit consent, i.e., silence or apparent acquiescence to another's decision, to be used to generate bonds of political obligation, Simmons stresses that three conditions must, simultaneously, be fulfilled: (1) That the individual in question is conscious of the nature of the choice faced; (2) A reasonable period exists during which that individual can voice dissent in a known manner; (3) The individual must know the end of that period of grace after which consent is implied.²⁵ "These three conditions seem to jointly guarantee that the potential consenter's silence is *significant*."²⁶ Should any of the three fail to be adequately satisfied, i.e., communication broke down as to the nature of the potential consenter's silence, then "[i]n that case, silence could not be taken as a sign of consent."²⁷ Simmons goes on to suggest

two additional conditions ... important to the political applications of theory of tacit consent: (4) the means acceptable for indicating dissent must be reasonable and reasonably easily performed; and (5) the consequences of dissent cannot be extremely detrimental to the potential consenter. The violation of either condition (4) or (5) will mean that silence cannot be taken as a sign of consent, even though the other conditions for consent and tacit consent are satisfied.²⁸

Certain propositions, affecting subsequent political obligation, are engendered by Locke's use of the social compact. The first is that consent is irreversible: individuals may not leave or secede from the polity. Locke approves the dissolution of marriage,

upon certain Conditions, as well as any other voluntary Compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it should always be for Life.²⁹

But he views the contract forming polities differently, arguing that "if he were no farther tied by any Decrees of the Society, than he himself thought fit, and did actually consent to"³⁰ then the commonwealth would effectively cease, leaving only the state of nature.³¹ Therefore,

if we add the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections

of Men, the coming into Society upon such terms, would be only like *Cato's* coming into the Theatre, only to go out again. Such a Constitution as this would make the mighty *Leviathan* of a shorter duration, than the feeblest Creatures; and not let it outlast the day it was born in. ...^{32,33}

However, if as Locke suggests, people review the course of history and, in particular, the erosion of liberties (even in majoritarian democracies) coinciding with the rise of the State, then it would surely augur against their voluntarily entering a social compact with no obvious means of exit.

But, leaving this objection aside, what of Locke's argument that it is the consumption of certain goods or, for modern consent theorists, the participation in voting, payment of taxes, or the continued residence that generates consent and thus political obligation (even amongst those not party to the original compact)?

Locke regards those who enjoy State provided goods or services as having tacitly consented to political obligation. For,

[w]hen we enjoy the public highways, owning land, police protection, etc., our 'acts of enjoyment,' though not expressions of our consent, nonetheless are thought by Locke to 'imply' our consent by binding us to obedience as if we had in fact consented.³⁴

Though our "enjoyments" of State services, i.e., security and law, might "imply" consent,

they are not 'signs of consent'. Such enjoyments are not normally deliberate undertakings. ... Locke succeeds only in undermining the appeal of his own consent theory, with its dedication to the thesis that only through deliberate undertakings can we become politically bound.³⁵

(E) Further Arguments for Political Obligation

The public good argument for political obligation is unsound: both theoretical and historical studies demonstrate that those services or goods traditionally considered the province of the State can and have been provided by the market.³⁶ If, after Locke, we hold that individuals possess justice enforcement rights in the state of nature there seems little reason for the creation of the State. As recent developments in legal theory and empirical evidence have shown, the State is not necessary but is, in fact, contrary to the origin of law and order.³⁷

The proponents of the position that the individual 'free-rider' should be compelled to pay for 'public goods' (i.e., what the State's official designates), even if accepting that the individual is a 'kidnapped-passenger' and may not want to be 'provided' for, argue that majority votes in the political arena legitimize the State's claims upon an individual's resources.³⁸ For, upon entering the commonwealth, the individual agreed to be bound by the decisions of the majority and his later participation in the political process could be read as a sign of this consent.

But if the operation of majoritarian rule is examined it is clear that it represents the creation not of civil peace but of civil war. It was the separation of State and religion that promoted peace by removing the urgency to gain control of State power. Now Locke's operative

principle that the majority have a right to rule the minority, practically resolves all government into a mere contest between two bodies of men, as to which of them shall be masters, and which of them shall slaves; a contest, that — however bloody — can, in the nature of things, never be finally closed, so long as man refuses to be a slave.³⁹

As Lysander Spooner, in his devastating critique of the notion that the American Constitution was founded upon consent (*No Treason: The Constitution of No Authority*), argues:

Actual voting is not to be taken as proof of consent, *even for the time being*. On the contrary, it is to be considered that, without his consent having ever been asked, a man finds himself environed by a government that he cannot resist; a government that forces him to pay money, render service, and forego the exercise of many of his natural rights, under peril of weighty punishments. He sees, too, that other men practise this tyranny over him by the use of the ballot. ... if he will but use the ballot himself, he has some chance of relieving himself from this tyranny of others, by subjecting them to his own. In short, he finds himself, without his consent, so situated that, if he use the ballot, he may become a master; if he does not use it, he must become a slave.⁴⁰

The proposition that continued residence establishes political obligation appears equably untenable. Locke is silent about the manner in which an individual might leave or emigrate from a political society, since it would likely require a majority vote to enact. (Though even this is doubtful since are such powers transferred in the social contract?) However, worth raising are suggestions that continued residence could generate political obligation. This use of tacit consent is susceptible to Hume's observation:

[c]an we seriously say, that a poor peasant or partisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires. We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.⁴¹

And why is it necessary to even move geographically? Since the original compact was formed by individual property owners, most likely in adjacent plots, it seems plausible to suggest that by referring to the original territories or property deeds individuals would be able to determine the reduced limits of the commonwealth in the event of secession. If the study of history is their guide, then individual secession from the commonwealth, i.e., of getting out from under taxes, regulations, and other burdens imposed by the State, will be an attractive prospect. So long as they observe the Law of Nature they would be able to trade with other, like-minded fellows, and those remaining in the polity. If trade with the latter is prohibited by the magistrate it would represent a violation of inalienable rights, and endorse revolution against him.⁴²

Lastly, taxation is proposed as a way to derive political obligation through "signs of consent". As Spooner, again, explains:

[this] theory assumes that each man, who is party to the government, and contributes to its support, has individually consented to it. Otherwise the government would have no right to tax him for its support, — for taxation without consent is robbery.⁴³

"But," he observes,

this theory of our government is wholly different from the practical fact. The fact is that the government, like a highwayman, says to a man: *Your money, or your life*. And many, if not most, taxes are paid under the compulsion of that threat.⁴⁴

Coercion hardly appears sufficient grounds for consent and, thus, political obligation. Spooner further argues that since "the taxpayer does not know, and has no means of knowing, who the particular individuals are who compose 'the government'"⁴⁵ he cannot be held to have given consent for to him " 'the government' is a myth, an abstraction, an incorporeality, with which he can make no contract".⁴⁶ And so-called majority votes, through the secret ballot, go no way to establishing who are the principals empowering the agents of the government. And, since he cannot know who are the principals who established the government, when individuals come and, with force of arms, require of him monies to support the government

[t]o say, therefore, that by giving up his money to their agent, he entered into a voluntary contract with them, that he pledges himself to obey them, to support them, and to give them whatever money they should demand of him in the future, is simply ridiculous.⁴⁷

Because the State's power to 'tax' is built upon the use, or threat, of force it should be asked:

What can be more absurd in nature and contrary to all common sense than to call him Thief and kill him that comes alone ... to rob me; and to call him Lord Protector and obey him that robs me with regiments and troops? As if to rove with 2 or 3 ships were to be a Pirate, but with 50 an Admiral? But if it be the number of adherents only, not the cause, that makes the difference between a Robber and a protector: I will that number were defined, that we might know where the Thief ends and the Prince begins. And be able to distinguish between a Robbery and a Tax.⁴⁸

Indeed, Locke is largely sympathetic to such criticisms. As he sets out in the First Treatise, force can never be the basis of political obligation. For

[A] Man can never be obliged in Conscience to submit to any Power, unless he can be satisfied who is the Person, who has a Right to Exercise that Power over him. If this were not so, there would be no distinction between Pirates and Lawful Princes, he that has Force is without any more ado to be obey'd, and Crowns and Scepters would become the Inheritance only of Violence and Rapine.⁴⁹

(F) The Origin of Government in Conquest and Coercion

With the failure of Locke's attempt to ground political obligation upon the basis of consent, the alternative rise of government must be considered, that of conquest and coerced subservience.⁵⁰ Though as Estienne de la Boetie wrote, a

full century before Locke, that it was the individual's *Will To Bondage* that generated his own chains, i.e., his own willingness to accept the edicts of the State officials differently from that of robbers or murderers,⁵¹ the apparent 'legitimacy' and acceptance of the State must still be explained. In Charles Tilly's penetrating analysis several groups become visible that constitute 'consent' to the State. The functionaries and other clients or beneficiaries of State action acquire wealth through the violent transfer of property from others, a process characterised by Tilly as "War Making and State Making as Organised Crime".⁵²

Power holders' pursuit of war involved them willy-nilly in the extraction of resources for war making from the populations over which they had control and in the promotion of capital accumulation by those who could help them borrow and buy. War making, extraction, and capital accumulation interacted to shape European state making. Power holders did not undertake those three momentous activities with the intention of creating national states ... [and instead] warred in order to check or overcome their competitors and thus to enjoy the advantages of power within a secure or expanding territory.⁵³

Indeed, it is against this framework that the history of the seventeenth century can perhaps best be understood.

Behind the conflict we find the same thing everywhere: the State's demand for higher revenues ... in every case it was the governments that acted in a revolutionary manner: the tax demands disrupted the social balance. They did not create a revolutionary situation: they were in themselves a revolution.⁵⁴

Tilly himself notes how, "[w]hen ordinary people resisted vigorously, authorities made concessions: guarantees of rights, representative institutions, courts of appeal," whilst alliances with parts of the power elite such as

the broad mobilization of gentry against Charles I helped give the English Revolution of 1640 a far greater impact on political institutions than did any of the multiple rebellions during the Tudor era.⁵⁵

Later development of the Liberal critique and analysis of the State follows this line with its distinction drawn between property titles justly acquired (i.e., homesteading previously unowned resources from the state of nature, by trade or by gift), and those unjustly acquired (i.e., by use or threat of violence, i.e. by taxation, occupation and enslavement). Two classes emerge from this analysis: the 'productive' and the 'unproductive', corresponding to what Franz Oppenheimer respectively termed the "economic means" for the satisfaction of wants and the "political means".⁵⁶ The State is thus transformed from being the creation of a social compact for mutual benefit to being an imposed burden generating advantages for a few at the expense of the majority.

