

IDEAS OF CONTRACT IN ENGLISH POLITICAL THOUGHT

1679-1704.

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ABSTRACT

The thesis examines what Englishmen meant when they referred to a 'contract' in political discussions around the time of the 1688 Revolution. The study of the immense volume and considerable variety of writings referring to 'contract' reveals that our histories of late seventeenth century political thought, and of Contract Theory in particular, have misrepresented the meaning of the idea. It appears that there was no single Contract Theory and that appeal to 'contract' was not the monopoly of one particular group, party or side in the political controversies of the period. If we concentrate on what the term 'contract' was used to denote in political writing, we are confronted by a near hopeless confusion. If, however, we look to the connotations of the term and the coherence of arguments invoking a 'contract', a very clear, distinctive and significant division of contractarian writing emerges. I have argued that there are in fact three different types of Contract Theory exhibited in the political literature of the period: 'Constitutional', 'Philosophical' and 'Integrated' Contract Theories. My study portrays the characteristics of each of these theories, considers their distinctiveness and interrelations, and attempts to present a more adequate understanding of what 'contract' meant to men in late seventeenth and early eighteenth century England than historians have so far given.

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PART I
INTRODUCTORY.

CHAPTER I
INTRODUCTION

The purpose of the following work is to consider what Englishmen understood by the word "contract" when they read, wrote, or talked about it in political discussions during the late seventeenth and early eighteenth centuries. The period I have reviewed is fairly short in terms of the history of modern European Contractualist Thought. It covers only that generation of English political writers who were active during the years between the death of Hobbes and the death of Locke. Concentration upon this relatively narrow period encourages a more detailed consideration of the contemporary meaning of "contract" than can easily be accommodated in a general survey. It allows a consideration of "contract" as it appears in the whole spectrum of political writings from the philosophical work to the tract and polemical pamphlet. It enables us, in short, to gain an understanding of how the literate public of the age might have been expected to have understood references to "contract" in political debate. And since it was this sort of public which the writers of the "great texts" of seventeenth century Contract Theory (like Hobbes,

Pufendorf and Locke) were intending to address, a consideration of how their audiences understood references to "contract" provides interesting evidence for understanding the texts themselves.¹ Thus the concern with English political thought from 1679 to 1704 will not only provide evidence for reconsidering conventional accounts of the relations between political ideas, groups and practices of the period, but it will also provide evidence for re-examining the general history of modern Contract Theory.

English political life during this time was extremely unstable and violent. The period began with the Popish Plot and Exclusion Crisis - with political assassination and near civil war - it witnessed Monmouth's abortive rebellion, the successful revolution of 1688, numerous treason trials and assassination plots against all the reigning monarchs, and it ended with the uneasy settlement of Queen Anne on the throne early in the eighteenth century. The political literature of the age, multiplied to 'serve' an ever increasing electorate,² mirrored, enflamed and reflected upon the violence and instability of political life. In the distinctively political vocabulary of this literature the word "contract" features prominently. But it does so in a very confusing way. The conventional generalizations of political historians and historians of political thought appear to bear very little relation to the ways Englishmen in the late seventeenth century used the word. What, then, are these conventional generalizations and in what way is

the seventeenth century use of "contract" confusing?

Most of the conventional generalizations about the history of Contract Theory can be found in J.W. Gough's The Social Contract - the work which has dominated this area of scholarship since its publication in 1936. According to Gough there is, properly speaking, only one Contract Theory and this theory has appeared in a number of more or less incomplete "forms" throughout history. The theory acquires its distinctiveness from the self-conscious application of a legal analogy to political studies. In its fullest "development" the theory contains two contracts, or at least two stages of contracting. The first contract, the contract of society, appears as the agreement of previously independent individuals to constitute themselves into a society; the second contract, the contract of government, is the subsequent agreement of those individuals to form a government to rule over them, choose governors and define the extent and ends of their power. The "purposes" of the Contract Theory, still according to Gough, are first, to give an historical account of the origin of government, the state or society, and secondly, to give an account of the nature and limits of political obligation. In possession of these ideas, Gough depicts the history of post-medieval Contract Theory (particularly during its "heyday" in the seventeenth and eighteenth centuries) as a development from concerns almost exclusively with the 'contract of government', to concerns with the fully developed theory of 'contract of society' and 'contract

of government', to eventually - in the Europe of Rousseau - an almost exclusive concern with the 'contract of society'.³ In the literature that I am proposing to examine then, the characteristics of the 'fully developed Contract Theory' should be clearly in evidence. Before reviewing that literature to see whether or not it does portray these characteristics, we may enlarge our catalogue of conventional views by considering historical accounts more specifically concerned with English politics in the late seventeenth and early eighteenth centuries.

If we turn to J.W. Gough's work once more we find, in his chapter on 'Locke and the English Revolution', one of the commonest generalizations about English political thought in the late seventeenth century. During this period, Gough writes, English political theory "was divided between two main schools - the Anglican Royalists who believed in the divine hereditary right of kingship, and their Whig opponents, who maintained the cause of popular rights and a limited monarchy", and the contract of government was a "cardinal principle for the Whigs".⁴ An equally 'common-place' remark occurs later in Gough's chapter. Locke, he asserts, "summed up, and published in an easy, readable style, the accepted commonplaces of the political thought of his generation".⁵ And this view, that Locke's work is in some way 'representative' of his age, finds frequent expression in text book accounts of English politics at the time of the 1688 Revolution. The common assertions, for example, that Locke's Second Treatise

contains "an admirable summing up of the principles of law which triumphed at the Revolution"⁶, and that "Locke's general theory of government had its counterpart in most exclusion pamphlets"⁷, would both seem to imply that Locke's work was representative of his time. But what evidence is there, in the political literature of the late seventeenth century, for these assertions about Contract Theory?

A very superficial acquaintance with English politics in the late seventeenth century reveals that one idea of contract was of considerable importance then. For the 1688 Revolution itself was officially explained and justified in part in terms of "the original Contract". On the 7th February 1688/9, the Convention Parliament accepted the House of Commons resolution that:

King James the Second, having endeavoured to subvert the Constitution of the Kingdom, by breaking the original Contract between King and People, and by the Advice of Jesuits and other wicked Persons, having violated the fundamental Laws, and having withdrawn Himself out of this Kingdom, has abdicated the Government; and that the Throne is thereby vacant.⁸

But the "contract" referred to here, as Gough himself has pointed out, is definitely not the same as that which appears in the Second Treatise. It is not, that is to say, "an agreement between individuals to form a civil society and 'submit to the determination of the majority'".⁹

A closer inspection of the massive volume of political tracts, pamphlets and treatises that were published between 1679 and 1704 can only reinforce our awareness of the

significance of appeals to "contract" during this period. Indeed, it does so at the cost of forcing us to question whether our conventional accounts of the history of Contract Theory can possibly do justice to all the evidence. The order which has come to be imposed upon these references to "contract" appears to evaporate as we encounter more and more different meanings of the term, different synonyms used for it, and different occasions upon which it is invoked.

All sorts of writers - lawyers, politicians, historians, divines, propagandists, philosophers and journalists - make references to "contract" in their political works. But hardly ever do they appear either aware or concerned that they are employing a traditional political concept. They were mainly interested in advancing a "cause", or defending the activities of a particular political group, or in offering an explanation of some past events. The fact that arguments from "contract" were arguments drawing upon a legal analogy was generally not their concern. The word "contract" frequently appears in the literature and it is often considered in conjunction with, or as a synonym for, other legal concepts like "stipulation", "trust", "capitulation", "covenant", "compact", and even "coronation oath" and "law" itself.¹⁰ But equally as often, when occasion appeared to suit, writers left the realm of legal analogy and considered the idea much more loosely as equivalent to simply "promises", "bargains", "compromises", "barriers"

and "agreements".¹¹ Thus the use of the word "contract" is not evidence that a legal analogy is actually being employed.

The varied synonyms for "contract" indicate the absence of any precise, single (or even dual) understanding of the word in the political literature of the late seventeenth century. The view then, of J.W. Gough, and after him, of Sir Ernest Barker, that references to "contract" in political debate should be understood as references to either a contract of society or a contract of government¹², would seem too narrow and specific to do justice to most of the references with which we will be concerned. And the suspicion that this will be so appears more than justified when we find not only apparently imprecise uses of the word "contract", but also many specifically different types of contract being argued about. As we turn the pages of the tracts, pamphlets and treatises, we are confronted not by a governmental contract and a social contract, but by "fundamental contracts", "constitutional contracts", "national contracts", "political contracts", "original contracts", "mutual contracts", "express Original and continuing ..." contracts, "implicit contracts" and even a "Popular Contract and rectoral Contract".¹³

But the confusion which all these references to "contract" introduce into the conventional interpretations of the history of contract thinking is not the only reason for reexamining the late seventeenth century understanding (or understandings) of the term. Perhaps even more surprising

than the variety of 'contracts' written about is the fact that, in the period immediately following the 1688 Revolution, there is no simple correspondence between asserting contract ideas and defending the new regime. Thus even so entrenched a belief as that English political opinion at the time of the Revolution was divided between the two "main schools" of Royalist Divine Righters and Whig Contractarians must be reexamined. For even some Jacobite pamphleteers, like Jeremy Collier and Charlwood Lawton, were prepared to argue at least part of their case by reference to a 'contract'.

Nor can the existence of Tory and Jacobite contract arguments be accounted for in terms of the Hobbesian tradition of contractarianism. For not only were these royalist arguments concerned with different questions from Hobbes' (theirs were arguments about the requirements of English constitutional law rather than about the nature and necessity of civil society), but also there was, properly speaking, no tradition of Hobbesian thought in the late seventeenth century. At least there were no significant Hobbesian disciples, and there was no sense of any valuable Hobbesian contribution to political speculation. During this period Hobbes was, in fact, "the most rejected, and politically the least important, of all the absolutist writers".¹⁴ And by far the most common occurrence of the term 'Hobbist' was, as we shall see, as a very general and unspecific label of abuse. Tory and Jacobite contract arguments turn out to be of a very similar order to many Whig arguments. Indeed,

in the writings of one man - the colourful Robert Ferguson "the Plotter" - we find two of the most popular political pamphlets of the time, both apparently written in good faith, both employing arguments based upon the idea that the English Constitution embodied a "contract" between ruler and ruled, but one was written in defence of William of Orange and the other in defence of James II!¹⁵

But our enquiry into what Englishmen understood by the word "contract" in political debate between 1679 and 1704 cannot rest here. The numerous, varied, and confusing references that we have so far noted serve to warn us against too simplified a view of the meaning of "contract". They do not indicate that the term either had no meaning or was used in a purely arbitrary and idiosyncratic way.¹⁶ When Englishmen talked or wrote about "a contract" during this period they neither invented the term nor intended it to be understood purely idiosyncratically. They were addressing themselves to a public accustomed to hearing the term with a view to persuading it of something. That public was familiar with at least some understandings of the word "contract", and it is these public understandings (which in the nature of the case must be relatively stable for otherwise public debate could not take place) that we must attempt to outline and examine. A writer might very well misunderstand an idea, or he might wish to modify his audience's understanding of it, but this can only be determined by considering his use of the term in relation

to the general use and the ideas evoked by it.

So far I have simply suggested that many common ideas about the nature of appeals to "contract" in political debate appear inadequate or misleading when the evidence of the late seventeenth century is considered. If we now turn our attention to the literature of the major constitutional crisis of the period, the nature and extent of this inadequacy becomes clearer. In the controversies over the 1688 Revolution we may begin to see in some sort of perspective the significance and varieties of arguments from "contract". The confusions that have arisen because of the complexity of the evidence will then start to disappear.

CHAPTER II

ALLEGIANCE, OBLIGATION, AND CONTRACT : THE
CONSTITUTIONAL CONTROVERSIES OVER THE 1688 REVOLUTION

The dramatic series of events from James II's second Declaration of Indulgence (7 May 1688) to his eventual flight into France (22 December 1688) produced a deep crisis in the English political conscience. The myths of 'glory' and 'peacefulness' that have become attached to the 1688 Revolution were not so apparent to the majority of Englishmen who were neither ardent Williamites nor endowed with the hindsight and critical apparatus of the "Whig interpreters of history"¹. It may be, as some historians have argued, that the Revolution secured the victory of parliamentary government over royal absolutism², that it presaged an era of increasing moral respectability³ and political stability⁴, even that "liberty" had at length triumphed over "authority" and was paving the way for "enlightenment"⁵. But for most Englishmen educated into the Church of England's doctrines of Passive Obedience and Non-Resistance, and living amidst rumours of Irish Massacres and French Invasions, the Revolution meant none of these things. Doubt, confusion, conflict and guilt appeared as the most common reactions to James II's flight.

Only very recently have historians begun to recognize the wide disparity between Whiggish 'glorifications' of the Revolution and its appearance to contemporaries. This

disparity is exemplified, for example, in the difference between Macaulay's picture of the Revolution and that of one of its most recent historians. For Macaulay, the Revolution "averted" the "calamities" of arbitrary and despotic government. "It was a revolution strictly defensive", he tells us, "and had prescription and legitimacy on its side".⁶ But if attention is focussed on the dilemmas of contemporary Englishmen (as has recently been done by R.A. Beddard) the Revolution appears radically different. To the Church of England man, who, if a member of the politically relevant classes, was likely to have sworn oaths of allegiance to James, "the Revolution meant breaking faith with his lawful sovereign, the violation of sacred oaths, and nothing short of a national apostacy from the doctrines of passive obedience and non-resistance, a cherished legacy that had come down from the age of the apostles. It was impossible for him to acquiesce in usurpation without doing violence to his conscience"⁷. The difference between these two views of the Revolution is crucial if we are to understand the relationship between political ideas and politically important groups during the principal crisis of our period. For the Whig interpretation of the Revolution originates in the propaganda of the time and contains the bias of the most convinced anti-Jacobites. And yet this interpretation has come to dominate Englishmen's understandings of the nature of

the Revolution and has contributed to the general acceptance of those largely false generalizations about the political thought of the late seventeenth century which I noted in the previous chapter.

G.M. Trevelyan advanced one such generalization when he examined the Convention Parliament (1688-89) in terms of Tory defenders of divine right monarchy doing verbal battle with Whig contractarians.⁸ A well defined two-party system had apparently arisen in Parliament during the second half of the seventeenth century! And Whig interpretations of the conflict between these supposed two parties have tended to represent the battle in terms of authoritarian, retrogressive, religious or mystical Toryism attempting to stem the tide of libertarian, progressive, secular or rationalist Whiggism⁹.

This view of the character of English political thought at the time of the Revolution has come under the scrutiny and attack of some modern historical scholarship. Most notably, on the one hand, W.H. Greenleaf has clarified the rationale and coherence of Divine Right theories¹⁰ and G.L. Cherry has "defended" the legal and philosophical views of the Jacobites¹¹. And on the other hand, G.M. Straka has convincingly argued that it was a transition in Divine Right theory from "the divine right of kings" to the "divine right of Providence" that did most to reconcile Englishmen to the Revolutionary Settlement, and not the outright victory

of secular contractarianism¹². But even these reassessments do not adequately portray the complexity of the inter-relationships between ideas, attitudes and activities at the time of the Revolution.

