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SIGNIFICANT SILENCES IN LOCKE'S *TWO TREATISES OF GOVERNMENT*: CONSTITUTIONAL HISTORY, CONTRACT AND LAW

MARTYN P. THOMPSON
University of Tübingen

It is increasingly common in modern literary theory to read that a text's meaning must be elicited from the textual 'possibilities which are *not said*'.[1] At this level of generality, the proposition applies equally to the interpretation of non-literary as literary texts. In this paper, I shall endeavour to illustrate the usefulness of this approach by considering the meaning of Locke's argument in *Two treatises* in terms of things which Locke chose not to say. I shall argue two points. First, I shall suggest that many of the controversies which have arisen in recent years about Locke's meaning have suffered because inadequate attention has been paid to the precise character of a number of silences in Locke's argument. The persistence of an inadequate framework for understanding the character of Englishmen's appeals to an original contract, constitutional law and history in the late seventeenth century will occupy my attention here.[2] Second, I shall suggest that attention to the details of Locke's most significant silences can cast light on current controversies about the intellectual status of Locke's argument. In particular, I shall argue that the current tendency to locate *Two treatises* within a context of coded, conspiratorial politics is mistaken.[3]

Until very recently it was generally agreed that *Two treatises* were not particularly successful in terms of Locke's immediate intention in publishing them. That intention, according to Locke's preface, was:

> to establish the Throne of our Great Restorer, Our present King *William*; and to make good his Title, in the Consent of the People,... And to justify to the World, the People

[1] R. Seldon, *A reader's guide to contemporary literary theory* (Brighton, 1985), p. 48.

[2] My criticism is directed against understandings of late-seventeenth-century appeals to contract, constitutional history and law as evidenced, for example, in the recent debate between Thomas P. Slaughter and John Miller. See: Thomas P. Slaughter, '"Abdicate" and "Contract" in the Glorious Revolution', *Historical Journal*, XXIV (1981), 323–37; John Miller, 'The Glorious Revolution: "Contract" and "Abdication" reconsidered', *Historical Journal*, XXV (1982), 541–55; Thomas P. Slaughter, '"Abdicate" and "Contract" restored', *Historical Journal*, XXVIII (1985), 399–403.

[3] The most impressive argument to this effect is Ashcraft's. See: Richard Ashcraft, 'Revolutionary politics and Locke's *Two treatises of government*', *Political Theory*, VIII (1980), 429–86; Richard Ashcraft and M. M. Goldsmith, 'Locke, revolution principles, and the formation of whig ideology', *Historical Journal*, XXVI (1983), 773–800.

of *England*, whose love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation when it was on the very brink of Slavery and Ruine.[4]

The evidence of Locke's initial reception, however, indicates that the nation wanted some other justification for the 1688 Revolution than that which *Two treatises* had to offer. Indeed, the initial response to *Two treatises* has served to make historians of the period aware of just how different Locke's work was from the rest of the superficially similar literature of the 1680s and 1690s.[5] Locke was silent about the very troublesome controversies over the character of the ancient English constitution which occupied so much of the attention of his contemporaries. One major characteristic of those controversies was an appeal to an original contract – an appeal which Locke, too, is often supposed to have made. But Locke's contractualism was very different from that of most of his contemporaries precisely because of his silences on issues of English constitutional law and history. But these differences have been inadequately understood. They are necessary for an appreciation both of the failure of Locke's publishing purposes and of the character of Locke's arguments in *Two treatises*. They will, then, occupy my attention here. But first, a seemingly troublesome objection must be met.

Charles D. Tarlton has recently claimed that Locke's statement of publishing purpose has been misconstrued. In reality, Locke intended it as a mere rhetorical flourish and those historians who have taken it literally have been misled into attempting to interpret Locke's text within a false context of contemporary justifications of the 1688 Revolution. They have found the sorts of differences that I have just noted and they have cast about for reasons and explanations. But all this, according to Tarlton, is inappropriate. The proper context for understanding Locke's publishing intentions is not that of revolutionary justification at all. It is rather the reappearance of political circumstances so similar to those which led Locke to write the *Treatises* in the first place that publication seemed called for. Locke wrote the *Treatises* as a warning to Charles II and his tory supporters and he published them with the same warning to William III and his tory supporters. Since Locke, then, was not setting out to do the sort of things which other supporters of the 1688 Revolution did, it is beside the point to dwell on Locke's differences from them. Those differences were as great as one would expect them to be since his purposes were not theirs. And hence to refer to Locke's initial 'failure' as an apologist for the Revolution and to interpret his not entering the field of English constitutional history as a 'significant silence' are both based on misunderstandings of the activities in which Locke was engaged when writing and publishing *Two treatises*.[6]

[4] John Locke, *Two treatises of government*, Peter Laslett (ed.) (New York, Mentor edn, 1965), p. 171.

[5] See, for example, J. P. Kenyon, *Revolution principles: the politics of party, 1689–1720* (Cambridge, 1977), pp. 17–20 and Julian H. Franklin, *John Locke and the theory of sovereignty* (Cambridge, 1978), pp. 105–8.

[6] Charles D. Tarlton, '"The rulers now on earth": Locke's *Two treatises* and the Revolution of 1688', *Historical Journal*, XXVIII (1985), 279–98.

Tarlton's arguments are persuasive in establishing the political circumstances in which it might not only appear appropriate but actually pressing for Locke to publish a work in 1689 which he had written several years earlier. But none of the other conclusions which might seem to follow from Tarlton's thesis do in fact follow. Locke's *Treatises* differed quite as much and in quite the same ways from the vast majority of Exclusion Crisis or Rye House Plot pamphlets as they did from the Revolutionary pamphlets. Although Locke's arguments were very different from the pro-Revolutionary tracts written immediately after the event, there is no reason to believe that they could not have served the purposes which Locke proclaimed in the preface. Subsequent readers, much later, had no difficulty in reading them this way. There is, in fact, no reason why Locke's professed intention in publishing should be irreconcilable with the supposed real intention which Tarlton offers as an alternative. The *Second treatise*, in particular, justifying resistance to tyrannical princes may well have been considered 'sufficient' both to justify the opposition to James II *and* to serve as a warning to any future monarch. Indeed, this again would seem a common enough understanding of the work amongst eighteenth-century readers and beyond. But for all this, the fact remains that Locke's contemporaries did not regard his arguments as 'sufficient'. They did look for different arguments to justify their opposition to Charles II and James II and they used these different arguments to warn William III and any future monarch of the dire consequences that would follow should they break the terms of their contract.[7] Locke certainly knew these arguments but he chose not to employ them himself. Thus despite the service which Tarlton has rendered in recovering a neglected aspect of Locke's publishing intentions, the problem still remains as to why Locke chose to justify resistance and to warn potential tyrants without deploying the arguments which his contemporaries in the eighties and nineties very frequently deployed. The answer is to be found in the precise differences between Locke and his contemporaries, the precise character of Locke's silences with respect to arguments from contract and the English constitution.