V Conclusion

What of the principles of toleration and liberty, expounded earlier, if government emerges through conquest? The calling into question of the nature of the State's legitimacy brings forward a need to develop a coherent theory of resistance and revolution. The massive expansion of the

power of the State, into so many aspects of life, not only undermines the fiction that it is founded upon unanimous consent but generates intense pressures destructive of liberty and toleration. For now, as in the past when State and Church promoted one another, so it has become both attractive and imperative for individuals and groups to battle for control of the State.

Though Locke's attempt to derive bonds of political obligation fails, his arguments, that (good) government or political power must rest upon the consent of the governed, do serve as rule to measure the legitimacy of claims of political obligation made by actual States. And, if government legitimacy derives only through express consent, then Locke's arguments seem to herald the formation of a permanent theory of revolution: in Lockean terms all existing governments can be considered usurpations or tyrannies.

Thus, this concern for the promotion of liberty and toleration, prompts, as Ogilvie urges, the study of the State. The manner in which it can properly and securely fettered will surely be a component of a renewed liberal theory of resistance and revolution. But more than that is necessary. As Jack Goldstone recently writes:

If liberal scholarship is to have the influence it should in this field, it must address Locke's question ["when does rebellion preserve liberty?"] in historical time and demonstrate the specific historical conditions under which revolution is likely to preserve or extinguish liberty. For millions of people in the world who are facing the prospect, or consequences, of revolution, there is probably no more important contribution political scholarship could make.¹

For the radical whigs this respect for history was supreme. Guided by the "Lamp of Experience", they sought to determine under what conditions liberty would be realistically achievable. This caution, concerning recourse to revolution, has been characterised by James Buchanan as awareness of the potential to destroy the social capital of laws and social ties in the hope of an often elysium dream of freedom.² Whilst State functionaries erect ever more restrictions upon individual liberty and create ever greater intolerance, so the "Good 'Ole Cause" of the radical whigs will continue to garner support. As Thomas Jefferson expressed it, writing at the height of Shays' Rebellion that broke out in Western Pennsylvania at the time of the Constitutional Convention, when Americans, asserting that the newly established American government violated their (Lockean) rights, had recourse to revolution:

God forbid we should ever be 20 years without such a rebellion. ... What country can preserve its liberties if its rulers are not warned from time to time that the people preserve the spirit of resistance. Let them take arms. The remedy is to set them right as to the facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is its natural manure.³

Endnotes

I am indebted to George H. Smith, Ralph Raico, and Leonard P. Liggio amongst many others who, in their lectures on seminars organised by the Institute for Humane Studies and the Cato Institute, helped to focus my attention upon the subject matter of this Paper. All blame for errors and inconsistencies, etc., remains mine.

I. Introduction

1. The terms *radical*, *real*, or *true whig* are used within the literature fairly interchangeably. For the purposes of this paper I shall endeavour to use either *radical whig* or the broader term commonwealthman. Robert Molesworth in his "Preface" to *Franco-Gallia*, 1721, proclaimed that "A True Whig is not afraid of the name of a *Commonwealthman*, because so many foolish People, who know not what it means run it down." Cited by Caroline Robbins in her superb, *The Eighteenth Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies*, Atheneum, New York, 1968, p. 3. The term *Liberal*, though it would be far more applicable to the subject matter of this paper, is however anachronistic to the period. Historian Ralph Raico noted (in a lecture entitled *The Origins of Liberalism* given at Cato Institute's Summer Seminar on Political Economy, Dartmouth College, New Hampshire, July 1991,) that it, *Liberalism*, does not enter into usage to describe the tradition upholding individual rights, free trade, limited government, and the rule of law, until the late eighteenth and early nineteenth centuries being derived from the name of one the parties involved in the constitutional struggles of Spain, the *Liberales*.
2. The Whig theory of revolution is best outlined by George H. Smith in his *American History (1): The Origins of the American Revolution (Colonial Era to Revolution)*, (lecture given at Cato Institute's Summer Seminar on Political Economy, Dartmouth College, New Hampshire, July 2nd, 1991). References from Smith's presentation include, most notably, writings by Pauline Maier, Bernard Bailyn, and Morton White. Pauline Maier's *From Resistance To Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776*, Routledge and Kegan Paul, London, 1973, especially chapter 2, "An Ideology of Resistance and Restraint", provides an excellent introduction to this topic. Further reading would take in Bernard Bailyn's *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge, Massachusetts, 1967. At the time of writing I knew of, but did not have access to, Morton G. White's excellent *The Philosophy of the American Revolution*, Oxford University Press, New York, 1978. This provides a thorough treatment of the issues discussed below in the context of the thought of the American revolutionary leaders, particularly in chapter 6, pp. 229-256, "Rebellion to Tyrants Is Obedience to God", especially in the section entitled "From the Unalienable Rights of Men to the People's Right To Rebel", pp. 239-244. Unfortunately, an adequate exploration of White's work is impossible to countenance within the confines of this Paper.
3. Robbins, *Eighteenth Century Commonwealthman*, p. 3.
4. From *The Complete Correspondence Between Thomas Jefferson, Abigail and John Adams 1777-1804, 1812-1826*, Lester J. Cappon, ed., University of North Carolina Press, Chapel Hill, North Carolina, 1959, Vol. 2, p. 455. Developing this theme, Adams writes that: "The records of thirteen legislatures, the pamphlets, newspapers in all the colonies, ought [to] be consulted during that period to ascertain the steps by which the public opinion was enlightened and informed concerning the authority of Parliament over the colonies." (p. 455, emphasis added.)
5. Cited by Bernard Bailyn, *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge, Massachusetts, 1967, p. 55.
6. John Locke, *Two Treatises of Government*, Peter Laslett, ed., Cambridge University Press, Cambridge, 1988 [1690], pp. 135-428. This edition includes an excellent "Introduction" by Laslett, pp. 3-133, who establishes the composition dates for the two papers as being almost a decade before their original, anonymous publication in 1690, p. 61.