If we look at the mass of political literature published during the period immediately following the rapid decline in James II's fortunes (from 1688 to 1693), this complexity becomes obvious. We shall find, for example, that beliefs in the Divine Right of Kings were by no means confined to Tory or Jacobite writings; that contract ideas were held alike by Williamites, Jacobites, Tories, Whigs, Republicans, and defenders and opponents of the revolutionary settlement; and that not only were there fierce debates about the justification of the series of events which constituted the 1688 Revolution, but also disputes about what had happened and what should as a consequence be done.

In the rest of this chapter I want to go some way towards outlining the complexity of the issues and ideas involved in the Revolution debates. My main concern is with the role played by ideas of contract in those debates, but this can only be appreciated by examining them within their more general context.

II

The majority of literate Englishmen became reconciled to James II's fall in three closely related and roughly

consecutive stages. The first concerned interpreting the events culminating in James' flight; the second, suggesting what should be done as a result; and the third, explaining the status of the new regime. One oath had been broken, and now another had been sworn. What was its status? I shall first sketch the main views advanced in the first two stages of the debates and then consider in more detail the arguments of the crucial third stage.

The pamphlets and books that were published in response to the Revolution, together with the records of the Convention Parliament's deliberations, allow us to piece together at least seven different contemporary explanations of what had actually happened to cause James's withdrawal. One legal idea canvassed was that James had abdicated the government and although this was vigorously contested in the Convention it was one of the views eventually sanctioned by Parliament.¹³ Another view was that James had deserted the government - a view less legalistic than that of abdication, and more acceptable to those unprepared to argue that James was no longer de jure king.¹⁴ A third idea suggested was that William had conquered England, forcing James to retire, although this was often modified, because of the association between conquest and slavery, into a view that William had conquered James but not England!¹⁵ A fourth interpretation offered was that James had been forced to leave by a successful rebellion and that therefore the Revolution was illegal and allegiance was

still due to the king now in forced exile.¹⁶ A fifth idea was that James had knowingly broken the fundamental constitutional laws and had withdrawn, thus leaving the throne vacant, rather than suffer the reprimand of an outraged Parliament.¹⁷ A sixth view, in many ways the most widely accepted of all, was that King James had simply suffered the judgment of Providence for his mis-government.¹⁸ And finally, it was also suggested that James had broken "the original contract" and that therefore he had either ceased to be king or been forced to leave, or again, more simply, that these two consequences followed from his breaking his "coronation oath" or "trust".¹⁹

The suggestions offered about what should be done in the absence of a de facto monarch were similarly varied. Some suggested the immediate unconditional recall of James²⁰, others his reinstatement upon additional guarantees or limitations of the prerogative power²¹, whilst a Regency²², the crowning of Mary²³, the crowning of William²⁴, the crowning of William and Mary together²⁵, or a republican remodelling of the government²⁶ were further serious suggestions canvassed during the interregnum.

Many of these different views of the Revolution were not of course mutually incompatible. The argument from Providence, for example, could and frequently did feature alongside practically all the other views. Similarly, although interpretations of what had happened affected judgments of what should be done in response, there was no

simple relationship between them. To modern ears most of the debate sounds so rarefied that we are tempted to dismiss impatiently the seemingly small and excessively fine distinctions. But to do so is inevitably to miss the point of the debates and therefore the significance of the Revolution for its contemporaries. For it is only from these debates that the contemporary understandings of the Revolution can be properly assessed.

The debates about the status of the William and Mary regime were similarly marked by fine and sometimes rather tortuous distinctions. C.F. Mullet has attempted to characterize these debates by noting that they bear a closer resemblance to Scholastic disputes than to modern political argument. And the reason for this, he explains, is that during the late seventeenth century political questions were still considered as, in essence, a branch of religious enquiry - that the content and language of political discourse were closer to mediaeval than to modern styles.²⁷ In one sense Mullet's observations are correct: the literature with which he was concerned was written, in general, by far from first-rate minds, and was concerned with 'oaths', 'revolution' and 'conscience', spheres in which the Church of England could fairly claim to be an important and authoritative guide. But greater and more perceptive minds were engaged by problems far removed from those of mediaeval political life. Religious ideals and life were undergoing considerable modification by the impact

of enquiries inspired by rationalist, scientific and empiricist thought.²⁸ This modification had affected the practical political debates of the late seventeenth century. Arguments from scripture were no longer sufficient to resolve disputes, if indeed they ever had been, and accepted doctrines of the Church were scrutinised and changed in order to appear "rational". The apparent conservatism of the political arguments, the constant appeal to scripture and the concern with Church dogma that most of the pamphlets portray should not be accepted unquestioningly as evidence of mediaeval style. The fact that it was only in sermons that exclusively religious arguments were used in reference to political affairs, and that most printed polemics appealed to the separate tenets of Reason, Religion, History and Law, is indicative of this change. Religion appears as a vital authority, but as one amongst others, and itself open to interpretation and change.

The new oaths of allegiance imposed a positive, sacred and public act of approbation upon the literate public, and thus a coherent and persuasive justification of the Revolution became of considerable practical importance. The oaths of allegiance to James had been broken and although James's unpopular actions had alienated practically all sections of opinion from him (including the established Church), still most Englishmen recognized a deep gulf between their 'interest' in getting rid of James and their 'duty' to continue obeying him because of the oaths. Thus

the conflict between 'interest' and 'conscience' became a dominant theme of the debates during the third stage of the Revolution controversies.

The defenders of the Revolution were concerned to portray it as the necessary and, more important, the lawful successor to James II's government. If these could be proved, particularly the second, then the new oaths of allegiance could be taken with a clear conscience and the stability of the regime would be the greater.

Arguments from 'necessity' seemed to carry the least conviction. Despite James's unpopularity and the fears he had created about the immediate prospect of popery and arbitrary power, it was not very satisfactory simply to argue from those that therefore resistance had been necessary to safeguard the supposed constitutional liberties of the citizens. For this simply avoided the three principal problems which made the debate of such intense and important practical concern: the problems of moral right, legal right and the stability of government.

At least since the Reformation, it was claimed, the Church of England had officially preached the doctrine of passive obedience and non-resistance - a doctrine which taught, as Abednego Sellar reminded Englishmen in 1689,

That it is the duty of every Christian, in things lawful, actively to obey his Superior; in things unlawful, to suffer rather than obey, and in any case, or upon any pretence whatsoever not to resist, because, whoever does so, shall receive to themselves Damnation.²⁹

The established Church, then, adjudged resistance to be

morally wrong and the problems of the moral status of the new regime were made all the more intractable to those who had taken oaths of allegiance to James II.

But to the problem of moral right was added that of the positive law. Statute laws, for example 13 Charles II st. 2c. 1 paragraph 3, undoubtedly part of the continuing law of the land, declared that "it is not lawful upon any pretence whatsoever to take arms against the King ... or against those that are commissioned by him."³⁰ Any comprehensive defence of the Revolution, then, would need to take account of such unequivocal statutes which declared the enterprise illegal.

Attempts to overcome these legal difficulties, however, would have to avoid a further problem. This was that, given the widespread belief, as one writer put it, that "the Law is the very soul that animates this Body Politick"³¹, that arguments overriding one law did not threaten "to loosen the Bond of due Subjection"³² and thus threaten the stability of any regime.

The arguments, then, in defence of the Revolution from the position that "Necessity in exceptional circumstances overruled Human Laws"³³ were clearly inadequate when confronted with the problems of moral right, legal right and the stability of government. As one defender of the Revolution remarked, 'necessity' might explain and in certain circumstances 'excuse' action but it did not 'justify' it.³⁴ The argument from necessity in fact plays

a minor role in the disputes over the Revolution and its shortcomings help to explain why most of the defenders of the new regime attempted far more ambitious arguments. The Revolution, they claimed, was certainly necessary but much more importantly it was lawful!

Justifications of the "lawfulness" of the new regime took many different forms. Not only were there a number of related activities to be proven 'lawful' - e.g., armed resistance, transferring allegiance from a living monarch, calling a Convention, breaking or modifying the hereditary succession, and by-passing statute laws - but also there were a number of different standards of law to which appeal could be made - i.e., divine law, natural law, the law of nations, and positive law.

Appeals to the higher laws of nature and God were the easier to uphold because they were necessarily more general than the intricate and specific positive law. But just because they were more general, they were more easily open to dispute. Arguments from divine law and the will of God were, however, some of the principal means whereby the legitimacy of the Revolution was defended. The fierce controversy which followed William Sherlock's decision to take the new oaths of allegiance highlights the strengths and weaknesses involved in arguments from Providence.³⁵

Sherlock initially refused to take the oaths not because he wanted James II's return, nor because he distrusted William and Mary, but simply, so he claimed,

"out of pure Principles of Conscience".³⁶ Allegiance had been sworn to James and was therefore due to him for as long as he remained king; and no action which disregarded the Church's doctrine of passive obedience could ever rightfully dismiss a king. On these grounds Sherlock had refused the oaths and was prepared, along with the rest of the non-juring clergy, to be deprived of his benefices.

But Sherlock recanted on the eve of losing his livelihood, took the oaths and was promoted to the Deanery of St. Paul's. He justified this change by referring to a doctrine in Bishop Overall's Convocation Book. This work contained the elements of political theory which the Convocation of 1606 had found acceptable. It was a strongly royalist book, and had been republished as part of James II's defence. But in one passage relating to the de facto authority of the revolutionary government of the United Provinces, Sherlock claimed to have found a Church authority to justify swearing allegiance to William and Mary.³⁷ In his The Case of Allegiance Due to Sovereign Powers (1691) Sherlock argued that the controversies over the rightfulness of the new oaths had become hopelessly confused. Many writers, he noted, had been arguing that legal rights were the only grounds for paying obedience, and thus it had become necessary to justify the Revolution on positive law grounds. "But ... to judge truly of this", he claimed, "requires such perfect skills in Law and History, and the

Constitution of the English Government, that few men are capable of making so plain and certain a judgement of it, as to be a clear and safe Rule of Conscience".³⁸ Claiming Overall's Convocation Book as authority, Sherlock declared that the dispute over positive law right was unnecessary. The Divine Will was the surest guide and the strongest bind of conscience.

"Subjects are bound to obey, and to pay and swear allegiance," he asserted, "... to those Princes whom God hath placed and settled in the Throne, whatever Disputes there may be about their legal Right"³⁹

The Convocation Book "proved" this by affirming:

1. That those Princes, who have no legal right to their Thrones, may yet have God's Authority.
2. That when they are thoroughly settled in their Thrones, they are invested with God's Authority, and must be revered and obeyed by all ...⁴⁰

The only question, then, in reference to 1688 should be whether the new regime were thoroughly settled, and, if it were, allegiance ought to be sworn to it. Sherlock insisted that the "distinction between a King de jure, and a King de facto, relates only to Human Laws, which bind Subjects, but are not the necessary Rules and Measures of the Divine Providence".⁴¹ His argument was simply that it did not matter whether William and Mary could be shown to have a legal right to the English throne, it was sufficient that they enjoyed a quiet possession. A rightful monarch, that is to say, need only be de facto and sufficiently secure in his position to be able plausibly to maintain that he had God's blessing.

Sherlock's arguments provoked a vast number of replies. Exception was taken to his views by both the defenders and the opponents of the revolutionary settlement. Jeremy Collier, from the more extreme wing of the non-juring clergy, criticised Sherlock for asserting that "Legal Right must always give place to Unjust Power".⁴² Since the English constitution was clearly monarchical and not republican, he insisted, then James, or at the very least his new-born son, should be king. Sherlock was in fact nothing less than a "Hobbist"⁴³ in arguing as he had.

The concern shown by Collier for legal rights was apparent in most of the other critics of Sherlock and the derogatory label of "Hobbist" was freely used.⁴⁴ Samuel Johnson, for example, accused Sherlock of setting up "Two Kings, one of Right, the other by Providence"⁴⁵, and of implying that the new regime was "an unjust Usurpation, and the Revolution illegal".⁴⁶ And Robert Jenkin reaffirmed the need for justifications from positive law when he declared, against Sherlock, that "the Laws of that Constitution of Government under which we live, ... are to determin when the Authority of Sovereigns ceases, and the Allegiance of Subjects; and we are not to think their Power and Authority transferred, unless it be transferred legally."⁴⁷

Sherlock's arguments from the divine right of Providence, then, met with considerable opposition. There was a widespread desire to go farther and to support or oppose William and Mary according to their titles as

de jure monarchs. Nonetheless the sort of defence that Sherlock presented for taking the new oaths was of considerable importance. By arguing that it was God's hand that had expelled James and established William and Mary in his stead, Sherlock provided one way in which Englishmen's consciences could be reconciled to the Revolution. Indeed, as G.M. Straka has recently argued, it was precisely this transition in Anglican political theory (of which Sherlock's ideas represent the finished product) from the "Stuart concept of divine hereditary right" to the post-Revolution theory of "the divine right of providence" that in fact persuaded most Englishmen to accept the new regime.⁴⁸ And it certainly is the case that arguments from Providence formed a crucial part of the juring Church's self-justifications. Bishops Tillotson, Tenison, Burnet, Sharp and Lloyd of St. Asaph, all made considerable use of such arguments. Laymen, too, like William Atwood, Samuel Johnson, Sir George Eyres and even Edmund Bohun (who was Filmer's editor in 1685) attempted to persuade their readers that the Revolution was a "miracle" of Providence.⁴⁹ William, it was claimed, was a king by divine right as surely as any English king before him - he was king by the divine right of Providence and therefore, as Samuel Johnson claimed, "the Rightfullest King that ever sat upon the English Throne."⁵⁰

Thus when Sherlock asserted that William and Mary were monarchs by divine right he was arguing a very widely accepted point. It was rather his insistence that to be rightful monarchs they need only be de facto which created

most antagonism. Defenders of the new regime affirmed that the new monarchs were de jure whilst opponents insisted that allegiance should be payed to James, the king de jure who was now in forced exile. Sherlock in fact was frequently misrepresented, since he never denied that William and Mary were de jure monarchs. His point was that this was irrelevant to the question of obligation. But in the furore of polemical dispute misrepresentation is far from unusual.

As an argument to uphold a de facto prince's right to the allegiance of his subjects, however, Sherlock's writings were open to an obvious line of criticism. If it were possible to dispute whether God actually directed the outcome of the Revolution then Sherlock's 'divine right' could be made to appear little more than a justification of 'successful force'. Without direct evidence of God's participation in the Revolution, to justify attributing its course to God's will, then, Sherlock's sort of argument might equally be used to justify Cromwell while he was successful. And even the most determined Williamites and anti-Jacobites ardently denied any parallel between the Civil War and the Revolution. The author of Providence and Precept: Or, The Case of Doing Evil that Good may come of it (1691) made precisely these criticisms of Sherlock. By resting his defence of William solely on an unproven intervention by God, Sherlock had reduced William's right to "success". And, the author continued, "if Strength and Force be the only determination of Right

and Wrong, Religion and Laws will quickly become useless".⁵¹

When interpreted in this way, Sherlock's arguments appeared little different from another very popular, but short-lived, justification of the 'lawfulness' of the Revolution. This was the idea that the new regime had been established by a 'just conquest in a just war'. Charles Blount, the supposed author of King William and Queen Mary Conquerors (1693), produced one of the most forthright statements of the 'conquest' case. He wrote the work, he claimed, because he found "that several, who are not yet satisfied with any thing that hath been hitherto offered, do declare, That if it could be made appear that their present Majesties have on their side all the Right of Conquest, they would entirely submit to the Government, and take the Oath."⁵²

Arguments from 'conquest' to justify 1688, however, enjoyed only a very short-lived acceptability. In late January 1692/3 Parliament ordered that King William and Queen Mary Conquerors and Bishop Gilbert Burnet's Pastoral Letter (1689) should be burned publicly by the common hangman. A pamphlet by William Lloyd, Bishop of St. Asaph, would probably also have joined them had not the managers of the case misread the relevant passage.⁵³ The error of all three books lay in asserting that William and Mary were king and queen by right of conquest over James II. They deserved their fate, according to Parliament, because such an assertion "was highly injurious to their

majesties' rightful title to the crown of this realm, and inconsistent with the principles on which this government is founded, and tending to the subversion of the rights of the people".⁵⁴ The Licensor of the Press, Edmund Bohun, excused his authorizing the publication of the works because he believed the argument to be "innocent" since "many Treatises had been published higher on this point" and nothing had as yet been done against them.⁵⁵ In this Bohun was undoubtedly correct.

