Hobbes’s and Locke’s Contract Theories: Political not Metaphysical

DEBORAH BAUMGOLD
Department of Political Science, University of Oregon, Eugene, OR, USA

ABSTRACT  Inspired by Rawls’s admission that his twentieth-century contract theory builds in the parochial horizon of modern constitutional democracy, this essay critically examines two truisms about seventeenth-century contract theory. The first is the stock view that the English case is irrelevant to the logic of Leviathan and the Second Treatise. To the contrary, I argue that their political conclusions depend on introducing constitutional and legal ‘facts’, in particular, facts about the constitution of the English monarchy. Second, I challenge the Whiggish characterization of contract theory as an important step in the development of democratic sovereignty. I draw on Hume’s famous critique of the genre to make the case that seventeenth-century contract theory addressed a peculiarly ancien-regime issue – namely, resistance to legitimate rulers. In both respects, Hobbes’s and Locke’s social contracts are properly regarded as ancien-regime theories of politics. They are, as Rawls would put it, ‘political not metaphysical’ theories.

KEY WORDS: social contract, Hobbes, Locke

In ‘Justice as Fairness: Political not Metaphysical’, John Rawls admits that his twentieth-century version of contract theory builds in the parochial horizon of our time. ‘Justice as fairness is framed to apply to what I have called the “basic structure” of a modern constitutional democracy’ (Rawls 1985: 224). ‘In contrast to what Nagel calls “the impersonal point of view”’, he explains in Political Liberalism, ‘constructivism both moral and political says that the objective point of view must always be from somewhere’ (Rawls 1993: 116). By implication, Rawls’s admission calls into question more than the abstract universality of A Theory of Justice: it should lead to a rethinking of classic contract theory generally.

According to standard accounts of contract thinking, A Theory of Justice belongs to a tradition of theorizing inaugurated by Thomas Hobbes and John Locke. They developed a genre of abstract, universalizing contract thinking that was sharply distinct from the older tradition of historical (or ‘constitutional’) contractarianism. A survey of the tradition explains:

Correspondence Address: Deborah Baumgold, Department of Political Science, 1284 University of Oregon, Eugene, OR 97403-1284, USA. Email: baumgold@cas.uoregon.edu
The theoretical ambitions and the aimed-for generality of thought of those who employed ['philosophical’ contractarianism] tended to be greater than that of the alternative language, best described as constitutional contractarianism … In constitutional contractarianism particular positive laws and the institutional inheritance of specific polities were most relevant and important, rather than universal propositions about all men and all politics. (Höpfl & Thompson 1979: 941)

Rawls’s admission prompts us to be skeptical about so thorough-going a contrast as it may confuse style with substance. If the universalistic clothing of the arguments in A Theory of Justice fails to imply a universal subject,¹ might not the same be the case for the theories of his great predecessors? In Rawlsian language: Mightn’t Hobbes’s and Locke’s contract theories be ‘political’ rather than ‘metaphysical’ in nature?

Granted, the standard view corresponds – at least in part – to the authors’ intentions as well to the style of their arguments. Like the Rawls of A Theory of Justice, Hobbes and Locke meant to be reasoning sub specie aeternitatis, as was characteristic of the natural-law tradition within which both worked (albeit in distinct – secular versus theological – variants). My skeptical question concerns their grasp as opposed to their reach. However much they intended to speak about and to humanity, a constructivist view of philosophy suggests that their achievement was necessarily more parochial.

To start with, it may be that the distinction between particular and universal – an argument for England versus an argument for humanity – did not strike them as self-evident in the way it does us. In terms of intentions, they clearly meant their theories to run on two tracks. Their universalistic arguments were meant to alter local politics, which they conceptualized within the inherited frame of monarchy.² If Hobbes and Locke aspired to universal philosophy, it is equally the case that they saw themselves as reformers of an established order. Hobbes wrote his political theory three times, starting in the late 1630s in the waning days of Charles I’s personal rule. The project began as a brief for his patron, the prominent royalist Earl of Newcastle, in the political debates surrounding the Short Parliament;³ and ended, in Leviathan’s ‘Review and Conclusion’ (1651), with a justification of submission to Cromwell’s regime. But he remained throughout a royalist, prepared to justify submission on the ground that this did the ‘enemy’ less good than refusal would have done; and never prepared to defend the constitution of the Commonwealth.⁴ Leviathan, he said later, ‘fights for all kings and for all those under any title who exercise the rights of kings’ (Hobbes 1957: 27). After the Restoration, Hobbes welcomed the Restoration as a return to constitutional sanity. Summing up the history of the Civil War in Behemoth, he observed that sovereign power at last came full circle back to the Stuarts, ‘where long may it remain’ (Hobbes 1969: 204). For his part, Locke surely hoped that power would not remain in the current Stuart’s hands much longer. Yet he nonetheless tried to persuade readers of the Second Treatise that resistance to one king was unlikely to change the established order: ‘The
many Revolutions which have been seen in this Kingdom, in this and former Ages, still kept us to, or after some interval of fruitless attempts, still brought us back again to our old Legislative of King, Lords and Commons’ (Locke 1965: [223] 462–463). No more than Hobbes did Locke desire something other than a continuation of the monarchy, albeit a properly constituted monarchy.³

Intentions aside, the real issue raised by Rawls’s admission concerns the logic of Hobbes’s and Locke’s arguments. Is their parochial English horizon built into the logic of their theories? The standard interpretative view is that it is not. Even Peter Laslett, whose historical work reformed our understanding of the context of the Second Treatise, thought the English case irrelevant. ‘As a political theorist’, he instructs in introducing the Second Treatise, ‘Locke made no appeal to history or tradition. Nothing in his book could be disproved by the discovery of new evidence about what had happened in England in 1066, or 1215 or 1642’ (Laslett 1965: 91). The first section of this essay will challenge this standard view through a close examination of the logic leading to Hobbes’s and Locke’s main political conclusions. We will see how the political conclusions of both theories depend, albeit in different ways, on introducing facts about the historic English monarchy.