7. "There is no evidence that his treatise sold any better than a half-dozen other books that said pretty much the same thing, and until 1774 his name was mentioned only rarely in the columns of even the most radical newspapers." Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty*, Harcourt, Brace and World, Inc., New York, 1953, p. 358.
8. Rossiter, *ibid*, p. 358-359.

II Toleration and the Right to Resist

(A) Toleration, Law, and Revolution

1. Harold J. Berman, "Introduction", *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Massachusetts, 1983, p. 18.
2. Berman, *ibid*, p. 19.
3. Berman, *ibid*, p. 19.
4. This view continues upto the commencement of the American Revolution.
5. Robert Thomas, *Civil Society and the English Civil War*, Libertarian Alliance, Historical Notes No. 20, London, 1992, p. 1. See G. E. Aylmer, *The Struggle for the Constitution: England in the Seventeenth Century, 1603-1689*, Blandford Press, London, 1975, who also interprets the history of this period as originating from constitutional considerations.
6. Thomas, *ibid*, p. 3, notes that: "Modern estimates put fatalities on both sides during the war at 185,000 — equivalent to 3.6 per cent of Britain's seventeenth century population. (By comparison only 2.6 per cent of Britain's population lost their lives during the First World War.)"
7. The theme that revolutions not only may fail but also can lead to a greater destruction of liberty than the regime against which the revolution was undertaken is considered later in the paper when a different conception of the origin of the State will be presented.
8. Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach", *Hamline Law Review*, Vol. 12, No. 2, Spring 1989, pp. 261-304.
9. Palmer, *ibid*, p. 267.
10. Barbara Ringer, "The Demonology of Copyright", in *Perspectives on Publishing*, P. Atzbach and S. McVey, eds., 1976, p. 38; cited Palmer, *ibid*, p. 267.
11. Palmer, *ibid*, p. 267.
12. Thus, Bruce W. Bugbee, in his *Genesis of American Patent and Copyright Law*, 1967, cited by Palmer, *ibid*, p. 267, explains that: "All of England's printers and publishers were required to join this association, organised to facilitate the control of the press for the suppression of Protestant literature. As compensation for royal supervision, censorship, and licensing of books to be printed, the approximately 100 members of the Company were given what amounted to a monopoly of all printing in England."
13. Palmer, *ibid*, p. 267-268. The underlying reality of such mercantile laws enacted for purposes of social control, exploitation, and extraction, is captured in David Boaz's aptly titled article, "The Gun Behind the Law", *Cato Policy Report*, January/February 1988, p. 2.
14. Palmer, *ibid*, p. 268.
15. Palmer, *ibid*, p. 268; Abrams, "The Historic Foundations of American Copyright Law: Exploding the Myth of Common Law Copyright", *29 Wayne Law Review*, 1137, 1138 (1983), cited by Palmer, p. 268. George H. Smith, in his excellent "Philosophies of Toleration", from *Atheism, Ayn Rand, and Other Heresies*, 1991, pp. 109-112, notes how individuals' attitudes towards toleration change upon their ascent to power. Particularly useful is his exposition of how Martin Luther changed his view towards the extension of religious toleration as his security from Rome's edicts increased. Smith provides an excellent example of how Protestant and Catholic authorities effectively reinforced one another. In the case of the Spaniard Michael Servetus who, whilst hiding in France "sent a manuscript copy of his last book (*The Restoration of Christianity*) to Calvin in Geneva. Servetus apparently hoped the Great Reformer would view the book sympathetically — a naive and fatal miscalculation." (Smith, *ibid*, p. 109.) Instead

Calvin revealed the identity of Servetus to the French Catholic authorities, whilst his minister, Trie, attacked them for permitting a heretic to remain undected in their number.

"You suffer a heretic, who well deserves to be burned wherever he may be. I have in mind a man who will be condemned by the Papists as much as by us or ought to be. ... Where I'd like to know is the zeal which you pretend? Where is the police of this fine hierarchy of which you so boast?"

(Trie, quoted in Roland H. Bainton, *Hunted Heretic: The Life and Death of Michael Servetus, 1511-1553*, Beacon Press, Boston, 1960, p. 170-1; cited by Smith, *ibid.*, p. 110.)