The meaning of contract in late-seventeenth-century English political debate, however, has been the subject of recent controversy between Thomas P. Slaughter and John Miller.[8] The controversy has served to remind historians of both the centrality of the term contract in the political vocabulary of the period and the complexity of the task of eliciting standard meanings in the face of such manifold and varied usages. But the debate has also suffered

[7] John Dunn, 'The politics of Locke in England and America in the eighteenth century', in John W. Yolton (ed.), *John Locke: problems and perspectives* (Cambridge, 1969), pp. 45–80; Martyn P. Thompson, 'The reception of Locke's *Two treatises of government*, 1690–1705', *Political Studies*, XXIV (1976), 184–91 and 'Reception and influence: a reply to Nelson on Locke's *Two treatises of government*', *Political Studies*, XXVIII (1980), 100–8. Contractualist warnings to William III were a significant part of early Jacobite propaganda. See, for example, Robert Ferguson, *A letter to Mr. Secretary Trenchard* (London, 1694), pp. 4–5; Anon., *The character of the present set of whigs* (London, 1711), pp. 6–7. For a general discussion of Locke and other whigs, see Franklin, *John Locke*, pp. 87–126.

[8] See the articles cited in n. 2 above.

from oversimplification. Neither participant has succeeded in transcending the tired, text-book generalization that contractualist argument in the late seventeenth century was set in the mould of either Lockean or Hobbesian ideas of contract. The generalization obscures most of the significant differences between Locke and his contemporaries. A fresh review of the evidence will make the point.

Even a fairly superficial reading of the political literature of the eighties and nineties reveals an enormous number of references to contracts and a great variety of apparently different understandings of the term. In the vast majority of cases, little or no interest was devoted to the conceptual refinement of a term understood as a traditional political concept. The considerable variety of synonyms which were currently used for contract is an indication of the wide range of meanings to which the term was open. They vary from the narrowly legal to the non-technical, loose terms of everyday language: from terms like 'stipulation', 'trust', 'capitulation', 'covenant' and 'compact' to simply 'promises', 'bargains', 'compromises', 'barriers' and 'agreements'.[9] The fact that these supposed synonyms are terms with quite diverse connotations raises doubts about whether appeals to contract in late seventeenth-century political argument were based on any agreed, standard meaning of the term. These doubts are reinforced when the variety of types of contract and the variety of causes on behalf of which appeal to contract was made are taken into account.

Robert Ferguson, for example, argued in 1695 from a 'Constitutional Contract'. In 1689, William Atwood set out to justify the Revolution in terms of the 'express Original and continuing' contract and in 1705 he concerned himself with various 'national contracts'. In 1691, Charlwood Lawton can be found reflecting on 'the original contract of our statute-books and law-cases'; whereas John Tutchin's *Observator* in 1703 was concerned with 'political' contracts. The anonymous author of *An entire vindication of Dr. Sherlock* (1691) chose to talk of an 'implicite Contract of Allegiance'; the elusive T.H. in *Political aphorisms* (1690), referred to 'mutual' contracts; the anonymous author of *A Political Conference between Aulicus, a courtier*; *Demas, a countryman*; *and Civicus, a citizen* (1689) argued from both 'the popular Contract' and 'the rectoral Contract'; and the radical Reverend Samuel Johnson can be found insisting in 1689 that 'Fundamental Contract, or Covenant of the Kingdom,

[9] See respectively Robert Ferguson, *The late proceedings and votes of the parliament of Scotland* (Glasgow, 1689), p. 24; Samuel Johnson, *Remarks upon Dr. Sherlock's book intituled, The case of allegiance due to soveraign princes, stated and resolved* (London, 1690), p. vi; T.H., *Political aphorisms; or, the true maxims of government displayed* (London, 1690), p. 29; Peter Allix, *An examination of the scruples of those who refuse to take the oath of allegiance* (London, 1689) in *State tracts* (London, 1705), I, 302; Robert Ferguson, *A brief justification of the Prince of Orange's descent into England* (London, 1689), p. 25; Samuel Johnson, *Remarks upon Dr. Sherlock's book*, p. x; Gilbert Burnet, *An enquiry into the measures of submission to the supreme authority* (London, 1689; 1st edn, Holland, 1688) in *Harleian miscellany* (London, 1810), IX, 204; John Savage, *The ancient and present state of Germany* (London, 1702), p. 36; and William Atwood, *The fundamental constitution of the English government* (London, 1690), pp. 9–10.

or Coronation-Oath,... are but several Names for the same Thing.'[10] And all these various contracts, as J. W. Gough and others have long since noted, are very different from Locke's 'original Compact' which appears in *Two treatises* as the agreement of independent and equal individuals in a 'state of Nature' to form a 'Political Society' and be governed by 'the *majority* of the Community'.[11]

In addition to all this variety of types of contract, and perhaps most disconcerting of all for those wedded to simplified visions of contract theory in the late seventeenth century, is the fact that appeals to contract were by no means the monopoly of whigs or pro-Revolutionaries. A small but troublesome group of Jacobites, including Robert Ferguson, Charlwood Lawton and Sir James Montgomery, were prepared to argue against the Revolution on grounds of original contract. Nonjurors like Jeremy Collier, Francis Turner, John Kettlewell and Henry Dodwell occasionally employed the vocabulary of contract and consensualism. And even tories, like Pembroke, who spoke in favour of a regency in the Convention Parliament, were prepared to do so by reference to 'the *original contract*'.[12]

Given all this complexity, verging on confusion, in appeals to contract in the eighties and nineties, it is hardly surprising that some contemporaries, like Jeremy Collier, should have concluded that 'most Men believe that the pretended Breach of that which they call *The Original Contract*, was designed for no more than a popular Flourish'.[13] It seems, however, that Collier was wrong in his generalization. He was, at least, as wrong as those who made the opposite claim. Peter Allix, for example, argued approvingly that breaking the original contract was the 'foundation' of the case against James II, and John Kettlewell, from the ranks of the nonjurors, complained that 'all the Power of the People,... is grounded by the Advocates for Resistance, on the *Original*

[10] See respectively Robert Ferguson, *Whether the preserving the protestant religion was the motive unto, or the end that was designed in, the late revolution?* (London, 1695) in *Somers tracts* (London, 1751), III, 423; William Atwood, *The superiority and direct dominion of England over Scotland reasserted* (title shortened; London, 1705), p. 9; William Atwood, *The fundamental constitution*, p. 84; Charlwood Lawton, *The jacobite principles vindicated* (London, 1693) in *Somers tracts* (London, 1809–15), X, 526; John Tutchin, *Observator*, 86 (London, 17 February, 1703); Anon., *A political conference* (London, 1689), p. 23; and Johnson, *Remarks upon Dr. Sherlock's book*, p. vi.

[11] *Two treatises*, II, sects. 97–9. J. W. Gough, *The social contract* (Oxford, 2nd edn, 1957), ch. 10 and *John Locke's political philosophy* (Oxford, 1950), pp. 29, 121–2.