Taking seriously the parochial horizon of classic English contract theory has the further consequence of calling into question the familiar periodization of the genre. The social contract is customarily regarded as a quintessentially modern political idea, which telegraphs the root modern principles of popular sovereignty and governmental accountability to the people. On this view, it hardly matters that the great contract theories of the early-modern period were written in the context of an ancien-regime hereditary monarchy. That is not the world to which they belong. Rejecting the principles that animated it, they articulate ideas – about the source of legitimate authority and the relationship between ruler and ruled – that would come to be embodied in the institutions of representative democracy of the coming age.

Jean Hampton substantiates the view, in game-theoretic terms, in Hobbes and the Social Contract Tradition. Lockean contract theory and modern representative democracy share the root idea, she argues, that ‘rulers are hired by the people for reasons’. Modern elections simply normalize what was, in contract theory, an extraordinary right to depose a legitimate government:

The contractarian will say that the ability of the people to make such changes in who governs them, or in the terms of their governing, exist in the meta political game of any state. But in modern democracies this ability is incorporated into the political system such that it is subject to rules of the object political game. That is, in these regimes there is an attempt to define within the object game itself the meta political role that people inevitably have on the social contract view. (Hampton 1986: 284)

In the second section of the essay, I will argue, to the contrary, that seventeenth-century contract theory is more accurately periodized as an ancien-regime genre
than as a modern one. Beneath the apparent continuity between contract theory and modern representative democracy lurks a deeper discontinuity. Hobbes’s and Locke’s contract theories address questions specific to the politics of hereditary monarchy, namely the questions of whether and when it could be permissible to resist a legitimate ruler. These questions evaporated with the onset of electoral politics. Seventeenth-century contract theory is therefore better regarded as a sophisticated approach to an age-old and soon-to-disappear issue than as a stage on the road to democracy.

The Assumption of Hereditary Monarchy

It is certainly the case that Hobbes’s and Locke’s contract logics do not appear to be embedded in any specific political formation. Locke’s contractarian defense of the right of resistance presents this as a universal, inalienable right on the basis of several abstract arguments. First, he makes ‘indifferent authority’ the defining feature of civil society. It follows that absolute monarchy, in which subjects may not resist their rulers, ‘is indeed inconsistent with Civil Society, and so can be no Form of Civil Government at all’ (Locke 1965: [90] 369). Furthermore, he asserts that rational individuals would never consent to absolute government. To imagine they would is to suppose, in the oft-quoted metaphor, ‘that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions’ (Locke 1965: [93] 372). Indeed, human beings are not actually free to make a contract giving up the right of resistance, according to Lockean theology: ‘for Man not having such an Arbitrary Power over his own Life, cannot give another Man such a Power over it’ (Locke 1965: [172] 429).

Hobbes had tried to establish the reverse proposition – that unconditional sovereignty is a universal fact by virtue of the necessary structure of a social contract. He describes the contract as consisting in a mutual promise, among incipient subjects, not to resist the will of the sovereign, who cannot afterwards be held accountable by the people because he was not a party to the contract (Hobbes 1983: 88; 1968: 230). This is, Hobbes claims, a logical, not merely stipulative, account of the nature of a social contract. Granting the nominalist assumption that the ‘people’ as a corporate agent does not exist by nature, there simply cannot be a contract between the sovereign and the people as a whole; there is no such agent with whom an incipient sovereign could contract (Hobbes 1968: 230). Somewhat harder to defend is the follow-up claim that accountability cannot be justified via the idea of a contract between the sovereign and each individual subject. To do so, Hobbes introduces in Leviathan the idea that each subject authorizes the sovereign’s acts (Hobbes 1968: 227) and defines authorization as creating an identity between sovereign and subject that precludes accountability. ‘He that complaineth of injury from his Soveraigne, complaineth of that whereof he himselfe is Author; and therefore ought not to accuse any man but himselfe; no nor himselfe of injury; because to do injury to ones selfe, is impossible’ (Hobbes 1968: 232; see
also 217–222, 230). The latter may not be a good argument, but it is an abstract one.

Like Locke, Hobbes appears to derive his conclusions from general, definitional premises rather than contingent constitutional facts. Yet closer inspection of both theories will show that, in different ways, the political force of their arguments depends on specifying facts about the local constitutional or legal order.

**Hobbesian Political Logic**

The core of Hobbes’s theory of politics is the doctrine of absolutism, meaning specifically the proposition that rulers are not accountable to the people. This is made as an abstract claim applying to all forms of government. About his preference for monarchy, he was more modest, granting in *De Cive* that this is the ‘one thing alone I confesse in this whole book not to be demonstrated, but only probably stated’ (Hobbes 1983: 37, emphasis omitted). Yet the specification of a particular constitution – namely, monarchy (or aristocracy) – turns out to be crucial to his defense of absolutism. That defense is devoid of political force without the specification of a monarchic constitution (or, conceivably, an aristocratic one).

This is evident in the logic of Hobbes’s account of sovereignty. In democracy, the third possible form of government, the people reserve sovereignty for themselves and therefore rulers are accountable:

> If this power of the people were not dissolved, at the choosing of their king for life, then is the people sovereign still, and the king a minister thereof only … And farther, though in the election of a king for his life, the people grant him the exercise of their sovereignty for that time; yet if they see cause, they may recall the same before the time. (Hobbes 1928: 95)

In principle democracy is simply another form of absolute government. But in practice, a democracy with an executive agent is the same thing as a monarchy holding only conditional sovereignty.

Therefore, in order to know the nature of the relationship between ruler and ruled, and specifically to know whether or not rulers are accountable, the location of sovereignty must be specified. The key factual question is who controls governmental transitions. Monarchies are either absolute or elective (meaning conditional) depending on whether or not the people have reserved the right (and time and place) to choose a new ruler at the death of the old.  