Nonetheless, it was also true that very few defenders of the new regime were prepared to justify it solely upon the grounds of conquest.⁵⁶ The legitimacy of a conqueror seems to have been too questionable for that. Many felt, with Locke, that the consent of the governed was in some way necessary for the legitimate foundation of a government.⁵⁷ The strength of this feeling goes some way to explaining one of the most extraordinary pieces of 'mental gymnastics' in the whole of the Revolution debates. For some of the proponents of the conquest case attempted to reconcile 'conquest' with 'consent'. William Sherlock, for example, in his A Vindication of the Case of Allegiance due to Sovereign Powers (1691) argued that since a conquest destroys the previous government it forces the ex-citizens to 'consent' to the conqueror's regime in self-defence. And 'consent', he triumphantly asserted, is universally accepted as the lawful medium by which rights may be transferred!⁵⁸ Timothy Wilson, in a pamphlet entitled God, the King, and

the Countrey, United in the Justification of this Present

Revolution (1691), produced a variation of Sherlock's argument which was to have far reaching consequences.

Wilson here argued that since the purpose of government was the protection of its citizens - a common supposition in the seventeenth century - when a country is conquered the citizens may swear allegiance to the new government without sin or illegality, because only an effective government can fulfil the essential role of securely protecting the "Lives, Liberties, or Estates" of the citizen body.⁵⁹ This sort of argument, as Quentin Skinner has suggested, provided one of the main avenues through which the idea of conquest was assimilated into Whig thought (thereby allowing the Norman Conquest to find an acceptable place in Whig constitutional history).⁶⁰ But this we must clarify later.

Most defenders of the William and Mary government, however, were not prepared to rest their case on appeals to the general laws of God and Nature or on the Divine Will alone. They wanted instead to establish an even stronger 'legal' proof of the legitimacy of the new regime. Gilbert Burnet, in one of his most popular pamphlets,⁶¹ stated clearly the issues involved in effecting such a proof. He argued that the problem with the 'Divine Will' sort of argument was that it was uncertain and tended to justify "all usurpers when they are successful".⁶² Thus, instead of referring simply to God's will as the determinant

of political obligation, citizens should look to positive law:

The measures of power, and by consequence of obedience, must be taken from the express laws of any state or body of men, from the oaths that they swear, or from immemorial prescription, and a long possession, which both give a title, and in a long tract of time make a bad one become good".⁶³

In short, he asserted, "the degrees of all civil authority are to be taken from express laws, immemorial customs, or from particular oaths."⁶⁴

This view of the grounds determining political obligation was widely accepted,⁶⁵ but as Burnet recognized, it presented a great difficulty in the way of justifying the legality of the events of 1688:

"The main and great difficulty here" he remarked, "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 make it plainly unlawful, upon any pretence whatsoever, to take up arms against the King, or any commissioned by him".⁶⁶

Burnet was here referring to such statute laws as that of 13 Charles II st. 2c which I have already quoted. His solution to the dilemma involved asserting and justifying four propositions about the nature of law:

1. All general words how large soever, are still supposed to have a tacit exception and reserve in them, if the matter seems to require it ...
2. When there seems to be a contradiction between two articles in the constitution, we ought to examine which of the two is evident, and the most important, ... and then we must give such an accomodating sense to that which seems to contradict it, that so we may reconcile those together ... since the chief design of our whole law ... is to secure and maintain our liberty ... therefore

the other article against resistance ought to be so softened, as that it does not destroy us.

3. ... the not resisting the King, can only be applied to the executive power, that so upon no pretense of ill administration in the execution of the laws, it should be lawful to resist him: but this cannot with any reason be extended to an invasion of the legislative power, or to a total subversion of the government ... 4. ... The [word] King ... imports a prince clothed by law ... but if he goes to subvert the whole foundation of the government ... he annuls his own powers and then ceases to be King".⁶⁷

Burnet's argument, offering a reinterpretation of the English Constitution and the rules for legal exegesis, was purely a pièce d'occasion - a political argument masquerading as legal orthodoxy intended to justify the extremely questionable legality of those events leading to the crowning of William and Mary. Lest his defence of the Revolution from positive law should fail, Burnet covered himself by asserting the "principle, that in all the disputes between power and liberty, power must always be proved, but liberty proves itself; the one being founded only upon a positive law, and the other upon the Law of Nature."⁶⁸ Thus if the legality of the Revolution could not be maintained from positive law, Burnet was declaring, it could certainly be maintained according to natural law.

The desire to defend William and Mary as de jure monarchs was reflected in the many pamphlets adopting arguments similar to Burnet's. One writer, Samuel Johnson, emphasised the importance attached to these arguments. The Revolution Settlement, he affirmed, was "founded upon Legal Principles" and William and Mary were thus de jure

monarchs.⁶⁹ The consequence of denying this, as for example Sherlock had, was to maintain in effect:

1. That all Kings are absolute, and have Authority from God to trample upon our Religion, Liberties, and Laws, at their sovereign Will and Pleasure.
2. That all who joyn'd in Arms with King William ... without Repentance shall receive Damnation.
3. That King James has still a legal Right to the Crown: and therein, one would think to our Obedience.
4. That he may use Arms to recover ... [his] Right ...
5. That they who fought against the late King in Ireland, fought against the rightful King before Providence had declared God's Will.⁷⁰

Johnson's supposedly legal arguments in defence of the Revolution involved the assertions that the English Constitution was "Hereditary as to Family, elective as to Persons";⁷¹ that it was "limited, and founded in Contract: that a King, who Acts without regard to the Fundamental Contract, is not a Legal King";⁷² and that civil rights were rights at positive law and therefore any defence of them must be 'legal' according to positive law.⁷³ But, Johnson insisted, it was only inferior magistrates who could be legally resisted according to the law of the English Constitution.⁷⁴

A vast number of pamphlets appeared during the five years from 1688 to 1693 containing arguments upholding the legality of the Revolution. In addition to the sort of arguments of Burnet and Johnson, reference was made to a variety of sources, each fiercely contested, to defend this view. For example, it was asserted (in a similar way to Burnet) that the design of the law should be the

overriding consideration in interpreting particular laws.⁷⁵ The design of the law was usually said to be either the protection of the citizens or the well-being of the community. In either case, the point was that general considerations could be used to modify radically or over-rule a particular law. Some pamphleteers also argued that the Convention Parliament had resolved the problem of "legality" and that it, as the legally competent and representative body of the nation (a hotly disputed point), should be followed in the conclusion that William and Mary were lawfully king and queen.⁷⁶ Others again referred to Henry VII's Statute of Treasons and to Lord Coke's judgment that English law required obedience to be sworn to a de facto monarch.⁷⁷ Reference was also made to the notion of the dissolution of the government - James II, it was maintained, had destroyed the laws by his misconduct and the government was dissolved, therefore anything the citizens might do for their own safety could be accounted "lawful".⁷⁸ And finally reference was made to the legendary 'Ancient Constitution', which, it was supposed, James had subverted and William "restored".⁷⁹

We will return to these arguments again and again throughout the rest of our enquiry, but we must now consider in detail the role that ideas of 'contract' played in the complex constitutional controversies over the 1688 Revolution.

III

In the previous chapter I remarked that at least one idea of contract was obviously of considerable importance in justifying the Revolution. This was the notion referred to in the Convention Parliament's resolution concerning 'the state of the nation' as a result of James II's flight. James, it was claimed, was no longer king because he had broken "the original Contract between King and People", because he had "violated the fundamental Laws", and because he had "abdicated the Government".⁸⁰ Although this contract featured as only one of three explanations of James's fall, still several writers, amongst them Peter Allix, considered that breaking the original contract was the "foundation" of the case against James.⁸¹ But even if this were an accurate assessment of the complicated arguments that I have just outlined, there still appears considerable variety in the terminology and use of contract ideas in the Revolutionary literature.

Practically all the 'legal arguments' for and against the Revolution were at some time defended by reference to the 'contract'. Appeals were frequently made to an "original contract" which supposedly began the English Constitution, to a 'contract' that was supposedly embodied within English constitutional law, and to a 'contract' supposedly presupposed in any legitimate government. But there was certainly no general agreement about the specific

provisions of those contracts. In the Convention Parliament, for example, William's right to the throne was both defended and attacked on the basis of the English contract. The Bishop of Ely and the Earl of Pembroke were leading exponents of the contractualist case against the Convention Parliament's right to modify the hereditary succession by offering the crown to William. Pembroke's speech provides an interesting illustration of one type of contract argument that may appear somewhat surprising:

"The laws made", he argued, "are certainly part of the original contract; and by the laws made, which establish the oaths of allegiance and supremacy, we are tied up to keep in the hereditary line [of succession to the throne] ... There (I take it) lies the reason why we cannot (of ourselves) without breaking that contract, break the succession, which is settled by law, and cannot be altered but by another, which we ourselves cannot make."⁸²

This contractualist argument against the legal competence of the Convention Parliament occurred in a debate which contained much more familiar references to 'contract'. Sir Thomas Lee, for example, upheld a popular right to alter law by appealing to the contract of government:

"But, my Lords," he said, "I would ask this question, Whether upon the Original Contract there were not a power preserved in the nation, to provide for its self in such exigencies?

That contract was to settle the constitution as to the Legislature ... so we take it to be: And it is true, that it is a part of the contract, the making of laws, and that those laws should oblige all sides when made; but yet so, as not to exclude this original constitution in all governments that commence by compact, that there should be a power in the states to make provision in all times, and upon all occasions, for extraordinary cases and necessities, such as ours now is."⁸³

Only one of the members of the Convention - the Earl

of Clarendon - is recorded as rejecting the idea of an original contract altogether. He did so, he claimed, because "this breaking the original contract is a language that hath not been long used in this place; nor known in any of our law books, or publick records. It is sprung up, but as taken from some late authors, and those none of the best received".⁸⁴ But this critique of the legal status of the original contract did not prevent the acceptance of the idea, by the Convention, as justification for replacing James by William and Mary. Clarendon's objections failed in this respect partly because they had already been anticipated and rejected by a strong body of legal opinion.

When the Convention Lords first considered the resolution which claimed that James had broken "the original Contract between King and People" they suggested that a Committee of the whole House be instructed by "the learned counsel of the law of what the original contract is, and whether there be any such or not." Nine experts in the Common Law were called to give their views and, although the records of what they said are far from complete, it is clear that in general they were agreed that something like an original contract was at the root of English law. Sir Robert Atkyns, for example, is recorded as arguing in the following way:

I believe none of us have it [the original contract] in our books or cases; not anything that touches on it. Thinks it must refer to the first original of government. Thinks the King never took any government, but there was an agreement between King and people. It is a limited monarchy and a body politic, and the King head of it. If there

were an original contract, yet it is subject to variations as the times. Mr. Hooker says all public government is by agreement. James I. himself admits in 1609 that there is a paction between prince and people. "Every just King," he says, "in a settled kingdom is bound to obey the paction made to his people by his laws." Reads preamble to the Act concerning Peter's Pence, &c., giving rules by which the prince shall govern and the people obey. This shows what the contract is, the laws of the kingdom. All public regiment seems to have arisen by contract between men and princes. Grotius de Bello, fol. 51. David who was made King by God, called all Israel together at Hebron, and made a covenant with them.⁸⁵

Sir Edward Montagu, following Atkyns, agreed that the law books were silent, but thought, both "as a lawyer and in reason, [that] ... government is made up of a contract ut ante." Dolben believed "In reason" that there was "some such thing ... originally", and Sir Edward Nevill insisted that it "must of necessity be implied by the nature of Government." Bradbury and Lord Chief Justice Holt were also firmly convinced that the English government was by contract and Bradbury even asserted that the "body of the Common Law must be taken to be that original contract." The remaining experts, Levinz, Whitelocke and William Petyt, seemed less obviously convinced that there was an original contract. Levinz was content to note that "this contract is government according to the king on the one side and the people on the other. You may call it an original contract, though you know not when it began, because there are oaths on both sides, king and people, one to govern, the other to obey." Whitelocke accepted that the term was appropriate - at least he was prepared to use it - for although there was

nothing about it "printed in book cases", at least "there is no book case to the contrary." And Petyt, despite apparently not making use of the word 'contract', still asserted that there "was always an agreement in the Saxons' times, and so it continues."⁸⁶

An authoritative group of lawyers, then, was prepared to argue that the notion of an 'original contract' was something known to, or at least consistent with, English Law. And the Convention Parliament further underlined the legal status of the idea by accepting the clause in the resolution concerning James's breaking "the original Contract between King and People" with a vote of 54 to 43. Thus references to the 'contract' in political debate during the late seventeenth century could claim to be references not so much to a legal analogy as to legal fact. The judgments of the Convention did not go unchallenged but at least some legal opinion could be appealed to as evidence of the fact of an English 'original contract'.

In the disputes which followed the Revolution, however, ideas of contract were introduced into a variety of sorts of argument. Appeal was certainly made to the supposed legal fact of an 'original English contract', but frequently the 'contract' featured as little more than a rhetorical device with which to label a set of political proposals or activities. It also featured as simply descriptive of the activity which the Convention Parliament was principally engaged in during the interregnum. It was, for example,

invoked by a rather luke-warm republican as a means to gain a hearing for his proposals. The Convention, he suggested, was about to make a new contract now that the old one had been dissolved and he offered his proposals as a basis for that new contract.⁸⁷ Sir James Montgomery and Robert Ferguson, on separate occasions, went further along the same lines and attacked William for, as Montgomery insisted, his "manifest infractions of that original contract which we made with him, upon the maintaining and preserving of which our allegiance was expressly founded."⁸⁸ Timothy Wilson argued from the new contract of 1689 that Englishmen were bound to obey William and Mary⁸⁹ and a Jacobite pamphleteer criticised the whole revolutionary settlement as being "a government built upon the most destructive principles to the peace and tranquillity of the nation, ... viz. the original contract with the people".⁹⁰

Often, indeed, the appeal to contract was more than simply a rhetorical weapon. Sometimes an argument from contract was accompanied by a fairly systematic examination of the theoretical presuppositions involved in adopting such a position. But at least as often contract arguments subsisted with many other types of arguments (appealing to reason or authority, to law, necessity, religion and history) arranged as a loosely knit catalogue of supposed reasons for accepting an author's political opinions.