16. John Milton, *Areopagitica*, collected in Gordon Campbell ed., *Complete English Poems, Of Education, Areopagitica*, J. M. Dent and Sons Ltd., London, Everyman's Library, 1990 [1644], pp. 573-620.
17. See especially Milton, *ibid.*, pp. 594-596.
18. Milton, *ibid.*, p. 596.
19. A familiar line of argument to modern readers acquainted with the mechanics underlying F. A. Hayek's *Road to Serfdom*, Routledge and Kegan Paul, London, 1976 [1944].
20. Smith, *Toleration*, p. 121.
21. Milton, *Areopagitica*, p. 613.
22. Thomas, *Civil Society*, p. 5.
23. "Cases of reintrusion (the reinstatement by the local parishioners of an Anglican minister excluded by Parliament) are recorded during this period from London (1647), Southwark (1649), Cambridgeshire, seven different parishes in Essex, and six parishes in Cheshire. In 1647 cases of reintrusion were so widespread that this phenomenon has been termed 'The Prayer Book rebellion'." (Thomas, *ibid.*, p. 5.)
24. Thomas, *ibid.*, p. 5.

(B) Toleration and Social Harmony

25. Smith, *Toleration*, p. 113.
26. Smith, *ibid.*, p. 113.
27. Also, "A free market serves the same function: by limiting the number of decisions made in the public sector, it reduces the need for groups to vie for political control." David Boaz, "Editorial: Free Trade, Limited Government, and Secession", *Cato Policy Report*, July/August, 1990, p. 2.
28. John Locke, *A Letter Concerning Toleration*, Prometheus Books, Great Books in Philosophy, Buffalo, New York, 1990 [1689], p. 35.
29. Caroline Robbins ed., "Introduction", *Two Republican Tracts, comprising of Plato Redivivus: or, A Dialogue Concerning Government* (c. 1681) by Henry Neville and *An Essay Upon The Constitution of The Roman Government* (c. 1699) by Walter Moyle, Cambridge University Press, Cambridge, 1969, p. 14.
30. Locke, *A Letter*, p. 67.
31. Locke, *ibid.*, p. 65. Such measures were, in part, effected by the Toleration Act following the Glorious Revolution.
32. Smith, *Toleration*, p. 113-114. This fact is bluntly illustrated when the following inscription is considered, from a statue commemorating Mary Dyer, Quaker:

"Witness for Religious Freedom
Hanged on Boston Common 1660
"My life not availeth me in
comparison to the
Liberty of the Truth" "

(C) The Right to Tyrannicide and the Social Contract

33. The best introduction to Leveller scholarship is Carl Watner's "Come What, Come Will! Richard Overton, Libertarian Leveller", published in *The Journal Of Libertarian Studies: An InterDisciplinary Review*, Vol. IV, No. 4, Fall, 1980, pp. 405-432.
34. Watner, *ibid.*, p. 405. This extension to include atheists went even beyond that degree of toleration advocated by Locke in *A Letter*, for Locke believed that atheism undermines civil society, p. 64.
35. Richard Overton, *An Arrow Against All Tyrants* (October 10, 1646), pp. 3; cited by Watner, *ibid.*, p. 410.

36. Richard Overton, *A Remonstrance of Many Thousand Citizens, and Other Free-Born People of England, to Their Own House of Commons, Occasioned Through the Illegal and Barbarous Imprisonment of that Famous and Worthy Sufferer for His Country's Freedoms, Lieutenant Col. John Lilburne* (July 7, 1646); republished in Don. M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution*, Thomas Nelson & Sons, New York, 1944, p. 113; cited by Watner, *ibid.*, p. 412.
37. Overton, *ibid.*; cited by Watner, *ibid.*
38. Lilburne argued that the King should be tried on the charge of commissioning murder on the battlefield. As Watner notes: "Despite their enmity towards the king, Lilburne and most of the other Levellers were objective enough in their thinking to realize that if arbitrary treatment could be meted out to the king, contrary to known forms of law, then they, too, might be subject to such capricious treatment. Overton, alone among the Leveller leaders, approved without reservation the manner and execution of judging the king; he called it the finest piece of justice that was ever had in England." (Watner, *ibid.*, p. 407.)
39. Gilbert Burnet, *The History of My Own Times*, 6 vols, Oxford, 1833, Vol. 1, p. 76; cited by Quentin Skinner, *The Foundations of Modern Political Thought, Vol. Two, The Age of Reformation*, Cambridge: Cambridge University Press, 1978, p. 348. Skinner's chapter 9, pp. 302-358, "The Right to Resist", represents an excellent preamble to the subject matter presented in this paper.
40. Juan de Mariana, *The King and the Education of the King*, (Toledo: 1599); cited Skinner, *ibid.*, pp. 345-347.
41. Skinner, *ibid.*, p. 346; (Mariana, 1599, pp. 76-77, p. 76).
42. Skinner, *ibid.*, p. 347.
43. Skinner, *ibid.*, p. 347.