> ‘If it be known who have the power to give the Soveraigntie after his death, it is known also that the Soveraigntie was in them before’ (Hobbes 1968: 246). The effect is to make hereditary succession (which he defines as meaning the sovereign chooses his successor [e.g., 1968: 249]) the sole criterion of absolute monarchy: ‘If … sovereignty is truly and indeed transferred, the estate or commonwealth is an absolute monarchy, wherein the monarch is at liberty, to dispose as well of the succession, as of the possession’ (Hobbes 1928: 95).
When Hobbes was first formulating his theory of politics, prior to the Civil War, he and his readers would have taken for granted that the specific government at issue was a hereditary monarchy. Making reservation of a popular right to choose the king’s successor the necessary condition of sovereign accountability only buttressed the assumption. Since no one contended that the English people controlled succession to the throne, Hobbes’s argument had transparent political force and so the assumption of a monarchic constitution did not have to be spelled out in the theory.

To the extent there was something unusual about Hobbes’s argument, it was the terms of his account of monarchic succession rather than his constitutional assumption. His ‘absolutist’ argument, privileging the king’s will, contrasts with the traditional English subscription to common- or natural-law views of succession.\(^\text{10}\) It is worth noticing that both traditional accounts are incorporated into the Hobbesian argument as subsidiary principles. Custom pertains, he says, in cases in which the monarch fails to appoint an heir because silence is ‘a naturall signe’ of endorsement of custom. But when there is neither testament nor pertinent custom, then it must be assumed that a ruler wills the continuation of monarchy, and therefore ‘natural’ principles of preference (for children, first male, then female, then brothers, and so forth) are to be followed (Hobbes 1968: 250).\(^\text{11}\) Presumably the point was to persuade Englishmen that traditional ways of thinking about the matter actually fit within his absolutist framework.

With the Civil War looming in the early 1640s, Hobbes took up a new topic: the possibility of changing a government. The sitting of the Long Parliament in November of 1640 soon led to debate over reform of the constitution. In spring 1641, the Triennial Act passed, which required the holding of a parliament every three years, and a variety of other reform measures were enacted later the same year. Charles I had long seen through such issues to a struggle for sovereignty; a 1629 letter declared that the Commons’ ‘aim was “to erect a universal, over-swaying power to themselves, which belongs only to us, and not to them”’.\(^\text{12}\) As Hobbes transformed the Elements into De Cive, he took up the idea that the people or the people’s representatives might change a government. The new version observes that ‘some may inferre’ from the description of a contract between incipient subjects ‘that by the consent of all the subjects together, the supreme authority may be wholly taken away’. Although it literally cannot be imagined, Hobbes continues, that every single subject would consent to this, most people hold the erroneous opinion that a majority vote in a popular assembly would suffice. Subjects must therefore understand that ‘though a government be constituted by the contracts of particular men with particulars, yet its Right depends not on that obligation onely; there is another tye also toward him who commands’. Hence:

\[\text{the government is upheld by a double obligation from the Citizens, first that which is due to their fellow citizens, next that which they owe to their Prince. Wherefore no subjects how many soever they be, can with any Right despoyle him who bears the chiefe Rule, of his authority. (Hobbes 1983: 104–105)\]
This second tie between subject and sovereign will be formalized in the authorization covenant of *Leviathan*, the express point of which is not only to deny sovereign accountability but also to bar changing the established form of government or deposing the sitting ruler(s). By virtue of the authorization relationship:

they that have already Instituted a Common-wealth, being thereby bound by Covenant, to own the Actions, and Judgements of one, cannot lawfully make a new Covenant … without his permission. And therefore, they that are subjects to a Monarch, cannot without his leave cast off Monarchy, and return to the confusion of a disunited Multitude; nor transferre their Person from him that beareth it, to another Man, or other Assembly of men. (Hobbes 1968: 229)

Conceptually, all this adds to Hobbes’s contract logic is the supposition that some form of government exists, with incumbent ruler(s). Nothing in the logic presupposes any particular constitution of government; however the new stipulation told readers they were not at liberty to change the government they had inherited. So long as readers filled in the logic with the assumption that the state at issue had traditionally been a hereditary monarchy, the implicit political import remained clear.

As the Civil War progressed, however, the shared horizon dissolved and abstract contract logic was no longer adequate for Hobbes’s political purposes: He needed to appeal to historical ‘facts’. By the late 1640s, he could no longer assume that his readers would presuppose that England was or ought to be a hereditary monarchy. To justify their cause in the Civil War, parliamentarians advanced the radical claim that they were sovereign by virtue of representing the people. Answering their claim, *Leviathan* focuses on the concept of representation and asserts that representation is simply a facet of sovereignty. ‘Where there is already erected a Soveraign Power, there can be no other Representative of the same people, but onely to certain particular ends, by the Soveraign limited’. Still, this abstract statement left open the constitutional possibility that the so-called ‘representatives’ really were sovereign. And ruling out this possibility required Hobbes to specify explicitly a ‘manifest truth’ about the constitution at issue: ‘in a Monarchy, he that had the Soveraignty from a descent of 600 years, was alone called Soveraign, had the title of Majesty from every one of his Subjects, and was unquestionably taken by them for their King’ (Hobbes 1968: 240–241). Absent the Norman Conquest, in other words, England was not necessarily a hereditary monarchy, and if it was not a hereditary monarchy, the king might be accountable to parliament or the people.

Without the fact of the Norman Conquest or, what comes to the same thing, his readers’ supposition that he was treating a hereditary monarchy, Hobbes’s abstract contract logic could not answer the question, ‘Who is sovereign?’. Answering this question is basic, within Hobbesian logic, to answering the all-important question of whether or not rulers are accountable to the people. He could initially...
formulate the theory entirely abstractly only because his audience would import to reading it the assumption that the referent was a hereditary monarchy. Once this could no longer be taken for granted, the supposition had to be expressly built into the argument through a historically explicit referent. Despite its ‘philosophic’ appearance, this is a ‘constitutional contractarian’ defense of absolute monarchy in which ‘the institutional inheritance of specific polities [is] most relevant and important’.