The loose way in which contract ideas were used indicates both the extent to which they had become commonplace (albeit

a severely criticised commonplace from time to time) and the imprecise connotations that were associated with them. Jeremy Collier went so far as to record 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."⁹¹ But this appears to have been more the fancy of a convinced Jacobite than the serious reflection of an impartial critic. Collier himself, as we shall see, was prepared to accept that some constitutions legitimately embodied an original contract! Arguments from contract featured in the political writings of Williamites, Jacobites, pro-Revolutionaries and anti-Revolutionaries, clerics and laymen alike. This only appears surprising because we have become accustomed to identify appeals to contract in the late seventeenth century with the ideas and arguments of Locke's Two Treatises (i.e. with opposition to royal power). In fact, however, an appeal to 'the contract' implied neither rejecting divine right arguments, nor denying the patriarchal origins of states, nor necessarily upholding a popular right of resistance.

Indeed, even some of the most ardent defenders of royal power and of James II's continuing right to the English throne accepted that a contract was the basis or origin of some governments. Jeremy Collier, for example, as I suggested above, accepted that the constitutions of Flanders, Poland and Hungary were founded upon an explicit contract between ruler and ruled.⁹² He only denied that England

had such a constitution and insisted that "the Silence of our Laws and History as to any such Compact, is a sufficient disproof of it".⁹³ Collier's acknowledgment that contract could be a legitimate origin of government reflected some of the results of historical enquiries which were being conducted in the late seventeenth century. Sweden, Denmark, Germany, Poland, Hungary, France, Spain, Arragon, England and Scotland - in short all the supposed "Gothic Kingdoms" - sported historians during this period who endeavoured to portray each original constitution as a limited monarchy founded by contract.⁹⁴

As well as being consistent with some royalist historical argument, upholding the contractual origin of government by no means implied rejecting the divine origin of royal power. Robert Ferguson, for example, argued that all government was ordained by God, but he insisted that this was for the purpose of the public well-being only. Thus rulers, he claimed, were "under Pact and Confinement" to God to rule in the public interest and this constituted a sort of higher contract which no human laws could alter. Human contracts, then, simply "prescribe and define what shall be the measures and boundaries of the publick Good, and unto what Rules and Standards the Magistrate shall be restrained".⁹⁵ The distinction between God's ordaining government in general and human freedom to establish particular 'forms' was widely affirmed by contract theorists. It permitted them to argue from divine right as much as any

of the "Jure Divino" men.⁹⁶

Nor did contract arguments necessarily imply a denial of some patriarchalist arguments. Most writers did not enter those definitional controversies which were of such concern to Locke, Tyrrell and Sidney.⁹⁷ The distinction between a father's 'economic power' and a magistrate's 'political power', by means of which Locke, Tyrrell and Sidney 'disproved' Filmer's patriarchalism, hardly featured in the debates about the Revolution. Contractarians seemed prepared to argue (if the need arose) that the first government in the world was a "Genarcha",⁹⁸ or a patriarchal government,⁹⁹ but that this government was transformed into a contractual government either "insensibly"¹⁰⁰ or when the original patriarchs died or were overpowered,¹⁰¹ or when men stopped living for hundreds of years at a time!¹⁰²

Whether or not the English government was founded by a contract was subject to fiercer dispute than whether any government could legitimately be founded by contract. But even in this controversy there was no simple relationship between adopting contractarian political principles and defending the deposition of James II. A Jacobite pamphleteer, one Charlwood Lawton, for example, argued in 1691 that "our oaths, and the original contract of our law-books, bind us to restore the King."¹⁰³ And in his Letter formerly sent to Dr. Tillotson, and for Want of an Answer made publick (1690?) he outlined that original contract as implying that the English monarchy was hereditary, that the king could do no wrong, and that he was not accountable to the people!¹⁰⁴

Robert Jenkin argued to a similar point by means of an analogy between the contract of government and a marriage contract. The 'original contract', he argued, is a contract made before God and thus it is eternally binding. Like a marriage contract it is sealed with the command "whom God hath joyned together, no Man may put assunder".¹⁰⁵

And although Jenkin was prepared to allow the possibility of divorce through mutual consent, or a "mutual Relaxation", his point in reference to 1688 was that even "If the People did set up Kings by Consent and Compact, this is no argument that they may depose them."¹⁰⁶

All of the references to contract that we have noted so far were, in one way or another, concerned with constitutional law. Even Robert Jenkin's account of the eternally binding contract was intended to describe the actual constitutional relations between the people of England and their sovereign. But this understanding of contract in terms of constitutional law seems very different from the idea of contract presented in the most famous political treatise to be published in England during the controversies over the status of the Revolution. In John Locke's Two Treatises of Government (1689/90) the "original Compact" appears 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".¹⁰⁷ The purpose of the Treatises was not, according to Locke himself, to describe or defend the

particular provisions of the English constitution and the work only very rarely refers to specific positive laws. Locke's argument was pitched at a much more general level than most of the Revolution books and pamphlets, and the questions which he considers were similarly of a much more abstract kind.

Certainly Locke's Two Treatises were published as a contribution to the disputes over the status of the William and Mary regime. In his Preface Locke expressed the hope that his arguments would be "sufficient to establish the Throne of our Great Restorer, Our present King William".¹⁰⁸ Yet such a hope, initially at least, was vain. Locke's work was not an immediate success and in the closing years of the seventeenth century the name of Locke did not feature very prominently amongst the 'authorities' of pro-Revolutionary writers.¹⁰⁹ One main reason for this apparent lack of success was that the Two Treatises were untypical of the political literature of the day. The arguments of the Treatises were not unique - they were in fact paralleled in works by Pufendorf, Sidney and Tyrrell. But on the one side Locke's work was published anonymously and enjoyed none of the inevitable respect accorded works published by such a famed scholar as Pufendorf, and on the other side the Treatises contained hardly a reference to the fierce controversies over the historic rights and liberties of Englishmen which engaged much of the attention of Sidney and Tyrrell and indeed practically every political

polemicist in late seventeenth century England.

There seem, then, good prima facie reasons for believing that Locke's Contract Theory did not exhibit the same understandings of 'contract' as those contained in most of the Revolutionary literature. But the difference between Locke's 'contract' and the constitutional law 'contracts' cannot be adequately understood in terms of the difference between a Social Contract and a Contract of Government.¹¹⁰ The questions with which Locke was concerned were different from those of the constitutional controversialists. Where they wanted to know what the particular rights of Englishmen were, Locke wanted to know the natural rights of man; where they wanted to explain the origin of the English constitution, Locke explained the origin of legitimate government; where they questioned the limits of the monarch's or parliament's power, Locke enquired into the necessary limits of political power; and where they wanted to know if Englishmen had a legal warrant to rid themselves of James II, Locke wanted to know if there was a natural right of resistance. Certainly Locke was concerned to explain the origin of society and the controversialists were not, and certainly Locke did not write of a Contract of Government. But it would have been quite consistent with the sort of enquiry that Locke undertook if he had referred to a Contract of Government - after all, Pufendorf and Sidney (writers who Locke himself believed had written arguments of a similar type to his

own)¹¹¹ had spoken of this governmental contract. The difference between Locke's understanding of 'contract' and the constitutional law understanding cannot be explained, then, by means of a 'mechanical' division between writers interested in a Social Contract and those interested in a Contract of Government. And the misleading effects of any such attempt are compounded if it is believed that speculation about a Contract of Government and speculation about a Social Contract must inevitably be construed as different parts of a single Contract Theory.¹¹² For this 'mechanistic' understanding of contractarianism completely misses the crucial differences of types of questions asked and 'level' of arguments that we have just noted. The Contract of Government to which Pufendorf refers, for example, is invoked in an attempt to explain the nature of government and political obligation. It does not lay claim, as does the Contract of Government of many of the controversialists, to a positive law status and it does not pretend to a specifiable historical reality. But here we are already anticipating the results of an enquiry that has not yet been described.

So far we have encountered a bewildering number of different uses of the word 'contract' in the political discourse of the late seventeenth century. This variety of uses highlights the inadequacy of conventional accounts of the history of contract thinking. Yet our attempt to understand what Englishmen during this period meant when

they referred to a 'contract' in their political writings should not end with this confusion of meanings. Somewhat paradoxically it is precisely the looseness and variety of understandings of 'contract' in wideranging types of political utterance that adds point to pursuing our enquiry. Englishmen in the late seventeenth century clearly felt that political capital could be made by introducing the notion of 'contract' into their political writings. They knew that they were addressing an audience accustomed to the terminology and ideas associated with that notion. Thus our endeavour to portray the late seventeenth century understanding of the notion must elucidate the associations of ideas which an appeal to the civil contract might have been expected to evoke and to outline the philosophical context which made that appeal and its associations plausible.¹¹³ If we concentrate exclusively on what 'contract' denoted in political argument then we are faced by bewildering confusion. A significant and interesting pattern of meaning, however, does emerge if we concentrate upon the various connotations of the term.

I have emphasised that appeals to contract in constitutional debate occurred in arguments intended to establish utterly conflicting conclusions. But despite the conflicting intentions of their authors, the references to contract shared one obvious characteristic: the contract originated a particular constitution and continued to enjoy

the status of positive constitutional law. I have noted also that references to contracts occur in works of constitutional history. These contracts, too, supposedly began a particular constitution and established supposed fundamental rights and duties which continued as the legal birthright of the citizens of the country concerned. And finally I have noted that an idea of contract was invoked in a very different sort of argument from the constitutional: a seemingly philosophical argument into the nature, necessity and limits of society, government and political power.

In the rest of this work I shall argue that these did, indeed, represent two very different understandings of the word 'contract'. The one idea of contract - the "Constitutional Contract" as I shall call it - formed part of a legalistic approach to the understanding of politics. References to it were particularly identifiable by the complex of ideas associated with it: the ideas, that is to say, of Fundamental Law, Fundamental Rights, Fundamental or Original Contract and Ancient Constitution. The other idea of contract - the "Philosophical Contract" - belonged to a more philosophical understanding of the nature of politics. It too, was easily identifiable in terms of the distinctive complex of ideas associated with it: but this time it was ideas of State of Nature, Natural Law, Natural Rights, and Original or Social Contract. But although these two contracts were distinct from one another, and although each contract had its own peculiar theoretical

framework, they still did share certain features in common. And the recognition of these common features helps to explain the appearance of a third type of contractualist thought evident in the political literature of the late seventeenth century. The understanding of contract exhibited in this third type of argument was distinguished by the attempt to 'integrate' the ideas and arguments associated with the other two contracts. By doing this, the third type of contractualist thought - the "Integrated Contract" as I shall call it - provided a theoretical justification for reconciling the requirements of English law with what were believed to be the dictates of reason, morals and religion.

There most certainly was not, then, a single Contract Theory subscribed to by political writers in the late seventeenth century. Nor was there a single, or two-part idea of contract. Understandings of contract during our period were much more complex than this. But precisely what these understandings were will become clear only after we have examined the uses, arguments and theoretical underpinnings associated with references to the "Constitutional Contract", the "Philosophical Contract" and the "Integrated Contract". I will begin by examining the Constitutional Contract Theory.

PART II

CONSTITUTIONAL CONTRACTARIANISM

CHAPTER III

THE CONSTITUTIONAL CONTRACT THEORY

What I have called 'Constitutional Contract Theory' was 'invented' in late seventeenth century England. Its origin, character and coherence have been entirely overlooked by historians of political thought. And yet this theory seems to underpin very many appeals to 'contract' in late seventeenth century constitutional debate. At the very least, the full force of such appeals to 'contract' can only be appreciated in the light of this theory. The clearest and most complete exposition of Constitutional Contract Theory is to be found in the writings of the constitutional historian and lawyer William Atwood. I shall examine Atwood's work in some detail in the following chapter, but it will be helpful at this point to note briefly the principal elements of his theory. We may then proceed and consider the strands of speculation that were combined within the theory and the circumstances in which that 'combination' took place before returning to Atwood once again for a more detailed scrutiny of the theory and the 'uses' to which it was put.

According to Atwood, questions about the requirements of the English Constitution should be settled by

constitutional law alone. This assertion, which seems far from astonishing, was, in fact, quite a pointed remark in terms of the contemporary disputes. It was aimed at the contributions both divines and laymen were making to those disputes with supposedly constitutional arguments drawn from natural or divine law. Throughout his career Atwood was thoroughly sceptical about the practical political usefulness of natural law arguments and he shared this scepticism with several other constitutional writers of his day. His contract theory, then, did not contain any substantial references to natural law, natural rights or states of nature. Instead, it purported to be a legally and historically valid account of the English Constitution. In summary, his theory was the following:

At some time in the distant past, or to be precise, at the time of the Saxon Heptarchy, our Saxon ancestors contracted together and set up fundamental laws to secure their liberty and property. They agreed to set up a monarchy and chose the monarch. The monarch, in turn, agreed to maintain the fundamental laws and any subsequent ones 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 him if he kept within the law. Thus, Atwood argued, "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."¹ This 'Ancient Constitution' Atwood called 'Gothic'. The Saxons were descended from the Goths - a freedom-loving people who, in the earliest times, had spread across the whole of Europe and Scandinavia setting up the only form of constitution consistent with liberty: mixed or limited monarchy. The Saxons, then, transplanted their Gothic mixed monarchy into post-Roman Britain and this was the Ancient English Constitution. And the English, more than any other of their European neighbours had remained faithful to that original constitution. Post-Saxon constitutional history was interpreted in the light of this belief and considerable effort was spent in attempting to show that no substantial constitutional change had occurred for some eleven centuries! More specifically, this effort was spent on the issues of the Norman Conquest and the origin of the House of Commons. The Norman Conquest, it appears, was not a conquest at all. And the House of Commons was a distinct part, though possibly not as a separate institution, of the original Saxon constitution.

The Ancient Constitution of England, then, was established by contract and followed the Gothic model. The coronation oath embodied the original contract, or at least it was a representation of it. This interpretation of the original contract gave rise to, and provided coherence for, several interesting arguments. It provided a way

of relating the Ancient Constitution to the contemporary, seventeenth century constitution, since all monarchs were required by their oaths to swear to keep the laws of their predecessors, and so on back to the original laws. Here was one reason, but by no means the only reason as we shall see, why historical enquiries into Saxon and Feudal law were of considerable practical importance to political argument in the late seventeenth century. Furthermore, the original contract became of much greater general significance than it could have done had it simply referred to the past event which created the Ancient Constitution. The original contract no longer referred only to that past event. It was also, and much more importantly, the "express Original and continuing Contract",² the process whereby the consent of the governed was made a legal requirement for legitimate governmental action. The theory also allowed considerable flexibility in interpreting what the fundamental laws enjoined. In the absence of any historical records concerning a constitutional question, or as an aid to interpreting the 'true meaning' of any such records, it was relevant and acceptable on this theory to argue from the supposed intentions of the rational and freedom-loving original contractors!