[12] Ferguson, *A letter to Mr. Secretary Trenchard*, p. 4; Lawton, *The jacobite principles*, p. 526 and *A letter formerly sent to Dr. Tillotson* (London, 1690) in *Somers tracts* (London, 1809–15), IX, 370; Sir James Montgomery, *Great Britain's just complaint* (London, 1692) in *Somers tracts* (London, 1809–15), X, 468. Similar jacobite contractualist arguments can be found in Robert Jenkin, *The title of a usurper after a thorough settlement examined* (London, 1691), pp. 57, 59 and Anon., *The dear bargain* (London, 1690), in *Somers tracts* (London, 1809–15), X, 377. Jeremy Collier, *Vindiciae juris regii* (London, 1689), p. 42 but see also p. 43; *A collection of the parliamentry debates* (London, 1741), II, 202–3; John Kettlewell, *The duty of allegiance settled upon its true grounds* (London, 1691), in *Works*, (London, 1718), II, 208–9, 214, 224, 263; Henry Dodwell, *A further prospect* (London, 1707), pp. 105–7. (I owe the last two references to Dr Mark Goldie.) *A collection of the parliamentary debates* (London, 1741), II, 248–9.

[13] Collier, *The desertion discuss'd* (London, 1689) in *State tracts*, I, 110.

Contract'.[14] We know, however, that the structure of political argument was much more complex than any of these contemporary, politically motivated, generalizations might lead us to believe.[15] And certainly, the trouble taken in the Convention Parliament to ascertain the legal status of an original contract, the reports of the nine common lawyers, the approval of the commons' resolution claiming that James II had broken his contract, and the esteem in which contracturalist treatises like Pufendorf's *De jure naturae et gentium* were held at the time all indicate that notions of contract were taken much more seriously than simply as popular flourishes.[16]

But just as contract arguments cannot be dismissed as mere rhetoric, so the terminological variety and the complexity of arguments from contract cannot be reduced to the simplified *schema* of Hobbesian versus Lockean contract theory. In their concerns to explain the nature of the social bond and the rise and extent of political power by reference to states of nature, natural liberty, natural rights and natural law, Hobbes and Locke had more in common with one another than either had with any of their contemporaries who argued from Englishmen's rights and duties derived from Saxon contracts, Magna Carta, the constitutional contract of 1688, or whatever. It is here, at the level of questions addressed and types of evidence considered appropriate for answering them, that the essential differences begin to arise between Locke and his contemporaries. The significance of Locke's silences in this respect can only be appreciated within the context of the various traditions of European contractualism.

I have argued in detail elsewhere that there were two, quite separate, traditions of European contractualism which can be traced back to at least the late sixteenth century. In late-seventeenth-century England, these traditions became intermingled in very specific ways but in important respects they remained distinct. William Atwood, Robert Ferguson and a number of other pamphleteers wrote exclusively within the one tradition; Locke alone amongst English writers wrote exclusively within the other. The differences between the two traditions are most readily (though superficially) apparent at the level of key terms. Each had a different vocabulary. In the first tradition, discussion focused on fundamental law, fundamental liberties, fundamental, original, or constitutional contracts and ancient or fundamental constitutions. I shall refer

[14] Allix, *An examination of the scruples*, p. 302; Kettlewell, *Christianity, a doctrine of the cross; or, passive obedience, under any pretended invasion of legal rights and liberties* (London, 1691), p. 80.

[15] See, for example, Kenyon, *Revolution principles*, chs. 1 and 2; and Mark Goldie, 'The Revolution of 1689 and the structure of political argument', *Bulletin of Research in the Humanities*, LXXXIII (1980), 473–564.

[16] *Historical Manuscripts Commission, 12th report, appendix part VI, MSS of the house of lords, 1689–90* (London, 1889), pp. 15–16 and *Lords Journals*, XIV, 110. On Pufendorf's reputation see, for example, Atwood, *The fundamental constitution*, pp. 30, 87, A. Tooke (ed.), *The whole duty of man* (London, 1691), preface, and J. L. Axtell (ed.), *The educational writings of John Locke* (Cambridge, 1968), pp. 294–5, 356, 395, 400. In view of Locke's clear preference for Pufendorf, the current tendency to relate Locke to Grotius requires modification. See J. O. Hancey, 'John Locke and the law of nature', *Political Theory*, IV (1976), 448 and Richard Tuck, *Natural rights theories* (Cambridge, 1979), p. 173.

to this tradition as constitutional contractarianism. In the second tradition, the language was more philosophical than legal. Here, discussion focused on natural law, natural rights, state or condition of nature, original or social contract and civil or political society. To be sure, the actual issues at stake when these distinct vocabularies were employed were frequently the same. But the decision to employ one or other of them made certain, distinct demands on the writer. To debate the provisions of fundamental law, constitutional contracts, the contractual arrangements of ancient constitutions, and so on, strongly intimated that evidence be found in law books and the histories of particular polities. Speculation about natural law, states of nature and the conditionality supposedly implicit in any human regulations, on the other hand, was above all a matter of rational abstraction and appeal to the laws of nature and God.[17]

These differences in vocabulary and the kind of evidence to which appeal was made reflect further differences about the sorts of questions addressed in each of the traditions. The vocabulary of philosophical contractarianism, that is, was appropriate for enquiries pitched at a high level of generality: why is civil society necessary, what is the nature of the social bond, what sort of government should rational men have, and so on? The vocabulary of constitutional contractarianism, by contrast, was appropriate for enquiries concerned with specific positive laws and the institutional inheritances of particular polities: how did the English constitution originate, what sort of constitution was it, what rights and liberties did its laws define and guarantee, what did all this mean for the conduct of present political affairs, and so on?

None of this implies that the style of argument in both traditions was not very similar. Gordon Schochet has recently argued that contract theorists, just as much as the patriarchalists against whom they so often wrote, were committed to genetic styles of reasoning.[18] This shared style goes some way in helping explain why several writers in the late seventeenth century slipped with apparent ease from one type of contracturalist argument to the other. But there were more particular reasons for them to do so, too. Two facets of English political debate in the 1680s seem of special importance in accounting for what Locke's contemporaries made of arguments from contract, constitutional law and history and how they intermingled the vocabularies of constitutional and philosophical contractarianism. These were, first, the widespread concern of opposition pamphleteers to avoid any association with Civil War doctrines by providing legal arguments to defend their activities; and second, the adoption of Sir Robert Filmer as a major authority by tories.

[17] Martyn P. Thompson, 'The language of contract in modern European political thought', in M. Cranston and P. Mair (eds.), *Langage et politique* (Bruxelles, 1982), pp. 171–81 and *Ideas of contract in English political thought in the age of Locke* (New York, 1987).

[18] Gordon J. Schochet, *Patriarchalism in political thought* (Oxford, 1975), pp. 8–9, 262 and in general chs. 11 and 13.

The first has often been noted. From the Exclusion Crisis onwards, the opposition literature which rose above scurrility was marked by deep equivocation. A very real fear of popery was set against an almost equally strong abhorrence of civil disorder. Thus the demand for constitutional change to guard against a catholic succession was checked by the fear of being seen to innovate. In these circumstances, constitutional contract arguments were especially attractive. Practically every publicist denied an intention to alter the ancient frame of the English constitution. At each stage of the debates, the various participants attacked their opponents as innovators and defended their own cause as according with law, history, reason and religion.[19] And this was the case even though the cause itself might involve breaking the hereditary succession, breaking known statute laws against resisting the monarch and breaking oaths of allegiance. Constitutional contract arguments provided one main way of defending the legality of such actions.