In a curious, concluding twist, Hobbes would subsequently contradict himself and reject the historical story. In *Leviathan*’s ‘Review and Conclusion’, he puts constitutional argument aside in favor of urging submission to the powers-that-be. Here, it is possession of power that matters rather than its history: ‘As if’, he writes scornfully, ‘the Right of the Kings of England did depend on the goodnesse of the cause of William the Conquerour, and upon their lineall, and directest Descent from him’ (1968: 721 [first emphasis added]). In context, the larger point is to urge the conquering regime to put the past out of mind because: ‘For to the Justification of the Cause of a Conqueror, the Reproach of the Cause of the Conquered, is for the most part necessary: but neither of them necessary for the Obligation of the Conquered’. The argument eased the way for the submission of royalists, though at the cost of obliterating differences between the regimes (to wit, ‘there is scarce a Common-wealth in the world, whose beginnings can in conscience be justified’ [Hobbes 1968: 722]). This clearly answers a different question from the constitutional arguments that had preoccupied Hobbes during the long Civil War decade: no longer was he concerned with how government should be structured but, instead, simply with whether it should be obeyed.17

*K Lockean Political Logic*

By contrast to Hobbes’s constitutional arguments, Locke’s core political thesis – that tyrants may be resisted – does not require any contingent constitutional assumptions. Under no legitimate constitution is resistance ruled out of court, in principle, in Lockean theory. Grant the definitional assertion that absolute monarchy is inconsistent with civil society, or the complementary propositions that rational individuals would not and could not enter into an absolutist contract; and it follows that the people always retain ultimate sovereignty and political authority is fiduciary in nature (1965: [149] 412–413). Hence it is always the case that rulers – whatever the form of government – may be resisted if they act contrary to the trust reposed in them.

Yet no one doubts that the *Second Treatise* is enmeshed in its *ancien-regime* context. The generation since Laslett’s pioneer work locating the *Second Treatise* in the context of the Exclusion Crisis of 1679–83 has seen numerous commentaries detailing Locke’s parochial horizons – political, religious, and intellectual. Richard Ashcraft extended Laslett’s work by making the case that Locke went beyond pamphleteering to participate actively in Whig conspiracies against Charles II and James II (Ashcraft 1980, 1986); and John Dunn led the way in showing that the
seeming modern liberalism of his thought is built on pre-modern, theological foundations (Dunn 1969). In addition, we also know that Locke drew on familiar, inherited intellectual resources to conceptualize tyranny and resistance. The work is summarily described by Quentin Skinner as combining traditional ‘private-law’ resistance theory with a secular justification of resistance that had been developed by Huguenot thinkers in the 1570s (1978: 239, 338). Echoing radical Calvinists of the previous century, Locke holds that tyrants forfeit their authority and cease to be legitimate rulers; hence they ‘may be opposed, as any other Man, who by force invades the Right of another’ (Locke 1965: [202], 448; see, also [232], 467; Skinner 1978: 198–199). In support of this ‘private law’ argument, the conclusion of the Second Treatise introduces the figure of ‘Barclay himself, that great Assertor of the Power and Sacredness of Kings’ – even he held ‘That a King may be resisted, and ceases to be a King’ (Locke 1965: [232], 467–468 and [239], 473). Barclay was an opponent of Buchanan, the Scottish Calvinist thinker whose mid-sixteenth-century Right of the Kingdom in Scotland first articulated the position, now famously associated with the Second Treatise, that the populace as a whole has the right to resist tyrants (Skinner 1978: 301, 339, 343). Also reminiscent of Huguenot argument of the previous century is Locke’s legalistic view of political authority and tyranny, which will be treated at more length shortly. ‘All these writers, from the Réveille Matin to the Vindiciae, habitually speak of the King as bound to respect positive law. He is bound to think of law as “lady and mistress”, and if he breaks the law habitually he becomes a “tyrant”’ (Allen 1960: 325; see, also, Franklin 1967: 122).

Hence the question is not whether the Second Treatise is a work of its time but, rather, whether the historical context is built into Locke’s arguments to any significant degree. Most scholars regard the local references as merely illustrations and applications of an abstract theory that can otherwise stand on its own, independent of the parochial context; and think that Locke used traditional materials to build a theory that escapes its ancien-regime horizon. However, consider closely the logic of Locke’s account of the right of resistance. In the climatic chapter of the Second Treatise, he tells us that resistance is justified when a government is ‘dissolved from within’, which happens either: when the ‘Legislative is altered’, usually through the misuse of authority; or ‘the Legislative, or the Prince … act contrary to their Trust’ (Locke 1965: [212, 221], 455–456, 460). These dual grounds recall sixteenth-century Huguenot theory, which distinguished ‘tyrants by usurpation’, who seize power that is not lawfully theirs, from ‘tyrants by practice’, who use legitimate authority badly (Skinner 1978: 306–307; see, also, Allen 1960: 320–321). Locke, we will see, uses the distinction to refer, respectively, to over-stepping constitutional authority or to violating the law.

The connection to the historical context is explicit in the case of the first criterion, ‘alteration of the legislative’: ‘This being usually brought about by such in the Commonwealth who misuse the Power they have: It is hard to consider it aright, and know at whose door to lay it, without knowing the Form of Government in which it happens’ (Locke 1965: [213] 456). Locke proceeds to stipulate a constitution of the
English sort (although it is not labelled as such) in which ‘the Legislative [is] placed in the Concurrence of three distinct Persons’:

A single hereditary Person having the constant, supream, executive Power, and with it the Power of Convoking and Dissolving the other two within certain Periods of Time.

An Assembly of Hereditary Nobility.

An Assembly of Representatives chosen pro tempore, by the People. (Locke 1965: [213] 456)

Stipulating a constitution is a necessary step in the argument insofar as the concept, ‘misuse of authority’, requires a prior definition of the parameters of authority. Only within some constitutional framework – such as that of England – does it become possible to lay out specific grounds for rebellion. He proceeds to enumerate several scenarios, which made transparent, though implicit, reference to the reigns of the last Stuarts. The legislative is altered when the king (1) sets up his arbitrary will in place of the laws; (2) hinders the assembly from meeting or acting freely; (3) meddles with elections, or the electors, contrary to the public interest; or (4) delivers the nation into subjection to a foreign power (Locke 1965: [214–217] 456–458).