The Fundamental Laws designed by our Saxon ancestors defined and guaranteed their fundamental rights and liberties. According to Atwood, the whole body of these laws and liberties, together with such subsequent ones as were

created to further the 'intentions' of the original contractors, constituted the Fundamental Constitution. The most interesting thing about this Fundamental Constitution was not so much the particular provisions that it was supposed to have contained, but rather its barely concealed element of rationality. It provided an extraordinary 'legal' principle of constitutional interpretation. Since the Fundamental Constitution of England was designed by our ancestors, and since our ancestors were rational men, it followed, Atwood argued, that they would never have designed anything that could be harmful to themselves or their descendants. He admitted that they would not have been able to foresee the several turns of state that occurred in later ages, but he argued that they did make constitutional provision for dealing with them. Again, they must have done this, he felt, since they were rational men. They neither insisted that all the laws they made should be accounted fundamental laws, nor that all fundamental laws should remain unalterable. He thought it was certainly true 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."³ But this restraint on constitutional change he considered only, in the last resort, applied to what he called the "Chief Fundamental Law", the law that Salus Populi Suprema Lex esto.⁴ This law, the most important of all the

fundamental laws, the "Foundation" of the original contract as he called it, was "the scope and end of all other Laws, and of Government it self".⁵ It was the test through which all laws and public actions must pass before they could be accepted as valid according to the constitution. This, indeed, was an extraordinary principle of constitutional interpretation. Indeed, it was not 'constitutional' at all. Law books, records, history, all were ultimately subordinate to the fundamental law of Salus Populi.

We need do no more than note the paradox involved in this theory of English constitutional law. Atwood insisted that he wrote in accordance with the constitutional law of the land. He insisted that he could justify the various causes he believed in by reference to historical and legal testimony alone. But he ended by asserting that it was only by being in accord with the vague criterion of the 'public well-being' that a rule or action could properly be described as constitutional.

Not only did Atwood believe that his Contract Theory was legally valid, however, he believed it was historically accurate as well. Countless critics have ridiculed contractarians for holding this second belief. But Contract Theorists of the late seventeenth century believed they had at least one piece of irrefutable historical evidence of the English 'original contract': The Mirror of Justices.

The document known as The Mirror of Justices was first

noted in 1550 by Plowden who believed it was written before the Norman Conquest. It was circulated in manuscript form through legal circles and Coke drew many arguments from it. He, too, believed that it was mainly pre-Conquest in origin, but thought that Andrew Horn had added to it at the time of Edward I. The document was first printed in 1642 and was translated into English in 1648. It was, however, a fake. According to F.W. Maitland it was probably written at the end of the thirteenth century by Andrew Horn from old manuscripts and his own imagination. Nonetheless the document gained considerable reputation as an original and authoritative source of Saxon constitutional history and law.⁶

In Book I Chapter II of the document, entitled "Of the Coming of the English", there was recorded an event which could be interpreted as the English 'original contract'. After the Saxon Conquest, it appeared, the Saxons,

Of which folk there were as many as forty sovereigns, who all aided each other as follows. They first called this land England, which theretofore was called Britannia Major. And they, after great wars and tribulations and pains long time suffered, chose from among themselves a king to reign over them and to govern the people of God and to maintain, and defend their persons and goods by the rules of right.

And at his coming they made him swear that he would maintain the Christian faith with all his power, and would guide his people by law without respect of any person, and would submit to justice and would suffer right like any other of his people. And after this the Kingdom became heritable.⁷

We will meet these sentences again in the writings of Atwood, Tyrrell and Allix, where they appear as historical

evidence for the English 'original contract'. We shall also encounter references to the Saxon contract and the Mirror in several other contractarian pamphlets. But it is interesting to note here just how informal the late seventeenth century understanding of 'original contract' might be. The passage from the Mirror indicates that there was nothing very 'original' about the 'original contract' and that the contract itself was not a very 'democratic' affair. Government was not originated by this Saxon contract since "forty sovereigns" already existed. All that was achieved was the constitutional unification of Saxon England. It was not the body of the Saxon people who contracted with their king - only the forty sovereigns were involved. This undemocratic feature of the original contract however, did not contradict its radical implications. The insistence that the king "submit to justice" and "suffer right like any other of his people" was certainly no less repugnant to a divine right monarch for all that. Indeed most contractarians in the late seventeenth century seem to have restricted their views of who the original contractors were to a section of the population only. To Atwood, Tyrrell and Pufendorf, the contractors were 'the fathers and masters of families', or "the proprietors, especially of land";⁸ to Robert Atkyns the term "the People" referred most often solely to "the Freeholders" who were "the true Proprietors of the Nation and the Land";⁹ and many of Locke's arguments seem to presuppose a similarly limited

view of the meaning of the term "the People".¹⁰ The significance of these restricted understandings of 'the people' in contractualist writings stems from their considerations of who had the right to judge when the terms of the contract had been broken. But I will return to this point later.

So far I have sketched the main outlines of Atwood's version of the Constitutional Contract Theory. It is apparent that that theory combined elements of three distinguishable traditions of seventeenth century constitutional thought: the traditions of the Ancient Constitution, of Gothicism,¹¹ and of one kind of Contractarianism. Speculation within the first of these traditions has been brilliantly examined by Professor J.G.A. Pocock.

In The Ancient Constitution and the Feudal Law (1957) Professor Pocock presents a study of the peculiarities of constitutional historiography in the seventeenth century. One of the principal modes of constitutional argument during the century was historical. Within this field of historical study and argument, two main schools of thought opposed one another. On the one side were the 'common lawyers' who believed that the English Constitution was immemorial; on the other side was a much smaller group of dissentients (like Spelman and Brady) who believed that the constitution had been at least considerably modified by the Norman Conquest and the introduction of Feudal Law. The Common

Law view of the English Constitution, to which the Constitutional Contractarians owed most, saw constitutional law as customary law, and custom as 'immemorial and unchanging'. In these terms Professor Pocock relates the history of seventeenth century constitutional historiography from two, connected standpoints. The one is the rise of an increasingly 'historical consciousness', centring around the issue of the Norman Conquest as a break in the continuity of 'unchanging custom'. The other is the creation of a polemical situation through partizan use of the results of historical enquiry. The notion of 'immemorial custom' was retained and used by the advocates of limited monarchy. Their arguments were of the form: 'the rights and duties of citizens vis-a-vis the monarch have existed "time out of mind", they are immemorial custom and therefore bind the present'. The notion of 'discontinuity' was utilized by the advocates of strong monarchy, with arguments of the form: 'all laws and thus legal rights are the product of the King's will, they are the grants and concessions of a conqueror and are therefore revocable at pleasure'.

By the time of the Exclusion Crisis these debates had firmly crystallized around the critical issues of the Norman Conquest and the position of the House of Commons in the pre-1066 period. A Tory group (championed by Dr. Robert Brady) was asserting that William I had really conquered England and had introduced the system of Feudal Law that

radically altered traditional Saxon Law. The House of Commons, this group claimed, was no more ancient than the reigns of Henry III or Edward I. In the face of these assertions, a Whig group (championed by William Petyt) sought to reaffirm that William I neither conquered England nor altered the legal system. William had a claim to the throne made good by trial of arms, they insisted. He was elected by acclamation and swore to maintain the ancient laws in his coronation oath. Some of his actions contradicted his oath and were therefore illegal but the damage was rectified by Henry I. The House of Commons, they also insisted, did not owe its being either to rebellion against, or to the concession of, a king ruling by right of conquest. It had existed, although perhaps not as a separate body, 'time out of mind'. The peculiarities of the historical arguments employed in these debates will engage our attention at several subsequent points in our examination of late seventeenth century contractarianism. At the moment the general contours of Ancient Constitution argument will suffice to identify one of the main traditions from which Constitutional Contractarianism drew its inspiration.

A much more amorphous tradition of constitutional speculation than the Common Law view located the origin of the Ancient Constitution in the Gothic past. The specific provisions of the Gothic Constitution might be precisely the same as the immemorial customary law of the common lawyers' ancient constitution but the origin was

different. Instead of being an indigenous growth, the Gothic Constitution was invented by the Goths and transplanted into England by the Saxons who, in their turn, had been educated by, or descended from, the ancient Goths. According to this tradition the whole of Europe had been over-run by Gothic peoples as the Roman Empire declined and thus the first post-Roman constitutions of Europe had been of the same kind. Frequently, as we shall see, this sort of Gothic history of Europe was connected to biblical accounts of the peopling of Europe after the Flood. The Goths were often regarded as the direct descendants of the sons of Japhet and thus their political arrangements were regarded as the first ever to have existed. The post-Roman spread of Gothicism was thus a restoration of the original European constitutions.¹²

By the late seventeenth century the term 'Gothic constitution' was very widely used to describe a good, orderly and just form of government which operated by balancing elements of monarchy, aristocracy and democracy. 'Gothic Constitution', 'mixed monarchy', 'limited monarchy' and 'a balanced government' were thus interchangeable terms in much of the political argument at the end of the seventeenth century. And references to the English Constitution as 'Gothic' appear in a variety of polemical and historical writings intermingled with arguments from 'contract' and 'immemorial custom'. In short, by the late seventeenth century 'Gothic thought' appears to have

lost that distinctiveness that led Professor Pocock to insist that it was sufficiently different from "common-law ... thought" to be excluded from his account of the latter.¹³

The third tradition of constitutional speculation which contributed to the development of Constitutional Contract Theory, was that of contractarianism itself. The writers of the late seventeenth century did not invent the idea that governments originated by contract. The republication of works containing this sort of idea by authors like Robert Parsons, George Buchanan, William Allen, Philip Hunton, and John Milton, as contributions to the political debates of the 1680s and 1690s serves as a constant reminder of this. But what was most obviously different about the majority of arguments from contract in the constitutional debates of the late seventeenth century was that they took place within the context of the Ancient Constitution tradition. It appears that around 1680 the interpretation of the Ancient Constitution as based on 'immemorial custom' was replaced by a view of the Ancient Constitution as originated by, and continuing to embody, an 'original contract'. The critical points in the Ancient Constitution debate concerning the Norman Conquest and the origin of the House of Commons remained as contentious as ever. But the supposed provisions of the Ancient Constitution were significantly modified. The 'common law' view of the Ancient Constitution had maintained that the monarch alone was not sovereign. Supreme power

was shared by King, Lords and Commons. The law guaranteeing this partnership was 'immemorial customary law'. None of these institutions could lay claim to being 'author' of this law and thus none of them derived their being from the will of any other. In the 'original contract' view of the Ancient Constitution, on the other hand, it could be claimed that all the institutions of King, Lords and Commons depended upon the will of the citizens. The constitution had been designed by its citizens and could be changed by them. The reasons why the 'immemorial' Ancient Constitution lost ground to the 'original contract' Ancient Constitution must be sought in the political conflicts from the Exclusion Crisis to the 1688 Revolution. I will consider first of all the general character of the political arguments surrounding these conflicts. I will then proceed to examine both the evidence for the transition in Whig constitutional thought from the 'immemorial' Ancient Constitution to the 'original contract' Ancient Constitution and the reasons for it.

During the decade from the Exclusion Crisis to the 1688 Revolution constitutional argument in England was dominated by the issues of the Succession and the powers of the monarchy and the House of Commons. The tracts, pamphlets and books which contributed to these controversies were written against the background of an extraordinarily bloody and violent political experience and the concepts and types of arguments employed in them all had a long history. The memory of violent Civil War helps to explain

the apparent conservatism that I have already noted as characterizing most parliamentary tracts. But the continued use of traditional political concepts and arguments (most of them with fairly specific connections with the Civil War and Protectorate) is more problematic. The almost universal disavowal of these associations, even by those writers of the 1680s who counselled active resistance to Charles II and James II, is itself evidence of both how deeply the experience of the recent past affected political argument in the 1680s and of how dangerous the employment of certain arguments and concepts might be. The fate of an Algernon Sidney only served to underline the need to remove any associations with regicide from an author's concepts and arguments.¹⁴

Yet this fear of repression and the apparently genuine abhorrence of civil disorder, which both tended to at least an outward conservatism in the political debates, was checked by a very real and intense fear of popery. Thus the demands for constitutional innovation to guard against a Catholic succession which the fear of popery engendered, were expressed in terms that denied any desire for innovation. Indeed, practically every pamphleteer and tract writer of the 1680s felt it necessary to dissociate himself from any intention to alter the 'ancient frame of the English Monarchy' or to re-institute a Commonwealth. Even those very few authors, like Henry Neville and Walter Moyle, who selfconsciously wrote in the English Republican tradition

were concerned to advocate the virtues of limited monarchy.¹⁵ In general the various participants in each constitutional dispute chose to attack their opponents as innovators and to defend their own cause as according with law, history, reason and religion. This was the case even though, as we have seen in the debates over the 1688 Revolution, the cause defended might involve breaking known statute laws or breaking the Oaths of Allegiance.

A final general point that requires emphasis here concerns the form of the practical political arguments that we are examining. It is interesting to note that in practically all save the most abusive and scurrilous of political pamphlets, writers attempted to argue and 'prove' their case by reference to a single set of conventionally accepted general authorities. As a result, the literature of the period portrays a remarkable formal uniformity. Almost every writer attempted to show that his arguments represented the most consistent case according to religion, law, history and reason.¹⁶ It is in terms of the various 'weights' attached to these separate authorities, and the supposed inter-relationships between them, that many of the most significant differences in the political theories of the age can be seen. The uniformity that convention imposed upon political argument serves to highlight the distinctions that writers endeavoured to make. A close attention to the details of constitutional argument in the 1680s reveals the striking transition in Whig theory

from the 'immemorial' Ancient Constitution to the 'original contract' Ancient Constitution.

In 1684 we find Robert Brady, M.D., one of the most famous contemporary defenders of royal power, still describing his opponents as divided into ^{two} groups - original contract theorists and 'immemorial' Ancient Constitution theorists. His assertion was that

Two sorts of Turbulent Men there are in the World, who under plausible Pretences have appeared for the Liberty of the People ...

One of these sort of Men preach to the People, That the Origin of all Power and Government is from Them; That Kings or Magistrates derive their Authority from them; That they have none, nor more than what they give them ... These Men are Pretenders to Platonic and Eutopian Governments, such as never had a Real Existence in any part of the World, nor never can be practicable amongst any People, or in any Nation whatsoever ...

The other sort are such as hold forth to the People, Ancient Rights and Privileges, which they have found out in Records, and Histories, in Charters, and other Monuments of Antiquity; by these Men the People are taught to prescribe against the Government for many Things they miscal Fundamental Rights.¹⁷

Brady was one of the most influential writers on the royalist side and it is significant that he should have divided the opposition into these clearly defined types. He was particularly concerned to refute the arguments of the second sort of "Turbulent Men" and the opponents he singled out were William Petyt, William Atwood and Edward Cooke.¹⁸ All three were concerned to defend parliament against what they believed were the illegal encroachments of an increasingly powerful monarch. The arguments they

used were initially very much in the style of Brady's second category. But, as I have suggested, Atwood was soon to become an exponent of the Constitutional Contract Theory - a theory which combined arguments from both of Brady's types. Edward Cooke's arguments, especially in his Argumentum Anti-Normannicum (1682), were mainly of the 'fundamental rights' kind, but they also contained interesting references to the contractual origin of the English government and to the kings of England deriving their authority from the English 'people'. And William Petyt, Atwood's tutor in the Inner Temple and defender at least of his pupil's early writings, portrays in his manuscripts an increasing concern throughout the 1680s with questions about the origin of government and a preference for Hooker's explanation of these matters.