Indeed, this quest for legality was behind a major transition in whig political argument between the Exclusion Crisis and the 1688 Revolution. John Pocock is one of the few historians to have noted this. He remarked that during the 1680s 'the ancient constitution' became 'a conservative and legalist version of the contract'.[20] This brief comment requires expansion. In the late seventies and early eighties, William Petyt and William Atwood were working together in the Inner Temple defending the rights of the house of commons, the jury system, and so on, on the grounds of the immemorial custom of an ancient constitution. This is all very familiar.[21] But from the mid-eighties onwards, Petyt's manuscripts and Atwood's published works refer more and more to consent as the origin of government, the Gothic original of the English constitution and they begin to defend Englishmen's fundamental rights in terms not of immemoriality but of an original contract. Thus instead of defending a mixed constitution with arguments based on ancient, immemorial and unchanging custom, a number of whig theorists began asserting the rights of parliament against the king by reference to an original English contract. In Atwood's words, the constitution was no longer 'an harmonious balance between King, Lords and the Commons' which could not be 'legally or by any lawful power chang'd but must remain forever once establish'd'. Instead, it was a constitution based on 'the express Original and continuing Contract

[19] Republican ideas did find expression, of course, but they were hardly the mainstream of debate. C. Robbins (ed.), *Two English republican tracts* (Cambridge, 1969), pp. 40–59 and M. Goldie, 'The roots of true whiggism', *History of Political Thought*, I (1980), 195–236. On charges of novelty, see, for example, Ferguson, *A brief justification*, pp. 26, 44, and *The design of enslaving England discovered* (London, 1689), p. 38; Clarendon in *A collection of the parliamentary debates*, II, 204; and Locke, *Two treatises*, I, sect. 3 and II, sect. 112. On the common form of argument, see, for example, Timothy Wilson, *Conscience satisfied: in a cordial and loyal submitting to the present government* (London, 1690), To the Impartial Reader; Thomas Hunt, *An answer to a book* (London, 1682), p. 182; and Thomas Browne, *An answer to Dr. Sherlock's case of allegiance to sovereign powers* (London, 1691), p. 5. The general point is made in Martyn P. Thompson, 'A note on "reason" and "history" in late seventeenth century political thought', *Political Theory*, IV (1976), 491–504.

[20] J. G. A. Pocock, *The ancient constitution and the feudal law* (Cambridge, 1957), p. 231.

[21] Ibid. ch. 9.

between Prince and People with [parliament] as the Legal Judicature empowered to determine concerning it'.[22]

Atwood's theory of this ancient contract constitution was elaborate. Drawing on a host of authorities including Bracton, Fleta and the *Mirror of justices*, Atwood argued that forty Saxon sovereigns contracted together and set up certain fundamental laws to secure their liberty and property. At the same time, they established a mixed monarchy to rule according to these and subsequent laws made by king, lords and commons assembled in parliament. The prospective king was made to swear in his coronation oath that he would only act according to law, and the people promised to obey if he kept that promise.[23] Thus, Atwood concluded, the 'King's Oath is the real Contract on his side, and his accepting the Government as a Legal King the virtual one; and so it is *vice versa* in relation to the allegiance due from the subject.'[24]

The coronation oath was thus the essential link between the ancient contract constitution and the present contract constitution. Of most interest in this view of England's 'Fundamental Constitution' was the fact that it provided an extraordinary principle of constitutional interpretation. The constitution was designed by our ancestors and since they were rational men they could not be supposed to have designed anything harmful to themselves or their descendants. Atwood repeated the common seventeenth-century *dictum* that 'They that lay the first Foundation of a Commonwealth, have Authority to make Laws that cannot be altered by Posterity...For Foundations cannot be removed without the Ruin and Subversion of the whole Building.'[25] But this, he considered, only applied to what he considered the 'chief Fundamental Law', the law of *salus populi*. This law, understood as the 'chief Constitutional Law' and the 'Foundation of the Agreement', was 'the scope and end of all other laws', the test through which all laws and public acts must pass before they could be accepted as constitutionally valid.[26] This was a strange principle of constitutionality. For all Atwood's diligent searching through law books, records, histories and legal authorities, his ultimate court of appeal was parliament determining cases according to *salus populi*, the law necessarily intended by our Saxon ancestors as the chief fundamental law.[27] William Petyt was much more cautious. But in his manuscripts and the rather cryptic notes of his speech to the Convention Parliament about England's original contract, there is evidence that he was moving in the same direction as Atwood.[28] Indeed, it is fascinating to find Petyt, sometime after 1700, recommending Locke's *Two treatises* to anyone interested in 'William I^{sts} Oathes Government Election Coronation etc'.[29]

[22] Atwood, *Lord Hollis his remains* (London, 1682), p. 266 and *The fundamental constitution*, pp. xxii, 84.

[23] Atwood, *The superiority and direct dominion* (London, 1704), pp. 377–8 and *The fundamental constitution*, p. 30.

[24] *The fundamental constitution*, p. 32.

[25] Ibid. p. 59. Atwood was quoting Robert Sheringham.

[26] *The fundamental constitution*, pp. 78–9.

[27] Ibid. p. 27.

[28] Inner Temple MS 512 'U', fos. 66, 253, 284, 341 and Inner Temple MS 512 'H', fo. 12.

[29] BM Lansdowne MS 510 B, fo. 32.

Locke, of course, had next to nothing to say about these matters. He was here being called upon to support a contractualist, anti-conquest argument which we can be fairly certain that Locke himself was not interested in supporting.

Similarly, constitutional contract arguments had no need to appeal to characteristically Lockean concepts like natural right, natural law and states of nature. Atwood, in fact, always dismissed what he considered the 'thin and metaphysical notions' of natural right 'which few are Masters and Judges of'. He attacked William Molyneux in 1698 for discussing constitutional problems by reference to 'wheadling Notions of the *inherent*, and unalienable Rights of Mankind'. Such talk was utterly out of place since 'nothing but the Law of *England* can settle Men's Judgements of the Nature of the English Monarchy'.[30] In all this, he was certainly not alone. Gilbert Burnet, for example, expressed the widespread desire to reconcile the overthrow of James II with the positive laws of the land. 'The measures of power, and by consequence of obedience', he declared, 'must be taken from the express laws of any state or body of men, from the oaths that they swear, or from immemorial... customs.' He then continued: 'The main and great difficulty here, is, that though our government does indeed assert the liberty of the subject, yet there are many express laws made, that lodg the militia singly in the King, that makes it plainly unlawful, upon any pretense whatsoever, to take arms against the King, or any commissioned by him.'[31] Burnet was referring to a number of laws passed in the early years of Charles II's reign which certainly did outlaw resistance.[32] But the problem was easily solved on constitutional contract grounds. Reference to the intentions of the original contractors and to *salus populi* revealed that so manifest a restriction of the liberty of the subject, even if it was enshrined in statute laws, could not really be part of English law.[33]

This, then, is the sort of thing which many of Locke's contemporaries were

[30] Atwood, *Lord Hollis his remains*, p. 293, *The history and reasons of the dependency* (London, 1698), p. 211, and *The superiority and direct dominion*, p. 392.