III The Revolutionary Context of The Two Treatises

1. Locke, *Two Treatises*, Preface, 4-11, (p. 137.)
2. Smith, *Origins*.
3. Laslett, "Introduction", pp. 58-66.
4. Laslett, *ibid.*, p. 31.
5. A collected set of Filmer's works is available, Sir Robert Filmer, *Patriarcha and Other Writings*, Johann P. Sommerville, ed., Cambridge University Press, Cambridge, 1991. Filmer draws upon the earlier ideas (1576) of the French absolutist, Jean Bodin, in the latter's *Six Books of the Commonwealth* first translated into English in 1606. (It should be noted that Sommerville, (p. ix), in comparing Laslett's earlier edition of Filmer to the original Cambridge manuscript, remarks on numerous errors and mis-readings made by Laslett, leading this student to be wary of Laslett's pronouncements concerning Locke.)
6. Filmer's view of political authority was that, made first to Adam, and then passed down through the line of the oldest son, this divine grant of political dominion could theoretically be traced back to Adam from current rulers. This political 'authority', for Filmer, is synonymous with, and indistinguishable from, that dominion enjoyed by the father of a family wherein the interests and rights of the wife and children exist merely upon his whim. Whilst, in Filmer's view it is immaterial as to who actually is the most direct descendent of Adam (and hence appointed by God), and thus theoretically entitled to reign as monarch, there remains an obligation to obey even a usurping sovereign so denying any resistance rights retained by the people.

He also saw the monarch as the originator of such law that existed in the society, a view still retained today by adherents like Richard Posner to the belief that it is necessary for the State, perhaps through a constitution, to establish the law. Not only is this modern conception ill-founded, as Bruce Benson shows, in his *The Enterprise of Law: Justice Without the State*, Pacific Research Institute, San Francisco, 1990, especially chapters 2 and 3, pp. 11-83, all too often the privately and voluntarily evolved legal systems (i.e., market institutions that define and protect the market process) have been perverted and displaced by the State for reasons of conquest, power, prestige, and wealth. In this regard see also Murray Rothbard's *The Anatomy of The State*, first published in the *Rampart Journal of Individualist Thought*, Vol. 1, No. 2, Summer, 1965, and

Franz Oppenheimer's *The State*, Vanguard Press, New York, 1926.

This legal positivism, that law flows from the State's edicts and judges, is controverted by Clarke, one of the Leveller debaters in the Putney Debates, in opposing Henry Ireton (Cromwell's son-in-law), when he argues that "properties are the foundations of constitutions, and not constitutions of property. For if so be there no constitutions, yet the law of nature does give a principle for every man to have a property of what he has or may have which is not another man's. This natural right of property is the ground of mine and thine." Collected in A. S. P. Woodhouse, ed., *Puritanism and Liberty, Being the Army Debates, 1647-9*, Clarke Manuscripts, University of Chicago Press, Chicago, 1951, p. 75; cited by Watner, "Come What, Come Will!", p. 408-409.

7. Algernon Sidney, *Discourses Concerning Government*, J. To-land, London, 1698; republished by Liberty Fund, Inc., LibertyClassics, Indianapolis, Indiana, 1990.
8. A simple page count of Locke (298) and Sidney (578) against Filmer (68) is indicative of the seriousness with which the Whigs received Filmer's views.
9. Laslett, "Introduction", pp. 31-32.
10. See Thomas G. West's "Foreword" to Sidney's *Discourses*, 1990, pp. xv-xl.
11. Laslett, "Introduction", pp. 63-64.
12. See Laslett, *ibid*, pp. 62-64.
13. Laslett, *ibid*, pp. 25-37. As an instance of this cautiousness is the anonymous publication of the *Two Treatises*, made behind a veil of intermediaries. It is further strengthened by Locke's vehement denial of authorship and his asking his friend James Tyrell to purchase a copy for him (since surely an author would have access to the print-run?). Locke later returned the favour by acquiring for Tyrell the latter's *Patriarcha non Monarcha*. Witness also his flight into temporary exile, and the careful removal of manuscripts pertaining to the *Two Treatises*. It was then that Locke suffered the loss of the very substantial middle treatise of his proposed Discourse.
14. See Laslett, *ibid*, pp. 19-20, where he argues that, though Locke's position appears very much that of an authoritarian, "Locke is revealed as a constitutionalist, and a man convinced of the fundamental distinction between secular and spiritual power, political and religious authority" (p. 20). Paul Marks, in an unpublished manuscript, also points towards a more consistent interpretation of Locke's general conception of the role of government between the *Two Tracts* and the *Two Treatises* than a general reading of each would produce. See his "*The Balance Between Order and Liberty*" or *Locke on the Functions of Government*, York University, 1989-1990. Samuel Pufendorf's exposition of natural law theory was particularly influential upon Locke's development in that field, with much of his articulation of natural law, state of nature, the use of reason, and the law of self-preservation, and the formation of commonwealths, seemingly drawn almost directly from Pufendorf's own articulation of them. See for comparison, particularly, Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, Cambridge University Press, Cambridge, 1991 [1673].
15. John Locke, *Two Tracts on Government*, Philip Abrams, ed., Cambridge University Press, Cambridge, 1967.
16. Locke, Book II, §1, 15-28.