On its face, the second criterion – violating the people’s trust – is the point at which Locke’s argument escapes from any contextual referent. His purpose in introducing the criterion is to license rebellion in advance of settled tyranny: ‘To tell People they may provide for themselves, by erecting a new Legislative, when by Oppression, Artifice, or being delivered over to a Foreign Power, their old one is gone, is only to tell them they may expect Relief, when it is too late, and the evil is past Cure’. The people must have the right to act earlier, when rulers violate their trust by ‘endeavour[ing] to invade the Property of the Subject, and to make themselves ... Arbitrary Disposers of the Lives, Liberties, or Fortunes of the People’ (Locke 1965: [220–221] 460). This turns out to be a legalistic argument, making reference to both natural and civil law. The claim that government exists to protect subjects’ lives, liberties and properties is originally founded in natural law. But, Locke says, we cannot count on natural law being applied and applied fairly; and, therefore, positive law is required to fill in the content of individuals’ protection rights. ‘Men unite into Societies, that they may have the united strength of the whole Society to secure and defend their Properties, and may have standing Rules to bound it, by which every one may know what is his’ (Locke 1965: [136], 404). Hence, in chapter nineteen’s explanation of the concept, ‘violation of trust’, Locke invokes the need for, and importance of, positive law:

The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set as Guards and Fences to the Properties of all the
Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society. (Locke 1965: [222], 460)

In this way, legal definition of ‘what is his’ becomes basic to defining arbitrary rule.

Locke finishes out discussion of the concept, ‘violation of trust’, by adducing additional constitutional examples. The ‘supreame Executor … acts also contrary to his Trust, when he either imploys the Force, Treasure, and Offices of the Society, to corrupt the Representatives, and gain them to his purposes: or openly pre-ingages the Electors, and prescribes to their choice’ (Locke 1965: [222] 461). These made implicit reference to James II’s activities in 1688 (Ashcraft 1986: 546).

The legalism of Locke’s political imagination has been widely remarked; Kirstie McClure lays out the underlying logic in Judging Rights. In the period, she explains, the concept of property meant ‘propriety’, which was ‘a morally loaded term connoting that which was properly “one’s own,” particularly as this was established by law’ (McClure 1996: 17). What is ‘one’s own’ being a matter of legal definition, the conceptualization of tyranny as the violation of subjects’ life, liberty or property necessarily took on a legalistic cast: ‘a legally constituted self-propriety [is] the experiential basis on which civil subjects might distinguish between the lawful and unlawful exercise of … power’ (McClure 1996: 239).

While Locke’s legalism is widely recognized, what is less well seen is that this legalistic logic builds a parochial context into his theory of politics (although the context need not be the English ancien-regime context that he had in view). His criteria for knowing when resistance is justified, in the concrete, require either (a) specifying a constitutional context (for the charge of the misuse of authority) or (b) specifying a legal context (for crimes of violating subjects’ property, broadly conceived). Rebellion, Locke said, is ‘an Opposition, not to Persons, but Authority, which is founded only in the Constitutions and Laws of the Government’ (Locke 1965: [226] 464).

The sense in which the political force of Locke’s theory depends on the facts of the case is different than in Hobbes’s case. In the earlier theory, the political force of the argument for unconditional sovereignty depended on introducing specific constitutional facts. In Locke’s case, the conclusion – that rulers are accountable to the people and may be resisted – does not depend on stipulating such facts, but the practical application of the argument does. It may be helpful to draw a distinction between justifying the right of resistance per se and justifying resistance in particular cases. The former is a Lockean universal. However, once he effectively defines tyranny as subverting a given constitutional order or violating subjects’ legally defined rights, justifying resistance in a particular case requires stipulating (as he does) the constitutional or legal context. Therefore, Laslett’s statement that nothing in the Second Treatise could be disproved by the discovery of new historical evidence about the English constitution is too strong. The shape of the inherited constitution bore directly on the legitimacy of rebellion in the immediate context, although it did not touch the principle that the people always retain the right to remove tyrants.
Given the integral role played by constitutional and legal assumptions in both theories, it is wrong to characterize them as ‘philosophical’ rather than ‘constitutional’ contract theories. They are both – that is, they are theories with pretensions to universality that nonetheless build the inherited English constitution and legal order into their logics. Oddly enough, since Locke was more willing than Hobbes to acknowledge the place of constitutional specifics in his argument, the connection is weaker in the logic of his theory. Still, the political force of his arguments requires a ‘constitutional’ contract argument that locates the theory firmly in some constitutional or legal context, and, for him, this context was the English ancien régime.

**Resistance: An Ancien-Regime Problem**

However obvious the affinity between contractarianism and modern political sensibilities may seem retrospectively, the customary view that the social contract is a modern idea passes lightly over a curious historical anomaly. Contract thinking went into eclipse in the Anglo-American world just as representative democracy was being institutionalized in the late-eighteenth and early-nineteenth centuries. David Hume’s famous essay, ‘Of the Original Contract’, published in 1748, and the American Declaration of Independence of 1776, the last great contract statement in Anglo-American politics, are convenient markers of the demise of contractarianism in the English-speaking world. During the emergence of ministerial government in Britain and the constitutional founding of the United States, thinkers on the ground seem not to have found the idea of the social contract relevant to the new political order.

The fate of contractarianism in the modern era belies the Whiggish story of a direct line of descent from contract theory to modern electoral politics and representative democracy. If, as Whigs think, contract theory embodied the fundamental principles of modern political culture, why did utilitarianism overtake it to become the dominant mode of political philosophy in the nineteenth century? Rather than speculate about reasons for the demise of contractarianism, let us turn to the arguments of critics on the ground in the eighteenth century. The most famous, of course, was David Hume, whose criticisms helped make the genre obsolete.