[31] Burnet, *An enquiry into the measures of submission*, pp. 9–10. Similar concerns are evident in: Browne, *An answer to Dr. Sherlock's case*, p. 3; Thomas Hunt, *Mr. Hunt's postscript for rectifying some mistakes in some of the inferior clergy, mischievious to our government and religion* (London, 1682), p. 28; Theophilus Downes, *An examination of the arguments drawn from scripture and reason, in Dr. Sherlock's case of allegiance, and his vindication of it* (London, 1691), p. 72; Jenkin, *The title of a usurper*, p. 32; Samuel Johnson, *Dr. Sherlock's two kings of Brainsford* (London, 1691), p. 4; Timothy Wilson, *God, the king, and the countrey, united in the justification of this present revolution* (London, 1691), Epistle dedicatory, n.p.; William Atwood, *Reflections upon a treasonable opinion* (London, 1696), p. 9; Jeremy Collier, *Dr. Sherlock's case of allegiance considered* (London, 1691), p. 10; Anon., *The case of allegiance consider'd* (London, 1689), pp. 6–7, 18–19; Anon., *Reflections upon two books; the one entituled, the case of allegiance to a king in possession; the other an answer to Dr. Sherlock's case of allegiance to sovereign powers* (London, 1691), p. 6; Daniel Whitby, *Agreement betwixt the present and former government* (London, 1690) in *State tracts*, I, 413; Robert Ferguson, *A brief justification*, p. 18; Robert Brady, *An inquiry into the remarkable instances* (London, 1690), p. 20; Anon., *A disputation* (London, 1679) in *Harleian Miscellany*, VIII, 317; and Robert Ferguson, *A sober enquiry into the nature, measure, and principle of moral virtue, its distinction from gospel-holiness* (London, 1673), p. 77.

[32] Particularly, the militia acts of 1661 and 1662. See J. R. Western, *Monarchy and revolution* (London, 1972), pp. 32–3.

[33] Burnet, *An enquiry into the measures of submission*, pp. 10–11.

doing with the vocabulary of constitutional contractarianism. The common lawyers called to advise the Convention Lords on the status of the original contract even lent it a quasi-legal authority. At least, they did not deny that an original contract was consistent with English law and most of them seem to have agreed with Sir Robert Atkyns that if there were to be talk of an original contract then 'the laws of the Kingdom' must be taken to show 'what the contract is'.[34]

Much of the contract literature of the eighties and nineties, however, appeals to notions of natural law, natural right and state of nature, as well as fundamental right, fundamental law and the English constitution. The intention embodied in this literature was essentially the same as that of the constitutional contractarians: to draw specific conclusions about the requirements of English law. At its simplest, the attraction in combining the vocabularies of philosophical and constitutional contractarianism might be explained by reference to the second characteristic facet of the debates of the period that I noted above: the adoption of Filmer as the principal tory authority. As a response to Filmer, constitutional contract arguments were appropriate for countering the arguments of, say, the second part of *Patriarcha* and *The freeholders' grand inquest* – arguments, that is, about the specific requirements of English law. A combination of philosophical and constitutional contract arguments, on the other hand, was appropriate as a response to the whole body of Filmer's political writings. Tyrrell made the point in *Patriarcha non monarcha* (1681):

> no man can imagine to what end the *Patriarcha* and other Tracts should come out at such a *Time* as they did, unless the Publishers thought that these Pieces, which printed apart could onely serve to ensnare the Understandings of some unthinking Country-Gentleman or Windblown-Theologue, could do no less, being twisted into one Volume, than bind the conscience, and enslave the Reasons of all his unwary Readers.[35]

Tyrrell proceeded to devote his own single volume to a rebuttal of all Filmer's works and in doing so he integrated the vocabulary of the two types of contract argument.

Tories, then, having turned to Filmer, came to merge appeals to divine law, natural law and the law of the English constitution into the same flow of argument. In response, their opponents did the same. The tory Robert Brady, for example, in an anti-Exclusion tract *The great point of succession discussed* (1681), set out to show in Filmerian fashion that monarchy was established by God, that divine and natural law sanctioned only hereditary succession by primogeniture and thus that the exclusion of James was contrary to 'the known Fundamental Laws of the Land'.[36] In response, whig Exclusionists began appealing to natural law and a state of nature. Monarchy was neither natural nor divine but a human institution like any other. The ultimate questions at stake remained matters of English constitutional law. But drawing

[34] HMC, *12th report*, appendix part VI, p. 15.
[35] *Patriarcha non monarcha*, preface, n.p.
[36] *The great point of succession discussed*, pp. 25–6.

conclusions about English law from an analysis of natural law, natural rights, state of nature and social contract exacted a heavy price. Notions of state of nature and social contract were loosened from their rationalist moorings and turned into historical events requiring historical evidence; and the claim that Englishmen's rights were the natural rights of mankind involved loosening the conditions of current legal theory to an extraordinary extent. Each of these requires brief comment.

Practically all of Locke's contemporaries who employed a contractualist language believed that contracts were historical events. Algernon Sidney had claimed that he could prove:

> ...in the first place, that several nations have plainly and explicitly made contracts with their Magistrates.
>
> 2. That they are implicit, and to be understood, where they are not plainly expressed.
>
> 3. That they are not dreams, but real things, and perpetually obliging.
>
> 4. That judges are in many places appointed to decide the contests arising from the breach of these contracts.[37]

In reaffirming, against Filmer, the scholastic distinction between economical and political power, Tyrrell felt obliged to locate a period in history when political power had not yet been set up.[38] His fullest discussion is in the first volume of *The general history of England* (1696). Tyrrell presented an historical account of the origin of government in Western Europe which was expressly based on *Genesis*, but which owed more to his contractualist commitment than to any expertise in biblical exegesis. '*Europe*', he argued, 'was Peopled by the Posterity of *Japhet*', Noah's son. And the Saxons, who originated the English constitution, could trace their ancestry through 'the ancient *Getae*', or 'Goths', back to Japhet himself.[39] Here Tyrrell linked his arguments with ideas that were very familiar to late-seventeenth-century historians: all the governments of Europe had, in their earliest years, enjoyed the same constitutional form of a mixed or limited monarchy known as the 'Gothick balance' or 'Gothick Constitution'.[40] In England, this was understood as the balance of king, lords and commons, the ancient constitution which had supposedly been restored in 1660.

Thus Tyrrell associated the origin of the Gothic constitution with the repopulation of the world after the Flood. In doing so, he identified that constitution as the form of government which men, under the necessity derived from living in a state of nature under natural law alone, had set up when they

[37] Algernon Sidney, *The works* (London, 1772), p. 269.

[38] For the distinction between economical and political power amongst 16th-century scholastics, see Quentin Skinner, *The foundations of modern political thought* (Cambridge, 1978), II, 156ff.

[39] *The general history of England*, I, 4–6, 121. See also James Tyrrell, *Bibliotheca politica* (London, 1694), pp. 352–8.