What was it then, that led these writers and others to modify their defence of parliamentary rights? What occasioned their increasing reliance upon arguments from 'the original contract' rather than 'immemorial custom'? Three factors appear relevant to account for it. First, there was the serious attack upon the notion of 'immemorial custom'. Second, there was the challenge to parliamentary rights created by the republication of Filmer's writings in 1679-80 and their adoption in the royalist cause. And third, there was the modification in the claims of the parliamentarians of the 1680s from a demand for the balanced constitution to a demand for the legal sovereignty

of parliament.

In the Ancient Constitution debate the notion of custom as 'immemorial and unchanging' was attacked as ridiculous. William Petyt noted this attack and attempted to counter it in two drafted, but unpublished, replies to Robert Brady during the late 1680s. Petyt quoted Brady's argument as being:

What! were the Commons of England, as now Represented by Knights, Citizens and Burgesses, Ever an Essential Constituent Part of the Parliament,

1. From Eternity?
2. Before Man was Created?
3. Or have they been so Ever since Adam?
4. Or Ever since England was Peopled?
5. Or ever since the Britains, Romans, and Saxons inhabited this Island?
6. Certainly there was a time when they began to be soe represented.¹⁹

Petyt was prepared to accept that there must have been a time when the House of Commons was originated. But he refused to agree with Brady when the latter insisted that the Commons first became a part of Parliament in "Anno 49. H. 3" (1265 A.D.). The Commons themselves, Petyt argued, regarded their presence in Parliament as dating from 'time immemorial' and that was good enough testimony for him.²⁰

This rather weak reply to Brady's criticism did not imply however, as a recent commentator has suggested, that Petyt was only concerned to date the Commons' participation in Parliament before the coronation of Richard I (3rd September 1189) - "the date at the common law when legal memory began".²¹ "Immemorial" meant far more to Petyt and the other participants in the Ancient Constitution debates than simply pre-1189. As the same commentator

notes, Petyt was interested in finding out the constitutional arrangements of Norman and Saxon England and in 'proving' that the Norman Conquest had not altered the ancient English constitution. He believed that one could only conjecture about the actual origin of that constitution "from some footsteps remaining in historyes and Records."²² But had he simply been concerned to locate the origin of the Commons in the pre-1189 constitution then the great debate about the Norman Conquest and the legal continuity of the Saxon and Norman governments would have been irrelevant.²³

The substitution of an original contract for immemorial customary law as either the historically 'provable' or the 'conjectured' origin of the English constitution, avoided the problems that Brady had pointed out to Petyt. It did this by replacing the idea that the Commons had 'always been' a part of Parliament with the notion that Parliament had been established at a definite time in English history with the Commons as an indispensable part of it. Thus the force of Brady's assertion that the Commons must have originated at some time could be recognised, whilst at the same time his further argument that the Commons must owe their rights solely to the will of the monarch could be denied. In the constitution begun by contract, neither King, nor Lords, nor Commons owed their right to participate in government to any of the others, but all owed their existence to the will of the 'people'.

As I have already suggested, William Atwood thoroughly

modified his account of the English constitution along these lines during the 1680s. William Petyt, however, did not adopt the Constitutional Contract position in its entirety. The words 'contract' or 'compact' rarely occur in Petyt's writings but during the 1680s he did concern himself with 'conjectures' about the origin of government. He adopted arguments clearly drawn from Hooker to justify the 'most plausible' conjecture and he adopted arguments about the 'Germanic' (or 'Gothic') origins of the English constitution - arguments that were strongly 'flavoured' with contractualist ideas.²⁴

So far I have argued that reference to an original contract could overcome some of the more immediate difficulties involved in arguing from an ancient constitution composed of immemorial customary law. The existence of some historical and legal testimony (like that contained in the Mirror of Justices) apparently referring to such an original contract made the change all the more acceptable. These considerations go some way in accounting for the popularity of the idea of an original contract to writers like Atwood, Cooke, Hunt, Atkyns, Allix and Tyrrell - all of whom had had at least some legal training and had engaged in legalistic justifications of the position of the House of Commons in the English Constitution of the 1680s. Nevertheless, many of the historical difficulties involved in the Common Law view of the Ancient Constitution could not be overcome simply by replacing the original contract for immemorial custom. The principal of these

was the Norman Conquest.

If England had actually been conquered in 1066, as Brady and a mounting body of evidence insisted, then two important consequences seemed to follow. First, there appeared no alternative to the view that the constitution depended solely upon the will of a conqueror and that it was therefore an absolute monarchy in which the rights of parliament and subjects could be revoked at the monarch's pleasure. Secondly, there could be no relevance in discussing the pre-Norman constitution (i.e. the constitution that was claimed to be based on contract) because William I had secured a total change in government. The Constitutional Contractarians were concerned to deny both these consequences and this involved denying that the Norman Conquest was a conquest at all. But although this was necessary if the Saxon Constitution were to be shown to have survived the coming of the Normans, the problem still remained: why not establish the relevant original contract for the founding of the seventeenth century constitution after 1066 and thus avoid the problems of the Norman controversy altogether? Indeed, three possible locations featured prominently in the historical debate of the time. The first was the earliest date that the Bradyite historians would allow the House of Commons to have existed, i.e. the 49th year of Henry III's reign (1265 A.D.). The second was Magna Carta, recognised by all sides as a crucial document in English constitutional history. And the third was the Norman Conquest²⁵ itself since, once again, all sides agreed

that some change had occurred in 1066 although they disputed the proper significance of it. Why, we might ask, were none of these events 'turned into' the original contract?

There appear to be several possible answers to this question and in noting them some important features of the Constitutional Contractarian position become visible. First, the constitution would become that much more modern and thus its strength, thought to be derived from having stood the 'test of time', would be that much reduced. Secondly, to have dropped the Norman Controversy would have involved either repudiating those arguments which had hitherto formed the basis of their legal justifications of the House of Commons or of relegating them to insignificance. In both cases the Constitutional Contractarians could hardly have disguised their loss of one constitutional argument and their consequent (or apparently consequent) shift of grounds. Thirdly, the alternative dates to the Saxon Contract could not offer the same seemingly unequivocal historical evidence of a contract as that contained in the Mirror of Justices. But perhaps most important of all was the fact that if any of these other events were taken by the defenders of the House of Commons as major turning-points in English government, then the legitimacy of that government itself was open to question. For all these events were preceded by, or involved, struggles: struggles in defence of the Ancient Constitution the champions of the Commons claimed, struggles for innovation according to

their opponents. William Atwood made the general point here when he defended Petyt's Ancient Constitution against Brady's criticisms:

[Dr. Brady] seems to trample on the best Constitution, our Government itself, under Colour of its being New in the 49th. of Hen. 3 when it arose out of the indigested Matter of Tumults and Rebellion; and so not having a legitimate Birth, as not born in Wedlock between the King and his People; it may be turn'd out of Doors, by the help of that Maxim.

Quod initio non valet, tractu temporis non convalescit.²⁶

We have seen that as the basis of a constitutional theory, the replacement of 'immemorial custom' by 'contract' did overcome some historical problems encountered by the Common Law view of the Ancient Constitution. But problems of historical criticism are not in themselves sufficient to explain the timing of this transition in Ancient Constitution theory. In order to provide a fuller explanation, attention must be paid to two further aspects of the political debate during the 1680s.

The first concerns the republication of Filmer's works in 1679-80. Appearing at the height of the Exclusion crisis, the new edition of Filmer's writings added a deeper dimension to the political debate and exacerbated the conflict. The Tory case became openly an attack upon the position of Parliament. Filmer's work seemed to prove that from the very nature of society political power was monarchical, that parliaments were the gifts of kings, and that, in the event of conflict between the king and

Parliament or king and law, the monarch must be supreme. Monarchy and hierarchical society were natural. The natural was ordained by God. Thus whoever denied the legitimacy of either unfettered monarchy or hierarchical society was guilty of denying God's will.

These arguments presented the Exclusionists and all other protagonists of rights against the monarch with serious theoretical opposition. A rethinking, or at least a reiteration of more basic political principles was necessary. If government had 'always been', then given the almost universal belief in the validity of Biblical history, there seemed no alternative but to concede a fundamental point to Filmer - Adam's authority was of a political nature. Thus monarchy was both the first form of government and directly created by God. But if this were conceded then most of what Filmer had built upon it would also have to be admitted. Government could no longer be held to rest on consent and could only be legitimate if it were an absolute monarchy. Filmer's conclusions would be almost 'inescapable' because all participants in the debate shared a number of fundamental beliefs.

All sides agreed, for example, that what government was like at its origin should be the standard against which governments in the present should be judged. If the first form of a government were markedly different from its present form, then the present constitution was illegitimate. This was how practically all arguments about legitimacy

were formulated. (In fact, as I shall suggest later, the criterion of legitimacy was logically prior and history was read in the light of that criterion.) Everyone acknowledged also that if God had revealed his will regarding the form of government necessary for earthly society, then that will had to be obeyed. But Filmer's argument had shown that the first government in the world had been an absolute monarchy tempered only by Adam's paternal care, and that this was according to God's will. Thus all should concede that present-day governments, including the English, were really absolute monarchies.

The obvious theoretical escape from this chain of reasoning lay in denying first that government 'had always been', and secondly that God had revealed a preference for monarchy. The first of these denials involved the rejection also of ideas of 'immemorial custom'. And current ideas about the contractual origin of government could serve as a convenient substitute for immemorial origins, and as the basis from which to reject both the Filmerian ideas that Adam's authority was political and that God had therefore authorised absolute monarchy.

The republication of Filmer's works then, by adding a deeper dimension to the constitutional controversies of the Exclusion crisis and by forcing the pro-Exclusionists particularly to re-examine the basis of their arguments, provided a further impetus for the adoption of constitutional contract arguments. But the republication of Filmer was

also associated with the second aspect of the political debates of the 1680s which helps to explain the increasing attraction of the Constitutional Contract. This was the increasingly radical demands that were made by the upholders of parliamentary rights against the king. The timing of the republication of Filmer's political writings does not seem to have been purely fortuitous. They appeared at the height of the Exclusion controversy when the House of Commons seemed on the verge of successfully barring Charles II's Catholic brother James from his constitutional right to succeed to the throne. The literary resurrection of Filmer seems to have been a deliberate act of policy intended to bolster the Royalist case. The work carried royal approval and the official journal, the London Gazette, strongly recommended it.²⁷ But by adopting Filmer as their champion the Royalists committed themselves to attacking parliamentary rights to a co-ordinate legislative power with the king. Brady's arguments in defence of the English monarch were certainly by implication a denial of parliamentary rights to participate in the exercise of legal sovereignty. But Filmer's arguments were explicitly so.²⁸ Brady's arguments did not necessarily involve the rejection of the idea that the seventeenth century English Constitution was effectively a Mixed Monarchy.²⁹ But to Filmer the idea of a "Limited or Mixed Monarchy" was a contradiction in terms.³⁰

The Common Law view of the Ancient Constitution could

be employed to combat royalist claims for the legislative supremacy of the monarch, but it could not accommodate arguments for parliamentary supremacy. And yet parliamentary opposition to the king during the 1680s approached closer and closer to this demand. As the royalist case for the hereditary monarch became openly an attack upon the legislative authority of Parliament, so the Whig Exclusionists and the more determined of their heirs retaliated by asserting something very close to the legislative supremacy of the House of Commons. The experience of the royalist reaction after the dissolution of the Oxford Parliament - most notably concerning the Rye House Plot (1683), Monmouth's Rebellion (1685), the accession of the Catholic James II, the attack on the Boroughs and Counties, and the Declaration of Indulgence (1687) - served to deepen the divisions within English political opinion that had appeared at the time of the Exclusion Parliaments and to alienate many of moderate views from their loyalty to the person of the monarch. The prosecution and trial of the Seven Bishops in 1687 even divided the loyalist Church of England. With the Church divided, moderate opinion indifferent towards the fortunes of James II, hostile groups at home and a colony of exiled anti-monarchical groups in Holland, the stage was set for the 1688 Revolution.

But if resistance were to be justified, and if Parliament were to claim legislative sovereignty then

reference would have to be made to some other constitutional theory than the 'common law' Ancient Constitution. For according to this theory both King and Parliament had existed 'time out of mind' and thus neither could claim supremacy over the other, because neither depended upon the will of the other. The 'original contract' Ancient Constitution provided just such a theory capable of upholding both parliamentary sovereignty and a right of resistance. For the 'original contract' view of the Ancient Constitution claimed that the English Constitution had been set up by the English people for a purpose specified in the contract with their monarch. The constitution depended upon the will of the people of England. It was a short step from this principle, although one beset with many difficulties, to the assertion that supreme power in the constitution must lie with the political public, or at least their representatives in Parliament. If this were the case, whenever the king acted against the wishes of Parliament he could justifiably be resisted. Here again, then, a problem in Whig constitutional thought could be resolved by adopting Constitutional Contract arguments instead of arguments from immemorial customary law.

Considerations of these kinds, concerned with the controversies over constitutional theory and practice during the 1680s, help to explain the origins and attractiveness of the Constitutional Contract Theory. But they do not explain the extent of the appeal of contractualist ideas

in constitutional controversy during and after the 1688 Revolution. For, as I noted in the previous chapter, constitutional arguments from contract were not solely the monopoly of the pro-Revolutionaries. To account for this broader acceptance of the Constitutional Contract, and to explain more fully the persuasiveness of the Constitutional Contract Theory, we must look at some general features of a philosophical kind that will illuminate the intellectual coherence of Contract Theory in the late seventeenth century.

Ultimately the plausibility and coherence of late seventeenth century contract theories can only be accounted for by reference to the widespread, though far from universal, acceptance of a set of beliefs that F.A. Hayek has termed "rationalist constructivism".³¹ In essence these beliefs were derived from the view that "all the useful human institutions were and ought to be the creation of conscious [human] reason."³² This involved a certain conception of man, society and history which had important implications for the proper study of politics. In order to get a true view of politics and society, according to 'rationalist constructivism', the initial confusing complex of political society must be reduced to its essential elements - rational men. Then, by examining the characteristics of rational man, the complex whole should be rebuilt from a chain of necessary consequences. The recomposed complex need not bear much resemblance to how the original complex (which it explains) first appeared. Political explanation,

then, was largely concerned with the elucidation of 'origins'. But the 'origin' of political institutions was by definition the conscious design of rational men. The history of those institutions was consequently focussed on their original design. Changes in the past could only properly be explained by reference to the conscious designs of rational men. But since what appeared reasonable to 'rational' men in the seventeenth century was invariably assumed to be the same as what would have appeared reasonable to rational men in the earliest times, historical change was generally felt to have been for the worse. Ideally the constitutional history of any particular country would exhibit no, or very little, change. The intentions of the founders of political institutions should be the same, in essence, as the intentions of their descendents. Only those modifications of institutions which could be shown to be in accord with the design of the founders could be accounted legitimate. Yet this seemingly severe restriction on the limits of legitimate change in practice amounted to hardly any restriction at all. For it was what appeared reasonable to seventeenth century men that guided their interpretations of the designs of their ancestors, and not vice-versa.