In *A Treatise of Human Nature*, Hume straightforwardly claimed that his philosophy could do better than the contractarians’ at resolving their main concern. ‘They wou’d prove, that our submission to government admits of exceptions, and that an egregious tyranny in the rulers is sufficient to free the subjects from all ties of allegiance’. The principle is correct, but their reasoning is fallacious: ‘I flatter myself, that I can establish the same conclusion on more reasonable principles’ (Hume 1969: 601). The key questions were: why, and how far, subjects are bound to obey their government; and when resistance is legitimate. Hume claims that our shared interest in security and protection provides a better way of answering these questions than contract theory: ‘There evidently is no other principle than public interest; and if interest first produces obedience to government, the obligation to obedience must cease, whenever the interest ceases, in any great degree, and in a considerable number of instances’ (Hume 1969: 602, 604).
This is a better way of thinking about resistance, Hume argues, for several reasons, negative and positive. ‘Of the Original Contract’ is well-known for criticizing the empirical falsity of the contract metaphor: most people simply do not imagine that rulers’ title to authority and subjects’ duty of allegiance are founded on consent (Hume 1987a: 469–470). Furthermore, interest underlies the very duty emphasized by the contractarians – that of promise-keeping – as well as the duty of political allegiance. ‘The obligation to allegiance being of like force and authority with the obligation to fidelity, we gain nothing by resolving the one into the other. The general interests or necessities of society are sufficient to establish both’ (Hume 1987a: 481).

Beyond the empirical falsity of contract and consent arguments, and the greater cogency of the principle of interest, Hume saw one very good political reason for rejecting contractarianism. That way of thinking is politically dangerous because it directs attention to enumerating exceptions to the general rule of obedience:

as obedience is our duty in the common course of things, it ought chiefly to be inculcated; nor can any thing be more preposterous than an anxious care and solicitude in stating all the cases, in which resistance may be allowed … Would [a philosopher] not be better employed in inculcating the general doctrine, than in displaying the particular exceptions, which we are, perhaps, but too much inclined, of ourselves, to embrace and to extend?

‘Maxims of resistance’, he concludes, ‘are, in general, so pernicious and so destructive of civil society’ (Hume 1987b: 490–491). In similar vein, he explains in the Treatise that it is ‘impossible for the laws, or even for philosophy, to establish any particular rules, by which we may know when resistance is lawful’. Hume has the Glorious Revolution specifically in view here. Having stated that it is impractical to make specific rules about resistance, he notes that in mixed monarchies resistance is legitimate in circumstances either of tyranny or usurpation of power beyond constitutional bounds (Hume 1969: 614–615; see also 1987b: 491–492) and leaves off saying it is not his present purpose to show how even these broad principles apply to the late revolution.

This last complaint indicates something important about the purpose of contract theory. As Hume saw it, contractarianism framed political analysis in terms of a casuistry of exceptions to the general principle of obedience. It promoted ‘an anxious care and solicitude’ for detailing relevant cases and particular rules applicable to rebellion. Hume’s complaint is nowhere better illustrated than by another eighteenth-century document, the American ‘Declaration of Independence’. Opening with a Lockean rationale for the right of resistance per se and the principles governing its application, the bulk of the manifesto is devoted to enumerating specific points that justify rebellion in the current circumstance. Jefferson takes Locke’s impulse to spell out how the resistance doctrine applied in the present constitutional case to the extreme with a bill of indictment against George III detailing more than 25 separate complaints. For instance: ‘He has forbidden his
governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained’; ‘He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature’; and ‘He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners’ (Jefferson 1963: 241). Hume might well have remarked a connection between this way of framing the crisis and the pernicious Jeffersonian opinion that ‘a little rebellion now and then is a good thing’ (Jefferson 1955a: 67).

‘Of the Original Contract’ identifies contractarianism with Lockean contract theory and ignores Hobbes’s conservative version of the genre. Nevertheless, Hume’s complaint about the school’s preoccupation with detailing relevant reasons and cases has implications for the conservative version. Hobbes’s absolutist contract can be seen as the mirror opposite of Locke’s and Jefferson’s – that is, an elaborate and complex set of reasons why tyrants may never be resisted. Indeed, Hobbes’s obsession with elaborating a cogent and comprehensive series of responses to resistance questions is evident in the process, detailed above, of revision through the several versions of his political theory. From Hume’s perspective, *Leviathan*’s ‘Review and Conclusion’, which derives subjects’ obligation from their interest in protection, must be counted the sole sensible part of his theory. Only the general principle that there is a ‘mutuall Relation between Protection and Obedience’ (Hobbes 1968: 728) could have met with his approval, as opposed to Hobbes’s massive contractarian denial of resistance rights.

There is, then, this second sense in which seventeenth-century English contract theory is rightly described as a parochial, ‘political’ genre. In addition to being framed with the institutions of hereditary monarchy in view, the genre addresses a species of problems specific to the politics of those regimes. It was essentially the same question that confronted Englishmen in the seventeenth century and Jefferson and the colonists in the eighteenth: When is it permissible to remove an established government with legitimate title to govern? In order to answer this question, whether pro or con, reasons had to be given. The edifice of contract theory provided a philosophically well-elaborated way of arriving at good reasons for removing (or not removing) ‘a bad king with a good title’, in Burke’s phrase (1973: 35).

Hume’s complaint about the contractarians’ casuistry of resistance indicates why the genre would become anachronistic when the center of British politics shifted from king to parliament and, in the colonies, the constitution of the United States institutionalized a representative national democracy. The signal fact about representative democracy is that it largely eliminates the need to give reasons for removing rulers from power. The question, ‘When may legitimate rulers be turned out of office?’, is only problematic in representative democracies when the normal electoral mechanism fails. Hampton’s notion that elections normalize the extraordinary right in contract theory to depose a legitimate government is precisely and importantly wrong. Only in the vaguest and most general sense does the electoral mechanism incorporate the contractarians’ ‘meta game’ into normal politics. Rebellions and elections are certainly two mechanisms whereby the people can
depose rulers. But the contractarians’ ‘meta game’ is fundamentally different from
the normal game of representative democracies. Unlike subjects of hereditary
monarchs, precisely what citizens of modern democracies do not need are reasons
for throwing the bums out.\textsuperscript{32}

So, instead of regarding classic English contract theory as the seed of modern
democratic politics, we would do better to see it as the culmination of medieval
resistance theory. The genius of the contract metaphor lay in giving structure to the
casuistry of reasons and cases that made up resistance argumentation.\textsuperscript{33} This is to
suggest a parallel between \textit{Leviathan} and the Second Treatise, on the one hand, and
Filmer’s \textit{Patriarcha}, on the other. The latter has been described as the final coda of
divine right theory. For their part, Hobbesian and Lockean contract theories
completed some five hundred years of thinking about resistance questions.