[40] S. Kliger, *The Goths in England* (Cambridge, Mass., 1952) and E. Hoelzle, *Die Idee einer altgermanischen Freiheit* (Berlin, 1925).

agreed to forego some of their natural rights in order to safeguard the remainder. In this way, the Gothic constitution and especially the English constitution set up by emigré Saxons represented the ideal arrangement of positive, fundamental laws, guaranteeing certain fundamental rights which were none other than the natural rights of man defined and made conformable to practical social experience.[41] Thus the laws of the English constitution were of three kinds. First, all those positive laws which could be changed without altering the nature of the constitution. The English law of succession, changed supposedly from election to heredity, was an example. The change had occurred with the consent of the citizens and it could be changed again in the same way.[42] Second, positive fundamental law which could be changed but only at the cost of destroying the old constitution. Third, the immutable laws of nature, laws which could not be changed by any human ordinance but which were nevertheless part of English constitutional law. Tyrrell's view of the English constitution only makes sense given some such theory of law:

> It is... granted, that all those Laws in a limited Government, but those of Nature and right Reason are alterable, because the Government it self is so, and in respect of which alone they may be called Fundamental, or Foundations of the Government, but these being altered, it would cease to be the same kind of Government it was before.[43]

Tyrrell's integration of arguments from reason, the Bible and history would seem to be another example of that latter-day scholastic harmony of reason, religion and history which characterizes much political argument in late-seventeenth-century England.[44] His understanding of the English constitution provided an even more complex groundwork for arguments about the constitutionality of resistance than that of Atwood, Petyt, Burnet, and the rest of the constitutional contract theorists. But Tyrrell, too, was far from alone. Sidney developed an argument to the effect that 'Contract and consent shew the root and foundation of civil powers [and] we may judge of the use and extent of them, according to the letter of the law, or the true intentional meaning of it; both of which declare them to be purely human ordinances, proceeding from the will of those who seek their own good.'[45] And he left no doubt about the implications for English constitutional law:

> Axioms in law are, as in mathematics, evident to common sense; and nothing is to be taken for an axiom that is not .... The axioms of our law do not receive their authority from Coke or Hales, but Coke and Hales deserve praise for giving judgment according to such as are undeniably true.[46]

Defoe, in 1702, asserted that one of the maxims of his argument was that 'Reason is the Test and Touchstone of Laws, and that all Law or Power that is Contradictory to Reason, is *ipso facto* void in it self, and ought not to be

[41] Tyrrell, *Bibliotheca politica*, pp. 666–70. [42] Ibid. p. 706.

[43] *Patriarcha non monarcha*, pp. 219–20. Jeremy Collier in *Dr. Sherlock's case of allegiance* (p. 96) also claims that 'the Laws of Nature... are part of the Constitution of this Realm'.

[44] Thompson, 'A note on "reason" and "history"', pp. 491–504.

[45] *The works* (1772 edn), pp. 82–3. [46] Ibid. pp. 409–10.

obeyed.'[47] And the anonymous author of *A brief account of the nullity of King James's title* (1689) was even more explicit. He declared that 'It is a Maxim of our Law, That the Laws of God and Nature should take place before all other Laws.'[48] Small wonder that professional lawyers like Atwood objected.

But the main point of whig appeals to an English constitutional contract should now be clear. They provided constitutional justifications for resistance. The point of appealing to natural right, state of nature and social contract should equally be clear. Filmerian arguments about the equivalence of paternal and political power and God's ordaining absolute monarchy could be rejected and the ground cleared for establishing a right to resist according to English constitutional law. This last was the main point as Tyrrell made clear in the concluding dialogue of his massive *Bibliotheca politica* (1692–4). Having rehearsed practically all of the political controversies of the 1680s and early 1690s and having moved deftly from a consideration of natural rights and social contract to Englishmen's rights and England's original contract constitution, Tyrrell concluded; 'I thought I had sufficiently proved in our former Conversations, that taking up Arms in defence of our Religion and Civil Liberties, when no other Remedy could prevail, was not unlawful, according to our Constitution.'[49] After the Revolution, of course, this kind of contractualist argument had a much less disruptive ring about it than before. For all the immense problems of conscience and constitutional propriety that troubled Englishmen in the interregnum, the turn of events seemed to lend an air of constitutionality to what had happened as allegiance was changed from James II to William and Mary.[50] Resisting James had not been so terrible after all. Indeed, it was largely left to Jacobite contractualists to continue drawing out the radical implications of the extraordinary legal doctrines of constitutional contractarianism. Robert Ferguson did so in characteristic style in 1694 after his conversion to Jacobitism. He warned William:

> whatever there was of an *Original Contract* between former Kings and the free People of these Kingdoms, yet it is undeniable, there is a very *formal* and *explicite One* between K. William and them. [William] may be sure, that they who could extort and wrest from the *Constitution*, which gave no such Allowance, and much less Authority, a Power and Right to dethrone K. James ...will be ready and forward enough when the Humour and Caprice takes them, to treat him in case of Miscarriages after the same rate.[51]

These, then, were the kinds of things which Locke's contemporaries in England were doing with the vocabularies of constitutional and philosophical contractarianism. The various contracts were all understood as historical events. Constitutional contracts were evidenced in histories and law books, in accounts of elections and popular acclamations, in Magna Carta and

[47] *The original power of the collective body of the people of England* (London, 1702), p. 3.

[48] Anon., *A brief account*, in *State tracts*, I, 284.

[49] *Bibliotheca politica* (London, 1727 edn), p. 739.

[50] Kenyon, *Revolution principles*, chs. 1 and 2.

[51] Ferguson, *A letter to Mr. Secretary Trenchard*, pp. 4–5. See also Anon., *The character of the present set of whigs* (London, 1711), pp. 6–7.

coronation oaths, and in the much-prized *Mirror of justices*.[52] The historicity of the state of nature and social contracts was evidenced, somewhat paradoxically, in the silences of sacred history.[53] Where clear evidence was missing, contracts were 'implicit and to be understood', but they were nonetheless 'real things' for all that.[54] Contracts were the basis of contemporary constitutional law. The people of England, organized and represented in parliament, were possessed of a constitutional right of resistance. Thus the Revolution of 1688 required no exclusive, extra-constitutional appeal to natural law, natural right or divine law for its justification. The laws of the English contract constitution were the appropriate, and sufficient, court of appeal. The people may or may not have been justified in 1688, they may or may not be justified on any future occasion, but it was the particulars of political practice and the requirements of English law (interpreted in the high-handed way I have outlined) that were thought to determine the matter.

This, I believe, is a more appropriate way of understanding the use of contract, constitutional history and law in the political controversies of late-seventeenth-century England than by reference to rather fuzzy notions of Hobbesian versus Lockean contract theories. Neither of the most recent historians of contract during the period is quite happy about their chosen frame of reference. Both note that 'by no means all the references to contract in the debates of 1689 can be fitted into those categories'. But neither offers any alternative. Late-seventeenth-century constitutional argument in this respect is left in a very unsatisfactory state. A very refined and intensely important debate was apparently conducted by a number of loose Lockeans and loose Hobbesians. And the key concept of contract was understood by most of these participants in the debate 'in the vaguest of terms'.[55] This unlikely view misses altogether both the intellectual coherence of constitutional contract arguments (arguments which might be used both for and against the 1688 Revolution) and the intermingling of philosophical and constitutional contract theories. But what is worse, the unsubstantiated belief that talk of government resting on trust or a mutual agreement between ruler and ruled was evidence of Lockean contract manages to obscure all that was distinctive about Locke's arguments, and especially his silences, in *Two treatises*.