I will examine in more detail the salient features of 'rationalist constructivism' at later points in my argument. Here it is sufficient to note the general characteristics of those beliefs that provide credence and coherence to

the ideas involved in the Constitutional Contract Theory. An outline of current rationalist constructivist beliefs helps to explain why appeals to contract in constitutional controversy cut across the political division of the late seventeenth century. It is nonetheless true, however, that references to contract appear much more frequently in the writings of the proponents of resistance during the 1680s and the defenders of the Revolution after 1688 than in the writings of their opponents. I have already suggested several reasons why this should have been the case. But there were also two major difficulties involved in invoking contract ideas to justify resistance and the Revolution: the association of contract theory with, on the one hand, Catholic writers of the sixteenth and early seventeenth centuries, and, on the other hand, defenders of regicide and the Commonwealth. An examination of the disputes that arose concerning these difficulties will enable us to appreciate further the meaning of 'contract' when appealed to in the constitutional debates of the late seventeenth century.

The Whig Exclusionists had objected to the Duke of York because he was a Catholic. Those who championed resistance argued for its necessity if England were to be secure from papal domination and if Protestantism were to survive. It was thus of considerable embarrassment to them when it was pointed out that their contract arguments were anticipated in, and derived from Jesuit writers like

Bellarmino, Mariana, Molina and Robert Parsons. Indeed; it seems that Parsons' major work, A Conference About the Next Succession to the Crown of England (1593), was deliberately republished by the royalists in 1681 so as to emphasize the Catholic derivation of 'contract' ideas and thus embarrass the Exclusionists. In fact, the whole history of Parsons work (as recounted by royalists and anti-Exclusionists at the end of the seventeenth century), is one of the most interesting and least well known of all contractarian treatises. Robert Brady, Abednego Seller, Sir Thomas Craig's editor in 1703, and the author of The Royal Apology (1684), all emphasised its extraordinary history. According to Brady, Part I of the Conference "contains for the most part, in nine Chapters, the very Principles of Sedition and Rebellion". It was republished in 1648, he claimed, "as a Preparative to the Deposition and Murther of King Charles the First". It was Parsons who provided "all the Factions in the late times of Rebellion ... with Arguments, Reasons, Examples and Pretences for their Seditious Practices." An abridged version of Parsons' work was published in 1655 possibly, according to Brady, "to set up a Foreign Title, or make way for Oliver Cromwell's Kingship."³³ And Milton,³⁴ Lord John Somers,³⁵ Algernon Sidney³⁶ and even Thomas Hobbes³⁷ were all accused by various writers of having raided Parsons for their arguments.

No matter what the truth of these accusations might be, it was embarrassing to the Exclusionists and pro-

Revolutionaries that their arguments seemed to be of popish parentage. Religion and politics were inextricably intermingled in the conflicts of the 1680s. And the Exclusionists and defenders of parliamentary rights against the king, presenting themselves as the champions of Protestantism, were constantly taunted by claims that "the Popish DOLEMAN [Parsons' pseudonym] is the Oracle of the TRUE - PROTESTANT Party."³⁸ For all the contractarians' declarations that the lineage of their ideas was irrelevant to their truth,³⁹ for all their catalogues of previous Protestant contractarians,⁴⁰ and for all their attempts to persuade James' Catholic supporters to accept their arguments precisely because of their popish lineage,⁴¹ the issue arose again and again in the pamphlet literature.

But it was not only contractarian writers who suffered because of the intermingling of religion and politics. The Church of England itself was deeply divided. As Thomas Hunt described in 1682, the Church was being pulled in two opposed directions. On the one side, adherence to the traditional Church doctrine of passive obedience led to support for, or acquiescence in, a Catholic monarchy and a Catholic succession. On the other side, opposition to Catholicism severely tested and strained adherence to passive obedience.⁴² Eventually the second of these pulls proved the stronger. But in the process many prominent churchmen experienced an almost total change in their

political opinions. A comparison of two statements from the pen of Bishop Gilbert Burnet gives some indication of the extent of this change. In the early 1680s we find Burnet an ardent champion of passive obedience. In this role he declared:

Of all the Maxims in the World, there is none more hurtful to the Government, in our present Circumstances, than the saying, that the King's Promises and the Peoples Fidelity ought to be reciprocal; and that a Failure in the one, cuts off the other; for by a very natural Consequence the Subject may likewise say, That their Oaths of Allegiance being founded on the Assurance of His Majesties Protection, the One binds no longer than the Other is observed: and the Inferences that may be drawn from hence, will be very terrible, if the Loyalty of the so much decryed Church of England does not put a stop to them.⁴³

And yet in 1689 Burnet was prepared not only to accept these "Inferences" but also to actively counsel the maxim that he here denies. His Enquiry into the Present State of Affairs (1689) opens with the assertion: "It is certain, That the Reciprocal Duties in Civil Societies are Protection and Allegiance; and wheresoever the one fails wholly, the other falls with it."⁴⁴ And from this time onwards, Burnet subscribed to the view that legitimate political constitutions were formed by, and embodied, a contract!

Thus far I have outlined the immediate context from which Constitutional Contractarianism arose and the general ideas associated with a Constitutional Contract. But before examining in detail the coherent theory of contract presented in the writings of William Atwood and implicit within the works of many others, two characteristics of

the arguments we have been considering should be emphasised. These are: the use to which Constitutional Contract arguments were put and the insistence that positive law and not natural law should be the proper test of legitimacy.

Although, as I noted in the two preceding chapters, it is a great oversimplification to view late seventeenth century political theory in terms of a conflict between Whig contractarians and Tory Divine Righters, there is nonetheless some point in this generalization. It certainly was the case that contract arguments were employed much more frequently against Charles II and James II than to defend them and that the Revolution was more frequently justified than opposed by reference to a contract. Contemporary writers tended to adopt a threefold classification of the principal groups involved in the Revolution debates. Gilbert Burnet, for example, referred to three main groups during the interregnum roughly corresponding to Jacobites, Tories and Whigs. These were respectively those who advocated a Regency (until such time as James could be conveniently "restored"); those who wanted Mary to succeed to the throne as next legitimate heir; and those who argued from the "original contract" to support William's right or William's and Mary's joint rights to the throne.⁴⁵ Thomas Long also adopted a threefold account of the major divisions of opinion over the Revolution. But his division - more in line with our conventional historical generalizations -

consisted of "Jure Divino" absolute monarchists; contractarian defenders of the people's rights to resist their legitimate king when warranted by circumstance; and the Church of England steering a middle course between the two other "extremes" with the belief that monarchs were truly the ministers of God rather than of the people, though their power was conveyed "Medias Populo".⁴⁶

Whilst classifications such as these are useful as indications of how contemporaries imposed order on the complex divisions of opinion they witnessed, they should not be accepted uncritically. For the complexity that I examined in the Revolutionary debates was also expressed by a number of contemporary writers. Most notable amongst this group were the two active and famous non-jurors, George Hickes and Jeremy Collier. Hickes emphasised the "multiform variety" of reasons that the jurors were giving to excuse their actions;⁴⁷ and Collier noted that "Though the Gentlemen of the Revolution seem well satisfied with their new Allegiance, yet the Reasons (if not the Degrees) of their Compliance are very different".⁴⁸ And yet there were still other writers who emphasised the importance of appeals to contract in the contemporary debates and who associated that appeal with a specific 'cause' or a single social group. The 'cause' was either a defence of the Revolution, as we have seen Peter Allix arguing,⁴⁹ or else it was more generally a defence of the legitimacy of resistance. John Kettlewell, for example, insisted that

"all the Power of the People is grounded by the Advocates for Resistance, on the Original Contract."⁵⁰

The group identified with these appeals to contract varied from the Whigs,⁵¹ to "Dissenters" generally.⁵² And certainly at the time of the Revolution, arguments from contract were of such general appeal as to cause one ardent royalist to note with alarm the sudden acceptance of contractualism, "as if the Doctrine were Apostolical".⁵³

The second characteristic of the political debates that should be emphasised, is the insistence that positive law, rather than natural or divine law, was the proper authority for settling disputes about allegiance and resistance. This insistence is to be found in the writings of both upholders and opponents of the 'legality' of resistance. Robert Brady, for example, rejected Edward Stillingfleet's arguments that the "Common Good" might legitimate political action and stressed that:

The Legal Constitution by which the Kingdom hath flourisht, and been supported in great Reputation for some hundreds of years, is the best and safest Rule for all sober Men ... to proceed by. When Men go from the Law, and legal Establishment, they walk in the dark, and go they know not whither, and travel while they make themselves not only uneasy but miserable.⁵⁴

On the other side, many of the pro-Revolutionaries as we have seen,⁵⁵ accepted Robert Jenkin's assertion that "the Laws of that Constitution of Government under which we live, ... are to determin when the Authority of Sovereigns ceases, and the Allegiance of Subjects; and we are not to

think their Power and Authority transferred, unless it be transferred legally."⁵⁶

In these debates a clear distinction was made between ethical and legal rights. This point has been denied by J.C. Corson and Sir F. Pollock.⁵⁷ But their arguments, although justified in respect of much political literature of the time, have overlooked the evidence associated with Constitutional Contractarianism. In 1679, for example, the author of A Disputation: Proving, That it is not convenient to grant unto Ministers secular jurisdiction clearly distinguished between the provinces of divine and civil law. His argument was:

A man cannot be a good judge, chancellor, nor justice of peace, nor bear any considerable office in the commonwealth, without insight into the law, the statute law ... and the common law and customs of the realm, and of particular courts, and places, the knowledge whereof cannot be attained with little pains, and time, and study, and without some experience ... It is made a distinct profession and order of men amongst us to be men skilled in the law .. Indeed, no man can be a good divine, or lawyer, that is not a good Christian, and learned in the laws of God, the law of Nature, and Christianity; what it is to be under law to God, and live under his government. To be a right divine is to be a heavenly lawyer; but this a man may be, and be ignorant of a thousand ... matters in the laws and customs of England: they are so many, and so intricate, and so uncertain, and so out of the road of divinity, and the knowledge and study of universal right, that it would be against conscience and faithfulness, in a minister, to give himself to the study of them; and, without giving himself to the study of them, he cannot attain to the knowledge of them, competent for an English judge, and political magistrate.⁵⁸

This distinction between natural law and divine law on the one side, and positive human law on the other, was affirmed

by a host of other writers. Samuel Johnson, for example, wrote in 1689:

I grant that the Laws of God and Nature are more sacred and inviolable than the Laws of our Countrey; but they give us no Civil Rights and Liberties, as the Laws of England have done. Every Leige-Subject of England has a Legal Property in his Life, Liberty, and Estate, in the free Excercise of the Protestant Religion established amongst us; and a Legal Possession may be Legally Defended.⁵⁹

The significance of these distinctions for those who invoked Constitutional Contract ideas was two-fold. Firstly they highlight their concern to present a legally valid case according to the requirements of English constitutional law. And this concern was of considerable and enduring practical importance in view of the longstanding controversies over James II's legal right to the throne even after the 1688 Revolution. Secondly the distinctions served to emphasise an awareness of the problems associated with attempting to defend particular activities by reference to general or universal laws of nature. This awareness we will meet most clearly in the writings of Atwood, but at least one reason for it can be seen in Robert Ferguson's remark in a treatise of 1673 that "Learned men do wonderfully differ, and some of them strangely prevaricate, in stating the Measure of natural Law and in defining what Laws are natural."⁶⁰

So far we have considered the general characteristics of Constitutional Contractarianism. If we now turn to

the writings of William Atwood, we may begin to fill out the details of the theory. Having done this, we may then consider the uses to which Constitutional Contract arguments were put by reviewing the ideas and extraordinary career of Robert Ferguson "the Plotter".

CHAPTER IV

WILLIAM ATWOOD AND THE CONSTITUTIONAL CONTRACT

Little is known of the life of William Atwood. He was a barrister, had at least one son,¹ and probably died in 1705.² Most of his mature years were spent as a political pamphleteer, for which he was rewarded by William III with the appointments of Lord Chief Justice and Judge of the Admiralty in New York. He took up these posts in August 1701 but was soon suspended (June 1702) for "gross corruption and Maladministration". His circle of friends included some of the most eminent men of the age - Robert Boyle, William Petyt and James Tyrrell. The encouragement and example of these men assisted Atwood in overriding the fiercest attacks on his intellectual capacity and reputation.³

Modern historians of the late seventeenth century have not paid much attention to Atwood's writings. Maurice Ashley⁴ and J.W. Gough⁵ do imply that some of his work was significant and W.H. Greenleaf notes that he was a prominent "commonwealthman".⁶ Caroline Robbins was even prepared to bracket him with Petyt as a 'learned lawyer'.⁷ But generally his writings are neglected, perhaps because in Laslett's judgment he was "the worst of the Whig constitutional writers."⁸ This neglect, however, has been both unwarranted and unfortunate.

If Atwood's constitutional writings are assessed according to the standards of current historical and legal scholarship, they certainly appear strange and inadequate.

But this kind of assessment is of no help if we wish to understand the significance of Atwood's works for the audience that he was addressing. Atwood, even more than Petyt, was concerned in his earliest historical works to provide the opponents of strong monarchy with a coherent legal and historical argument. The vehement attacks he encountered from Brady are perhaps indicative more of his success than his failure in this task. The judgments of fellow-travellers support this view. Petyt regarded him as an "ingenious Gentleman",⁹ Cooke believed he was an "industrious and worthy Gentleman"¹⁰ and Henry Neville referred to "the learned discourses lately published by Mr. Petyt of the Temple, and Mr. Atwood of Grays-Inn; being gentlemen whom I do mention, honoris causa."¹¹ These testimonies alone warrant some attention being paid to Atwood's works. And this attention is amply rewarded since Atwood's career highlights a significant transition in the constitutional theory of the late seventeenth century and his writings contain a coherent contract theory of an unexpected kind.

In his political works, Atwood's attention was constantly directed towards contemporary political affairs. The contract theory which he eventually constructed clearly reflected this concern with practice. It differed in several important respects from the theories of Locke, Pufendorf, Sidney and Tyrrell. These differences are most immediately apparent in terms of the concepts Atwood

neglected, or rather felt were unnecessary, for his theory. His contract theory is most remarkable for the absence of any reliance upon the notions of 'natural law', 'natural rights' and 'states of nature' that were so obviously of crucial importance to the theories of these other contractarians. Atwood was not in the least troubled by problems of the 'artificiality' of contract society or of the relationship between natural law and positive, fundamental law. He believed that the contract with which he was concerned was the actual, historically valid contract that founded the English Constitution. It was crucial in his arguments, not only because it explained the otherwise 'inexplicable' origin of government, but also because it provided a constitutional law which could legalize resistance to the monarch and other activities of similarly 'doubtful' constitutionality.

Atwood's idea of contract, then, was less important as an explanation of the past origin of the English Constitution, than as a means to prove the present constitutional law to be what Atwood felt it ought to be. In examining Atwood's work, it will become apparent that his contract theory is remarkable. His contract is not so much an 'event' as an 'express and Continuing' 'process' whereby the consent of the contractees is made a constant legal requirement for legitimate government.

II

As I noted in the previous chapter, Atwood began his career as a political pamphleteer under the tutelage of William Petyt - one of the most famous of contemporary constitutional historians.¹² Petyt was the principal advocate in the early 1680s of the limited Ancient Constitution based on immemorial custom. Atwood's first four political works¹³ closely followed his tutor's arguments.