IV Locke on Obligation and Resistance

(A) State of Nature Theory, Social Contract, and the Rise of Government

1. Locke, *A Letter*, p. 58.
2. Locke, II, §4, 3-6.
3. Locke, II, §4, 11-12.
4. Locke, II, §6, 1-4. Indeed, as Berman and other legal historians and theorists (like Bruce Benson) argue, such institutions as the *Law Merchant* arise from the need to adjudicate between disputes. Because it profits both parties to have a quick ruling, both sides agree to be bound by the outcome. That there are few defaults recorded is based upon the use of social ostracism to enforce contracts and debt repayments, a characteristic behind most voluntary law codes. Moreover, these polycentric or

competing, voluntary legal systems arise from Lockean type concerns with justice, procedure, and enforcement of Natural Law principles. For more on this see references below when public good theory, as grounds for generating consent and thus political obligations, is considered.

5. See reference to Pufendorf, in previous section, *supra* note 14.
6. Locke, II, §7, 4-7.
7. Locke, II, §8, 9-15.
8. Robert Nozick in his *Anarchy, State, and Utopia*, Basil Blackwell, Oxford, 1974, has recently revived Locke's attempts to this end in his endeavours to found the emergence of the State upon considerations of procedures of justice. His account of the rise of the State from a Lockean state of nature through market competition in security is fatally flawed as many writers have observed. See in particular the following: Murray N. Rothbard, "Robert Nozick and the immaculate conception of the state"; Roy A. Childs, Jr., "The invisible hand strikes back"; Randy E. Barnett, "Whither anarchy? Has Robert Nozick justified the state?"; John T. Sanders, "The free market model versus Government: A reply to Nozick". These articles are all to be found in *The Journal of Libertarian Studies: An Interdisciplinary Review* Vol. 1, No. 1, Winter, 1977. They also provide an effective critique of Locke's own story of how the State was formed, in that they argue that a Lockean state of nature would not lead to the formation of a state, except by force of arms, i.e., contrary to Locke's aim and Nozick's stated intent.
9. See Locke, II, §13.
10. Locke, II, §11, 5-6.
11. Locke, II, §14, 8-12.
12. Ruth W. Grant, *John Locke's Liberalism*, Chicago University Press, Chicago, 1987, p. 56.
13. Locke, II, §199, 1-10, whilst, "Usurpation is the exercise of Power, which another hath a Right to; so Tyranny is the exercise of Power beyond Right, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage. When the Governour, however intitled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion." (*ibid*.)

(B) From Resistance to Revolution

14. Locke, *A Letter*, p. 59.
15. Locke, II, §203, 1-5.
16. Locke, II, §225, 1-5.

(C) The Role of Conspiracy in Whig Revolutionary Theory

17. Smith, *Origins*.
18. Locke, II, §225, 1-11.
19. The *Declaration* continues, "Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States."
20. Locke, *A Letter*, p. 60.
21. *Ibid*, p. 61.

(D) Tacit Consent and Locke's Theory of Political Obligation

22. Locke, II, §23, 4-6.
23. A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press, Princeton, 1979, especially chapter IV, "The Argument From Tacit Consent", pp. 79-100.
24. There were, however, within many villages and towns during the tenth, eleventh, and twelfth centuries voluntary compacts between the inhabitants, renewed annually by unanimous consent, and from which derives the civil law charge of "a breach of the peace", from a lecture by Leonard P. Liggio, *Legal*

Roots of European Liberty, IHS-Europe, Liberty and Society Summer Seminar, Castle Szirak, Hungary, August 21, 1990.

25. Simmons, *Moral Principles*, p. 80.
26. *Ibid.*, p. 80.
27. *Ibid.*, p. 81.
28. *Ibid.*, p. 81.
29. Locke, II, §81, 6-8.
30. Locke, II, §97, 9-11.
31. Locke, II, §97, 11-15.
32. Locke, II, §98, 8-14.
33. Locke, II, §99, 8-12, who finds "that, which begins and actually constitutes any Political Society, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society. And this is that, and that only, which did, or could give beginning to any lawful Government in the World."
34. *Ibid.*, p. 90.
35. *Ibid.*, p. 91.