For Locke's concerns in *Two treatises* could not have been further from the

[52] On the importance of the *Mirror* as evidencing England's original contract see: Atwood, *The fundamental constitution*, p. 30; Allix, *An examination of the scruples* in *State tracts*, I, 302; Johnson, *Remarks upon Dr. Sherlock's book*, p. x; Tyrrell, *The general history of England*, I, xlix; Atwood, *The superiority and direct dominion*, pp. 377–8; Johnson, *An argument proving, that the abrogation of king James by the people of England from the royal throne, and the promotion of the prince of Orange one of the royal family, to the throne of the kingdom in his stead, was according to the constitution of the English government, and prescribed by it* (London, 1692), pp. 48–9 (for 58–9).

[53] The common argument was that the Bible was written with other ends in view than to explain the origins of human societies or governments. The point, of course, was directly at odds with Filmerian patriarchalism.

[54] Sidney, *The works* (1772 edn), p. 269.

[55] Miller, 'The Glorious Revolution', p. 547. Slaughter, '"Abdicate" and "Contract"', pp. 400–1.

legalism and constitutionalism that guided constitutional contract theorists and those, like Tyrrell and Sidney, who felt moved to incorporate the vocabulary of philosophical contractarianism into arguments that were essentially about the requirements of the English constitution. As is perfectly well known, Locke expressly denied that historical evidence could have any decisive effect on his argument in the *Second treatise*. His was an argument about right, not historical fact. Locke's language was exclusively that of philosophical contractarianism. His was an account of the rational origins, extent and end of civil government. At most he seems to have believed that his account of rational origins should not run counter to the historical experience of mankind. Historical evidence, that is, might add to the persuasiveness of his argument but the lack of such evidence or even the existence of counter-evidence could not logically undermine his account.[56]

Locke, of course, was well aware of his contemporaries' arguments about England's original contract and their search for the constitutional grounds of resistance. Yet when Locke wrote *Two treatises* as a contribution to the Exclusion debates and when he revised his text for publication as a contribution to the Revolution debates, he studiously avoided deploying any such arguments himself. This much, at least, has sometimes been noted by Locke scholars and a number of suggestions have been offered as to why this should have been so. None is quite adequate. But each requires comment.

First, it is frequently noted that Locke understood the relationship between ruler and ruled as one of trust, not contract.[57] In this case, of course, it would hardly be surprising that Locke should have had no time for arguments based on the view that the relationship was contractual. But the matter is by no means self-evident. For trust was a notion that was frequently used in conjunction with contract in the Revolutionary literature. Indeed, it was often used as a synonym for contract.[58] In the debates to which Locke intended to contribute, then, talking of trust did not preclude talking of constitutional contracts. Second, it does not seem adequate to explain Locke's silences about English constitutional history and a constitutional contract as Laslett does in terms of Locke's supposed 'indifference' to current constitutional myths.[59] Locke certainly believed that there was such a thing as an ancient English constitution and, in a letter to Edward Clarke in 1689, Locke unequivocally recommended its restoration as the best way of settling the 'nation upon the sure grounds of peace and security'. But Locke's reasoning here had nothing to do with constitutional contracts. He was simply convinced that restoring

[56] Locke, *Two treatises*, II, sects. 76, 101–6.

[57] Geraint Parry, *John Locke* (London, 1978), pp. 99–100; Laslett (ed.), *Two treatises*, pp. 127–30.

[58] See for example Tyrrell, *Bibliotheca politica*, p. 104 and Johnson, *Remarks upon Dr. Sherlock's book*, p. vi.

[59] Laslett (ed.), *Two treatises*, p. 475 note to lines 48–9 and pp. 89–92. J. W. Gough, 'James Tyrrell, whig historian and friend of John Locke', *Historical Journal*, XIX (1976), 587–8, makes the much more persuasive point that Locke saw such historical and legal arguments as irrelevant to his purposes in *Two treatises*.

the old constitution would be a settlement which was likely to be the most 'lasting, for the security of civil rights and the liberty and property of all the subjects'.[60] It was the constitution which would elicit the general consent of Englishmen.[61] On another occasion, Locke recommended John Sadler's *The rights of the kingdom and customs of our ancestors* (1649) to the gentleman who would know 'the ancient constitution of the government of England'. But once more, Sadler's account of that constitution was consensualist, not contractarian.[62] Finally, Locke's refusal to deploy constitutional contract arguments cannot be related to his understanding of history. In its essentials, Locke's view of history seems to have been very run-of-the-mill for the late seventeenth century.[63] He certainly believed that there was historical evidence for the origin of governments in contract and he did not think that the kind of historical activity which sent Tyrrell searching for the origin of the English nation amongst the sons and nephews of Noah was illegitimate.[64] Nevertheless, Locke did none of this himself.

Much more to the point, it seems, is that Locke found it both unnecessary and illogical to engage in the kind of constitutional argument to be found in Tyrrell, Sidney, Atwood, Ferguson, Burnet, and the rest. Thanks to the research of James Farr and Clayton Roberts, we now know that even when Locke wrote directly in support of William III, the Revolution and national unity he did not have recourse to arguments from contract, constitutional law or history. If such arguments were unacceptable as part of the rhetoric of support for the 1688 Revolution, as Locke seems to have thought, they were even more out of place in the argument of *Two treatises*.[65] There were two reasons for this. Both are crucial for understanding the kind of work which Locke intended *Two treatises* to be.

The first has been suggested by Julian H. Franklin.[66] Here the central argument of the *Second treatise* is construed as an attempt to grapple with the problem of sovereignty and resistance in mixed monarchies. And Locke's insistence on the constitutive power of the people provided a coherent answer to that problem where other whig theories did not. Constitutional contract theory identified the English constitution as embodying an 'express Original and continuing Contract between Prince and People' with parliament as the 'Legal Judicature empowered to determine concerning it'. This effectively

[60] E. S. de Beer (ed.), *The correspondence of John Locke* (Oxford, 1978), III, no. 1102, pp. 545–7. Quoted in John Dunn, *The political thought of John Locke* (Cambridge, 1969), pp. 143–4, fn. 2.

[61] As distinct from a mere 'general submission' in terms of Locke's critique of Sherlock quoted in Dunn, *The political thought of John Locke*, pp. 145–6, fn. 5.

[62] Axtell (ed.), *The educational writings*, p. 401. Sadler's work was not prominent amongst whig authorities.

[63] Axtell (ed.), *The educational writings*, pp. 226–7, 292–4, 393–4, 400–1, 403, 409–10, 422.

[64] *Two treatises*, II, sects. 101–4; I, sect. 141. Locke's comment that Christian nations 'must necessarily derive themselves from *Noah*' occurs in the same chapter as his praise of Tyrrell's *Patriarcha non monarcha*.

[65] James Farr and Clayton Roberts, 'John Locke on the Glorious Revolution: a rediscovered document', *Historical Journal*, XXVIII (1985), 385–98.

[66] Franklin, *John Locke and the theory of sovereignty*.

placed sovereignty in parliament. No doubt, after the Convention Parliament's discussions of abdication, forfeiture, desertion and vacancy, such a view may well have appeared less disruptive than Locke's theory of the dissolution of government. Constitutional contract accorded better with the desire to establish a constitutional right of opposing James II. But it did so at the cost of any commitment to the idea that England was a mixed monarchy. Sovereignty, by implication at least, was located in parliament without the king, not in king, lords and commons together. Locke's distinction between constitutive and ordinary power, on the other hand, preserved the mixed monarchy but at the cost of any possible commitment to a constitutional right of resistance. Government was dissolved by tyranny, power reverted to society from where a new government of whatever constitutional form might be constituted. These Lockean doctrines of dissolution and constitution anew, as is now well established, were too radical for the vast majority of Locke's contemporaries in their search for justifications of 1688. They were, however, a necessary part of Locke's solution to the problem of mixed monarchy.[67] Thus since Locke's problem in *Two treatises* was pitched at a much higher level of generality than the problems of his contemporaries, it is not to be wondered that his solutions were also different.