A skeptic might consider this counterfactual. Suppose the political clock had
stopped in the early eighteenth century, just following the great success of contract
thinking in the Glorious Revolution. James II had been charged by the Convention
Parliament with violating an original contract as well as with abdicating the throne
by leaving England. While the second charge accommodated Tory conservatism,
many thought the first contractarian charge more accurate to events.\textsuperscript{34} Let us
suppose, then, that England remained substantially what it was in the early eight-
teenth century – an \textit{ancien-regime} hereditary monarchy bedeviled by the dynastic
claims of the Stuarts. Thus erase from history the ascendance of parliament and the
collapse, at mid-century, of the Jacobite cause, and perhaps we would now look
back upon a flowering of contract theory \textit{after} Locke.

Contract theory would not flourish again until Rawls invoked the genre to create a
foil for utilitarianism. Interestingly, he purchased the relevance of the theory by
accentuating the level of abstraction: ‘My aim’, \textit{A Theory of Justice} begins:

is to present a conception of justice which generalizes and carries to a higher
level of abstraction the familiar theory of the social contract as found, say, in
Locke, Rousseau, and Kant. In order to do this we are not to think of the orig-
inal contract as one to enter a particular society or to set up a particular form of
government. (Rawls 1971: 11)

How might he have rephrased this after the admission in ‘Justice as Fairness: Political
not Metaphysical’? It might have been something along these lines: ‘My “political”
(as opposed to “metaphysical”) conception of justice is inspired by the – equally
“political” – theories of the classic contractarians. Some of their ideas – principally
an absolute regard for individuals and a recognition of plurality – provide a basis for
rejecting utilitarianism (see Rawls 1971: 27–29). We must recognize, however, that
those authors might not be able to see themselves in our appropriation and, in any
case, they were intent on answering different questions’. The concept of a ‘tradition’
of contractarian thought and the notion that the contract is a distinctively ‘modern’
idea need to give way to an appreciation for the variety of parochial purposes for
which ideas labelled ‘contractarian’ have been deployed.
Acknowledgements

My thanks to Gerald Berk, Leonard Feldman, John Christian Laursen and several anonymous referees for their comments and suggestions on earlier drafts of this essay.

Notes

1. ‘Whether justice as fairness can be extended to a general political conception for different kinds of societies existing under different historical and social conditions, or whether it can be extended to a general moral conception, or a significant part thereof, are altogether separate questions. I avoid prejudging these larger questions one way or another’ (Rawls 1985: 225).

2. Johann Sommerville holds a similar view of Hobbes’s theory: ‘despite its veneer of scientific detachment and its pretensions to universal validity, [it] was constructed to support conclusions that were of the highest relevance to contemporary political circumstances in England’ (1996: 247). See, also, Sommerville 1992.

3. The first version, titled The Elements of Law, circulated in manuscript in 1640. It was dedicated to William, Earl of Newcastle, with the explanation: ‘Now (my Lord) the principles fit for such a foundation [of a science of justice and policy], are those which I have heretofore acquainted your Lordship withal in private discourse, and which by your command I have here put into method … The ambition therefore of this book, in seeking by your Lordship’s countenance to insinuate itself with those whom the matter it containeth most nearly concerneth, is to be excused’ (Hobbes 1928: xvii–xviii). After his flight into exile, Hobbes quickly revamped the second, political section of the Elements into a Latin work, De Cive, which appeared in a small edition in 1642 and in a second, larger edition in 1647.

4. ‘A Review and Conclusion’ (Hobbes 1968: 719): ‘if a man consider that they who submit, assist the Enemy but with part of their estates, whereas they that refuse, assist him with the whole, there is no reason to call their Submission, or Composition an Assistance; but rather a Detriment to the Enemy’. While the chapter endorses the Engagement principle of a ‘mutuall Relation between Protection and Obedience’ (p. 728), no mention is made of the Commonwealth.

5. Wootton 1992 and Marshall 1994 (p. 278) argue that the Lockean – elective and contractarian – version of the ancient constitution was a novelty of the 1680s.

6. He explains in the next section: ‘For he being suppos’d to have all, both Legislative and Executive Power in himself alone, there is no Judge to be found, no Appeal lies open to any one, who may fairly, and indifferently, and with Authority decide, and from whose decision relief and redress may be expected of any Injury or Inconveniency, that may be suffered from the Prince or by his Order’ (Locke 1965: [91] 370).


8. ‘Elective kings … are subjects and not sovereigns; and that is, when the people in election of them reserve unto themselves the right of assembling at certain times and places limited and made known; or else absolute sovereigns, to dispose of the succession at their pleasure; and that is, when the people in their election hath declared no time nor place of their meeting’ (Hobbes 1928: 96; see 1983: 113–114).


10. My thanks to an anonymous referee for these points. See Nenner (1995).

11. In addition, Hobbes stipulates that it is a natural-law duty of sovereigns to appoint a successor in order to keep their nations from relapsing into civil war (1968: 246).

12. This discussion is drawn from Kenyon 1969: 191–193, quoting from Charles I, ‘The King’s Declaration showing the causes of the late Dissolution, 10 March 1629’.

13. This argument draws on Baumgold 2000.
14. E.g., Parker 1642: ‘In this Policy is comprised the whole art of Soveraignty ... where Parliaments superintend all, and in all extraordinary cases, especially betwixt the King and Kingdom, do the faithfull Offices of Umpirage, all things remain in ... harmony’ (p. 42); parliament is ‘to be accounted by the vertue of representation, as the whole body of the State’ (p. 45).