(E) Further Arguments for Political Obligation

36. See Benson, *Enterprise of Law*; Daniel B. Klein "The Voluntary Provision of Public Goods? The Turnpike Companies of Early America", in *Economic Inquiry*, Vol. XXVIII, No. 4, (October, 1990): pp. 788-812; R. H. Coase, "The Lighthouse in Economics", in *Journal of Law and Economics*, October, 1974, pp. 357-76; Tom Palmer, "Intellectual Property". Further instances can be followed from references given in Benson, Klein, and Palmer. Indeed, on efficiency grounds, as compared to State provision, a strong normative case can be made for a return to the market, i.e., that condition of voluntary interaction prevailing in the Lockean state of nature.
37. Spontaneous, and anarchically organised, legal systems have appeared throughout history, often in spite of the presence of the State. Responding to consumer requirements, such as speed and cost effectiveness, so voluntary codes often rely upon social ostracism and the uncoerced agreement of all parties to abide by the result.
38. Locke's argument that individuals are bound by their own consent is, however, presented in a manner making individual consent synonymous with the consent or will of the majority. If it cannot be properly established that the individual consented to the social compact (and therein to follow and accept the decision of the majority) Locke's argument falls: for the individual is not bound by any political obligation. Thus Locke, II, §140, 1-11, writes, " 'Tis true, Governments cannot be supported without great Charge, and 'tis fit everyone who enjoys a share of the Protection should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, i.e., the Consent of the Majority giving it either by themselves or their Representatives chosen by them. For any one shall claim a Power to lay and levy Taxes on the People, by his own Authority, and without such consent of the people, he thereby invades the Fundamental Law of Property and subverts the end of Government. For what property have I in that which another may by right take when he pleases."
39. Lysander Spooner, *No Treason No. I* (1867); republished in George H. Smith, ed., *The Lysander Spooner Reader*, Fox and Wilkes, San Francisco, 1992, p. 54.
40. Lysander Spooner, *No Treason No. VI* (1867); *ibid* Smith, p. 74. And, "Neither in contests with the ballot — which is a mere substitute for a bullet — because, as his only chance of self-preservation, a man uses a ballot, is it to be inferred that the contest is one into which he voluntarily entered." (*ibid.*)
41. David Hume; cited by Simmons, *Moral Principles*, p. 99.
42. For further development of a libertarian perspective upon the individual's right of secession, see John Tomasi, "Secession, Group Rights and the Grounds of Political Obligation: A Review of Allen Buchanan's *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press, Boulder, Colorado, 1991)", published in *Humane Studies Review*, Vol. 8, No. 1, Fall, 1992.
43. Lysander Spooner, *Trial By Jury*, chapter XII, "Limitations Imposed Upon The Majority", Smith, *Spooner Reader*, p. 299.
44. Spooner, *No Treason No. VI*, Smith, *ibid.*, p. 78.
45. *Ibid.*, p. 79.

46. *Ibid.*, p. 79.
47. *Ibid.*, p. 80.
48. Wendy McElroy, "De-Mystifying the State", *Neither Bullets Nor Ballots: Essays on Voluntarism*, The Voluntarists, Baltimore, Maryland, 1983, p. 44.
49. Locke, I, §81, 24-30.

(F) The Origin of Government in Conquest and Coercion

50. Even the American experiment failed when Washington, Hamilton and the other Federalists instigated central government rule by force in the face of open opposition and revolution, see Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution*, Oxford University Press, Oxford, 1986.
51. Estienne de la Boetie, *The Will to Bondage* [trans. *A Discourse on Voluntary Servitude*], 1577 [1735]; Ralph Myles Publisher, *Libertarian Broadides No. 6*, Colorado Springs, 1974, §2, "For the present I would only understand, how it is possible, and how it can be, that so many Men, so many Cities, so many Nations, tolerate sometimes a single Tyrant, who has no Power but what they give him; who has no Power to hurt them, but only so far as they have the Will to suffer him; who can do them no Harm, except when they chuse to bear him than contradict him."
52. Charles Tilly, "War Making and State Making as Organised Crime", from Evans, Rueschemeyer, and Skocpol, eds., *Bringing the State Back In*, Cambridge University Press, New York, 1985, pp. 169-191.
53. Tilly, *ibid.*, p. 172.
54. Niels Steensgaard, "The Seventeenth-century Crisis", in Parker and Smith, *The General Crisis of the Seventeenth Century*, London, 1978, p. 44; cited by Sheilagh Ogilvie, "Towards a Critical Classical Liberal History", *Humane Studies Review*, Vol. 6, No. 2, Spring, 1987, p. 12.
55. Tilly, *ibid.*, p. 183.
56. Elaborated by historian, Dr. Steve Davies, in a lecture, *Classical Liberal Class Theory*, given at the York Freedom Society's TANSTAAFL Seminar, March 2nd 1991, University of York. Thus, "the notion that 'the main function of the State is to preserve the privileges and power of those who are already rich'. In other words, politics largely consists of a process by which those who are at the top of the greasy pole manipulate and control free exchange, free production ... in order to preserve themselves in their positions, and to protect themselves from competition by ambitious outsiders ... So that the theory does not just include what you might call 'obviously unproductive classes' such as aristocrats or clergy. It also includes people who are putatively productive but whose position is largely sustained and articulated through control of the political process."

V Conclusion

1. Jack Goldstone, "Revolutions", *Humane Studies Review*, Vol. 5, No. 3, Spring, 1988, p. 5.
2. James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago University Press, Chicago, 1975, p. 129; cited by Jan Narveson, *The Libertarian Idea*, Temple University Press, Philadelphia, 1988, p. 325.
3. Thomas Jefferson, in a letter to William S. Smith, written from Paris, November 13, 1787; reprinted in Thomas Jefferson, *Writings: Autobiography; A Summary View of the Rights of British America; Notes on the State of Virginia; Public Papers; Addresses, Messages, and Replies; Miscellany; Letters*, Selected and with Notes by Merrill D. Peterson, Literary Classics of the United States, Inc., The Library of America, New York, 1984, pp. 910-2, p. 911; cited by George H. Smith, *American History (2): Constitution to Civil War*, lecture given at Cato Institute's Summer Seminar on Political Economy, Dartmouth College, New Hampshire, July 2nd, 1991. Smith discusses how Jefferson's (i.e. the commonwealthman or whig) theory of revolution thus applied as a continual check and measure upon all governments whatever their origins. Recourse to revolution, to restore and uphold the social contract, remains therefore a retained right of the people.

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