The second reason is related to the first. It derives directly from Locke's own understanding of the activity in which he was engaged when writing *Two treatises*, an understanding which was reflected in his exclusive and consistent use of the vocabulary of philosophical contractarianism. It is revealing that in the preface to the *Treatises*, where Locke explicitly relates the publication of his work to the business of justifying the 1688 Revolution, he does so by referring exclusively to the 'Consent of the People' and their defence of their 'Natural Rights'. In this, he could not be further from his friend James Tyrrell whose concern in the *Bibliotheca politica* was to defend the people of England 'according to our Constitution'.[68] An appreciation of what was at stake in this difference requires taking seriously Locke's division of politics into 'two parts very different the one from the other, the one containing the original of societies and the rise and extent of political power, the other, the art of governing men in society'.[69] *Two treatises* clearly belonged to the first part, with the *First treatise* clearing the Filmerian ground for Locke's own, alternative account presented in the *Second treatise*. But there was more to Locke's division than this.

The recommended reading which Locke suggested for the student of both parts of politics reveals that the origins with which the first part was concerned were rational origins, not historical ones. History, law and experience were relevant only to the second part of politics, the part concerned with the practical art of governing men in particular constitutions. Thus for the first part Locke recommended the first book of Hooker's *Ecclesiastical polity*,

[67] Ibid. pp. 105–8.
[68] Laslett (ed.), *Two treatises*, p. 171; Tyrrell, *Bibliotheca politica* (1727 edn), p. 739.
[69] Axtell (ed.), *The educational writings*, p. 400.

Sidney's *Discourses*, his own *Two treatises*, Peter Paxton's *Civil polity* and two of Samuel Pufendorf's works, *De officio hominis et civis* and *De jure naturae et gentium*. This last, Locke claimed, 'is the best book of that kind.' It is significant that Locke should have bracketed his *Two treatises* with these other texts of which Pufendorf's *De jure naturae et gentium* was the best example. It is also important, and there seems no reason to doubt it, that Locke should have confessed to never having read Sidney. For Sidney's work was the only one which dealt with the specifics of English constitutional history and law and in so far as it did so it belonged more properly amongst those studies which Locke considered appropriate for the second part of politics.

This second part, Locke explained, is 'best learned by experience and history, especially that of a man's own country'. He went on to recommend an English gentleman to look at Tyrrell's *History of England*, Bracton, Fleta, Henningham, the *Mirror of justices*, Coke's *Second institutes*, the *Modus tenendi parliamentum*, 'and others of that kind which he may find quoted in the late controversies between Mr. Petit, Mr. Tyrrel, Mr. Atwood, etc. with Dr. Brady' as well as Sadler's *The rights of the kingdom* and the two recent volumes of *State tracts*.[70] All of these, of course, were either favourite sources for constitutional contract theorists or they expressly developed such arguments. But Locke's point was to identify such arguments as belonging to a very different field of enquiry from that which had engaged his attention in *Two treatises*. His enquiry had had Pufendorf as the model, not Tyrrell and not Atwood.

Two treatises, then, was an example of a kind of theoretical enquiry into the rational origins, extent and end of civil power. As such it was to be categorically distinguished from the practical, historical enquiries of Locke's whig contemporaries. Pufendorf's elaborately contractualist treatises were the model but the essential difference which Locke was emphasizing between the two types of enquiry was that of their levels of generality and the different questions to which each was addressed rather than the specifics of contractualism. This emerges clearly from the fact that Hooker's book was a classic of consensualist thought and Paxton's *Civil polity* was not a contractualist treatise. Yet both were works of the same kind as *Two treatises*. Given Pufendorf as the model, however, Locke's language of natural right, natural law, state of nature and original compact was the appropriate one, not the language of English liberties, fundamental rights and England's constitutional contracts. The attempt to bridge the gap between philosophical and constitutional contractarianism, to attempt to derive the historically specific English constitution from natural right and natural law (in the manner, say, of Tyrrell), seems to have been regarded by Locke as an illogical enterprise. It involved collapsing Locke's careful distinction between the two, very different parts of politics and it was something which Locke studiously avoided doing even when addressing himself directly to the practical issues of the 1688

[70] Ibid. pp. 400–1.

Revolution. In the recently rediscovered manuscript notes which Locke sent to Edward Clarke and which contain Locke's 'call to the nation for unity' in early 1690, Locke certainly tailored his arguments for his audience. He dropped any notion that the constitution had been dissolved by the Revolution, the notion which created such difficulties for William Atwood when he first read *Two treatises*.[71] The logic of Locke's argument in *Two treatises* required dissolution; the rhetorical efficacy of a 'call to the nation for unity' required that reference to any such thing be dropped. But both logic and rhetoric, it seems, were against any appeal to England's constitutional contract. In this, then, just as Locke was more consistent than his whig contemporaries about the logic of sovereignty in a mixed monarchy, so he was more consistent about the implications of his language.

My point has been to focus attention on what Locke was not doing in *Two treatises* in order to cast light on what he was doing. A picture of Locke has emerged which is, to a degree, familiar. Locke certainly stood above the rest of the revolutionary debates of the eighties and nineties. The questions which he addressed and the arguments which he mustered were all pitched at a much higher level of generality than those which preoccupied so many of his contemporaries. The details of these differences have emerged from setting Locke's work within the context of contemporary contractualist literature. His silences on constitutional law, contract and history were significant. Just as Locke was not the philosopher of the 1688 Revolution, so he was not the most memorable representative of whig contractualists. His concerns were different from those of his contemporary whigs. And precisely because of these differences, Locke was not the covert, radical revolutionary that he has been painted in some recent historical research. His language was never that of the closet, conspiratorial politics of his radical whig contempories.[72] Quite the contrary. The singularity of Locke's enterprise becomes apparent against the background of contemporary usages of the vocabularies of constitutional and philosophical contractarianism. Locke's language was Pufendorf's, not Samuel Johnson's, nor Algernon Sidney's, nor even James Tyrrell's. Locke studiously avoided the language of constitutional contract, the language which provided so many of his fellows with a shared code of political analysis and argument.

[71] Farr and Roberts, 'John Locke on the Glorious Revolution', pp. 385–6, 390–4, 395–8. Atwood, *The fundamental constitution*, pp. 101–2.

[72] Ashcraft, 'Revolutionary politics and Locke's *Two treatises*', pp. 429–86. For Locke's distance from 'the mainstream of English radicalism' see J. G. A. Pocock, *Virtue, commerce, and history* (Cambridge, 1985), pp. 223–30. The present essay is a much reworked and redirected version of a paper originally delivered at the Conference for the Study of Political Thought Symposium on 'John Locke and the political thought of the 1680s' (Washington DC, 1980).