15. It is, Hobbes says, an erroneous opinion ‘That they will all of them justifie the War, by which their Power was at first gotten, and whereon (as they think) their Right dependeth, and not on the Possession’ (1968: 721).

16. ‘Therefore I put down for one of the most effectuall seeds of the Death of any State, that the Conquerors require not onely a Submission of mens actions to them for the future, but also an Approbation of all their actions past’ (Hobbes 1968: 721–722).

17. For a contrary view of the significance of the defense of de facto authority in the ‘Review and Conclusion’, see Hoekstra 2004.

18. Charles Tarlton has observed that, ‘scholarly interpretations still resist treating Two treatises as mainly an activist tract and persist in characterizing it always as something loftier, viz. "political philosophy", “systematic moral apologia”, and the like ... [E]ven critics friendly to a strictly histori- cal approach have hesitated before the implications of Laslett’s dicta that Locke wrote as a whig pamphleteer and for Shaftesbury’s purposes’ (Tarlton 1981: 49).

19. In a passage presumably inserted after the Glorious Revolution, he adds that ‘such a Government may be dissolved’ if the prince ‘neglects and abandons’ his charge (Locke 1965: [219] 459).

20. John Dunn, for instance, observes that ‘this [is] a theory of the restoration of an existing degree of legality rather than a conceptually primitive doctrine of tyrannicide’ (1969: 182). ‘The specific political doctrine which emerged from the work in 1679–81 and which made its publication such a natural gesture in 1690 was merely the dignifying of the legal order of the English polity’ (Dunn 1980: 60). See also Schwoerer 1993: 251.

21. An exception is Tully (1993), who characterizes Locke as having a ‘constitution-enforcing’ conception of rights: ‘the primary use of rights by Locke and republican-Whig writers is to constrain or limit the king or parliament to act within a known and recognized constitutional structure of lawfulness’ (p. 261).

22. For similar arguments, see McClure (1996: 228–229, and 238: ‘because the experiential judgment that grounds its expression is a cognizance of civil injury, its necessary frame of reference for exist- tential civil agents must be a preexisting constitutional order’).

23. Dunn (1969) notes a related, though smaller, argument: ‘The appropriate form of resistance varies to some extent with the constitution of society – in England for instance it appears not to be legitimate to attack the monarch himself. But its rationale is the same anywhere in the world and at any point in human history’ (p. 179).

24. Perhaps the connection between the general and the particular was spelled out in more detail in the lost, middle section of the Second Treatise, which may have dealt with English constitutional history (Laslett 1965: 66; and Franklin 1981: 122 n.79).

25. Just previously, he poses the question: ‘What necessity, therefore, is there to found the duty of allegiance or obedience to magistrates on that of fidelity or a regard to promises, and to suppose, that it is the consent of each individual, which subjects him to government; when it appears, that both allegiance and fidelity stand precisely on the same foundation, and are both submitted to by mankind, on account of the apparent interests and necessities of human society?’ (Hume 1987a: 480–481).

26. The impossibility, he explains, is of a practical nature, since one and the same act may be tyrannical in some circumstances and not in others (Hume 1969: 614).

27. These dual grounds for rebellion are analyzed in Forbes 1975, ch. 3.

28. The passage opens with a question and concludes with a non-answer: ‘But here an English reader will be apt to enquire concerning that famous revolution ... It does not belong to my present purpose to shew, that these general principles are applicable to the late revolution’ (Hume 1969: 614–615).

29. In a passage deleted by the Continental Congress (emphasized below), Jefferson took care to specify the colonial constitutional situation: ‘We have reminded’ our British brethren ‘of the circumstances
of our emigration and settlement here … in constituting indeed our several forms of government, we had adopted one common king … but … submission to their parliament was no part of our constitution, nor ever in idea, if history be credited’ (Jefferson 1963: 243). For the background and significance of Jefferson’s statement, see Wood 1969: 352.

30. See, also, a letter to William S. Smith in the same year in which Jefferson exclaims, ‘God forbid we should ever be twenty years without such a rebellion’ [Shay’s Rebellion] and declares, ‘the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants’ (Jefferson 1955b: 68, 69).

31. Indeed, the American device for dealing with that eventuality – impeachment – has itself been seen as anachronistic inheritance from ancien-regime politics. During the furor over impeachment in the Clinton administration, an article in the New York Times explained why it had gone out of use in Britain after 1788: ‘The reason impeachment withered in Britain was simply that the growing strength of Parliament and the waning of despotic monarchial rule allowed legislators to remove ministers through confidence votes. “As soon as the British system evolved into a parliamentary system”, a historian commented, “impeachment fell away”’ (Cowell 1999: 5).

32. Franklin (1981) makes a similar argument. In his view, the problem that Locke (and Lawson) solved was the justification of resistance in a mixed constitution. The modern world, except for the United States, has dispensed with executives who are constitutionally independent of the legislature, so the problem is now largely irrelevant; and their solution is outdated even in the United States because elections and impeachment now take the place of resistance. Hence, he concludes: ‘Locke’s and Lawson’s solution to the problem of removal is no longer required for a mixed constitution’ (pp. 123–124).

33. ‘All Whig statements about resistance’, Schwoerer (1993) observes, ‘were derived from some form of a theory of contract’ (p. 238).

34. The House of Commons’ resolution, to which the Lords assented, stated ‘That King James the Second, having endeavoured to subvert the Constitution of the Kingdom, by breaking the Original Contract between king and people, and … having violated the fundamental Laws, and having withdrawn himself out of this kingdom, has abdicated the Government, and that the throne is thereby become vacant’ (Slaughter 1981: 330). For differing assessments of the significance of contractarian thinking in the Convention debates, compare Slaughter with Kenyon 1974, esp. pp. 47–50.

References
Hobbes’s and Locke’s Contract Theories

Parker, H. (1642) Observations upon some of his Majesties late Answers and Expresses (London).