The critical issues of the constitutional controversy, the Norman Conquest and the origin of the House of Commons, dominate Atwood's early works. In his Ius Anglorum ab Antiquo (1680), Atwood declared that in Petyt's and his conflict with Brady:

The Controversie between us, is of Right, whether or no, the Commons, such as now are represented by Knights, Citizens, and Burgesses, had Right to come to Parliament, any way, before the 49. of H.3 except, in the fancy'd way of being represented by such as they never chose, Tenants in Capite, by Military Service.¹⁴

Atwood was determined to prove that the Commons were truly represented in the constitution not only before the reign of Henry III but immemorially, i.e. "beyond the account of Records or History".¹⁵ The substantiation of this claim involved, as we have seen, a denial that the Normans conquered England and also the assertion that the constitution itself was based upon unchanging and immemorial custom. Thus the overall purpose of Atwood's early works

was "to prove the continuance of the English Rights, or that William govern'd not as a Conqueror".¹⁶

It is interesting that by the 1680s the controversy between the royalist, Feudal Law interpretation of the constitution and the common lawyers' 'immemorial custom' interpretation, had become so exhaustively argued that Atwood could look upon these two problems as synonymous. If the Normans could be shown not to have conquered England, then it 'followed' that English rights could be called continuous. Atwood does indicate the grounds for this assumption that English rights were the same in the eleventh century and earlier as they were in the seventeenth. These grounds were that the law of the constitution was customary law, and that custom was immemorial and unchanging.

"I have followed the Authority of the Great Fortescue," he says, "who taught the World long since, ... that in all the times of these several Nations and of their Kings, this Realm was still ruled with the self-same Customs that it is now govern'd with all".¹⁷

Atwood's avowed purpose for delving into ancient records was to support "the admirable Constitution by King, Lords and Commons".¹⁸ Although in general it appears that he was more concerned to present a view of what the seventeenth century constitution ought to be, rather than to describe it as it was, he did not regard this as his intention. He made every effort to avoid accusations that he was presenting a novel interpretation of the constitution. And he insisted that he was writing neither against the king nor on behalf of popular sovereignty. Thus he

continued in his statement of purpose: "the Rights of the two last [Lords and Commons], I have, according to my capacity, defended, being they have been controverted. But surely no man dares to be so presumptuous, to set himself against God's Vicegerent, by Divine Appointment, put over us, and that to our Great Happiness in all matters or Causes".¹⁹ And in a later work, he argued against the idea "that, notwithstanding any kind of Establishment, the dernier resort, and Supremacy of Power is always in the People" because that was "a Notion that would unsettle all Governments, making them precarious. Whereas ... 'No Government can be legally, or by any lawful power chang'd but must remain for ever, once establish'd'".²⁰ With this view of government it is easy to see why Atwood should have been so concerned to repudiate accusations of novelty in his interpretation.²¹

Atwood's early political works, then, purport to defend a conservative view of the English Constitution. He was concerned to avoid what he thought were the excesses of both monarchists and parliamentarians. The form that his defence took pretended to be historical. But to our eyes, and indeed to the eyes of many Tory historians, it was a strange sort of history. His arguments involved asserting that the Norman Conquest made no material impact upon the constitution, that constitutional law was essentially customary law, and that custom was immemorial and unchanging. Yet the arguments were persuasive to

many, and this can only be understood by examining the practical function they performed and the characteristics of contemporary ideas of History.

Atwood was searching for a "Foundation for our Government by King, Lords and Commons"²², and that foundation he felt had to be located in the past:

"As on Mr. Petyt's and my side the design can be no other than to show how deeply rooted the Parliamentary Rights are;" Atwood explains, "So the Doctors [Brady] in opposition to ours, must be to show the contrary ... and 'tis a Question whether he yields these Rights to be more than precarious".²³

The constitution was the product of history but because of the absence of any strongly held notion of 'historical relativity', and because of the overriding practical concern in these historical researches, the 'past' referred to was a peculiar one. It had a function to perform for the present. It was made to take sides in a conflict of practical concern only for men in the late seventeenth century. The criterion for constructing the past was thus the needs of the present rather than the non-partisan sifting of evidence. The idea of 'historical relativity' was practically absent from these enquiries. There was no acknowledgement, for example, that what happened six centuries before could be of no more than interest value for the present. But there was sufficient acknowledgement that times changed to require some notion to 'connect' the past to the present. It was in providing this link that the notion of unchanging custom was of fundamental

importance to Atwood's early writings.

Immemorial and unchanging custom, as we have seen, eventually gave way to 'contract' as the foundation of Parliament's constitutional rights. But this contract was also viewed historically. Thus a connection between the original contract and the present constitution was still required and, as we shall see, mainly through the agency of the coronation oath the original contract was transformed from an original event into a constitutional process in order to effect this connection. We will return to the idea of History that lent plausibility to these arguments, but first we should examine the Constitutional Contract Theory that begins to appear in Atwood's writings in the mid-1680s.

III

Atwood's early writings were designed to establish his view of the English Constitution on an unshakable foundation. This he located in the past and justified on the grounds of immemorial and unchanging custom. His work from 1689 to 1705 portrays the same concern with historical foundations but the justification of those foundations and the content of the past had changed.

In 1690, after the succession of William and Mary, Atwood announced what was to be his central concern throughout the rest of his career as a controversialist:

as I am verily persuaded that our Government stands upon such a Rock as has been unmov'd for many Ages, and has no need of a Lie for its Support; I shall with the utmost Faithfulness address myself to its Defence.²⁴

This statement could, of course, be taken as the central theme of all his previous work. But by the 1690s a defence of the constitution on legal and historical grounds involved an additional problem, far more immediate than the Norman Conquest and Henry III's reign had been to defenders of the Ancient Constitution. James II had been forcefully driven from office and replaced by William and Mary, who, although members of the royal family, were not next in line by proximity of blood.²⁵ The constitution had been broken. Thus if the post-1688 constitution were to be proved to rest on "such a Rock as has been unmov'd for many Ages", then not only did the Norman Conquest and the constitutional innovations of Henry III's reign still have to be denied, but also the Revolution itself had to be portrayed as completely constitutional.

Atwood's principal task in The Fundamental Constitution of the English Government (1690) was, indeed, to prove that "King William and Queen Mary are RIGHTFUL King and Queen, according to the ancient Constitution of the English Constitution". In order to do this, he informed his readers:

I shall shew;

1. That the People of England had a rightful Power lodg'd with them for the Preservation of the Constitution, in vertue of which they might declare

King William and Queen Mary King and Queen of England and Ireland with all their Dependencies, tho J.2. was alive at the time of such Declaration.

2. That this rightful Power was duly exercis'd in the late Assembly of Lords and Commons, and afterwards regularly confirmed by the same Body in full Parliament.²⁶

It was in proving these two points that Atwood introduced his notion of an original contract. But Atwood's idea of contract did not play a role within a complex set of philosophical notions - i.e. 'natural law', 'natural rights', 'state of nature'. Indeed, throughout his career Atwood was extremely sceptical about the use of these notions even though they must have been very familiar to him from the writings of other Contract Theorists. In 1682, he argued:

Admit a Conquest, and the Inheritance which every one claims in the Laws will be maintainable only as a naked Right, and naked Rights are thin and metaphysical Notions, which few are Masters or Judges of.²⁷

Again, in 1698, he attacked one of Locke's admirers, William Molyneux, for his "wheadling Notions of the inherent, and unalienable Rights of Mankind".²⁸ And in 1704, the year before his death, he reaffirmed his distaste for rhetorical "Flourishes about the Law of God, of Nature, and of Nations", by insisting that "nothing but the Law of England can settle Mens Judgements of the Nature of the English Monarchy".²⁹

The problems which engaged Atwood's attention were constitutional, and the answers he gave purported to be founded upon a correct interpretation of constitutional law.

All the Opposers of our present Settlement, who pretend to talk Sense, when press'd home, grant that the Constitution of the English Government must be the Guide to their Consciences in this matter ... and thus Lawyers³⁰ are the best Directors of Conscience in this case ...

The great Unhappiness of this Nation is, that Divines not only set up for the greatest States-Men, but will pretend to be the best Lawyers and Casuists in these points.³¹

If a notion of contract were to be made part of constitutional law, it could not, on this view, be one idea in a complex of philosophical notions about the origin and nature of political power. Atwood's idea of contract, as I have said, definitely wasn't this. Instead, contract formed part of a complex of legal notions - i.e., fundamental law, fundamental rights, fundamental constitution, coronation oath - which were distinct from the philosophical, although there were attempts to relate the two complexes.³² As we shall see, Atwood in the end had to leave the realm of law in order to justify his view of the English Constitution. Or, more precisely, he had to forsake 'fundamental law' as written and customary law, and appeal to 'fundamental law' as something very close to the law of nature.

The fundamental constitution that Atwood wished to 'defend' was essentially quite simple. It consisted of a set of basic laws "on which ... Regal Authority depended, as well as [Parliament's] rights and Priviledges."³³ The fundamental constitution then "may and doe's in England limit ... Power ab externo."³⁴ The major powers of the constitution were King, Lords and Commons and, Atwood

informs us, their operation through "an Agreement between a King, with the Lords, and a full Representative of the Commons of England will bid fair [est] to being according to the Original Constitution of our Government".³⁵ But the monarchy itself, Atwood asserted using a convenient medieval argument, was "fundamentally an Elective Monarchy, keeping within a Family, but not confin'd to the next of Blood".³⁶ This last argument was much used in attempts to uphold the 'legality' of the Convention Parliament's 'election' of William and Mary to the throne, even though they were not next in the hereditary line of succession.³⁷

At the root of Atwood's view of the constitution seem to lie the notions of consent and property. As early as 1682 Atwood wrote of "the Fundamental Constitution, which, as far as I could learn, was, and is, that every Proprietor (of Land especially) should in the General Council of the Kingdom, consent to the making those Laws under which they were to Live."³⁸ This view of the constitution, then, although intended to maintain limits upon the power of the king, was not particularly radical. Parliament's function was essentially only to channel the consent of the politically relevant subjects (the proprietors, and not all the subjects) to the legislation of the government (i.e. in effect, the king).

The consent of the governed was vital according to Atwood because without it a government would be illegitimate. To substantiate this idea he appealed to the authority of

Hooker:

"Many have cited the Authority of the Judicious Hooker till it is thread-bare," he asserts, "to prove, that it is impossible there should be a lawful Kingly Power which is not mediately, or immediately, from the Consent of the People where 'tis exercised."39

This concept of legitimacy underlies all Atwood's speculations about the English Constitution. We have already seen that it was of great significance in his early conflicts with Brady.⁴⁰ If the constitution really were modified during Henry III's reign, he there argued, then that constitution was illegitimate. For Henry III's reign was marred by "Tumults and Rebellion", and any constitutional innovation arising from these could not be legitimate because it did not have "a legitimate Birth", it was "not born in Wedlock between the King and his People". And mere endurance could not provide legitimacy for such an innovation since "Quod initio non valet, tractu temporis non convalescit". This idea that legitimacy was determined by 'birth' remained one of Atwood's central principles throughout the whole of his career. But in the use he made of this principle, an even more fundamental notion becomes apparent. This was that a maxim of reason could always count as a stronger argument than any historical evidence. For legitimacy was determined by rational 'births'.

A legitimate government was a government founded in a particular way. The only way that legitimate government could be founded was by the peaceful, free co-operation of

the government and the governed: either the continuous co-operation that had existed 'time out of mind' of the immemorial constitution; or the explicit co-operation stipulated in contract of the contract constitution. Whichever way the co-operation was conceived, illegitimate government was identifiable by the absence of any signs of co-operation. Any constitution, then, that did not embody the co-operation of the government and the governed was illegitimate (although the idea of the 'governed' was largely restricted to the land-owning classes). The criterion of legitimacy was thus a rational criterion - outside the realm of both positive law and historical argument. This, of course, it had to be lest it become meaningless - all governments either powerful enough to rule, or that had ruled in the past would otherwise be legitimate. But in Atwood's endeavours to prove the ancient English Constitution to have been, and to have remained, the best and most legitimate of all governments at least since Saxon times, his history was constantly 'tailored' to the requirements of his pre-conceived notion of legitimacy. It was possible for him to do this whilst still maintaining that his historical work was valid history because of the prevalent view of the nature of History.⁴¹

The consent necessary for legitimate government would be based on rational self-interest, Atwood believed. And it was this that 'proved' government to be founded in contract:

Indeed if we consider, it will appear, that never any Empire or other Civil Society was founded, but there was an Original Contract or Agreement among the People for the founding of it ... [for] surely no People ever submitted to any [authority] without a prior Obligation, but where they had hopes or expectations of Advantages or Ease, the obtaining of which, if not made a Condition, was ever implied.⁴²

This sort of argument about the origin, nature, limits and end of government appeared in many tracts of the eighties and nineties. It is a part of the argument of 'rationalist constructivism' we have already encountered, that social and political institutions are entirely the product of human design.⁴³ But here it is interpreted not only as an explanatory device but also as historically valid. Thus Atwood described the historical origin of the English Constitution by employing it as a premise. At the same time he reasserted his belief, through the medium of Cicero, that the constitution was a balance of King, Lords and Commons:

[Men] judge for themselves upon what Inducement 'tis fit to enter into ... a Society ... and therefore some Man eminent for Wisdom may have been made King, for having proposed such a Regulation of the way of Living together, that all happily Unite in promoting the common Good, by which Plenty and Prosperity is secured to every one in particular. These Regulations being Universally agreed to, became Laws, and hence the proposers of them have been esteemed Wise Law-makers ...

Some of them, like Lycurgus may have divested themselves of Power for the good of all, and proposed such Participations, ... as might, be the most effectual means to prevent Competitions and Animosities.

Hence arose the happy Constitution of the English Monarchy, which Cicero plainly saw in Idea, as the most perfect form of Government.⁴⁴

Yet this 'proof' of the English contract was far from indisputable. More historical evidence was needed and here Atwood, like many others,⁴⁵ turned to the Mirror of Justices. There at least, as we have seen, was an account of an event that could be interpreted as the English 'original contract' expressed in terms of a coronation oath.⁴⁶

Having located the original contract in English history, Atwood's next problem was to prove its relevance to the post-Norman constitution. He continued to deny that as a matter of historical fact the Normans had conquered England. But he no longer insisted that 'unchanging custom' linked the pre-Norman to the post-Norman constitution. This link was now effected by equating the original contract with the coronation oath and thus viewing English constitutional history as a succession of reaffirmations of the original contract by each new monarch. The importance of a notion of contract in Atwood's new view of English constitutional law and history is clearly evident in his examination of the problem of the Norman Conquest in The Fundamental Constitution (1690):

"If it to [sic] objected," he wrote, "that tho there might have been a Contract, with a Free People at the beginning [of the English Constitution], it ceas'd to be so from the time of the Conquest.

I answer;

1. Till there be a Consent and Agreement to some Terms of Government and Subjection, 'twill be difficult, if possible, to prove any Right in a Conqueror, but what may be cast off as soon as there is an opportunity.

2. Every Election of a King truly, so call'd, is an Evidence of a Compact; but Ancient Authors tell us, that W.I. was elected King, nay they are express that he was receiv'd upon a mutual Contract and that ... he made a League with the People; ... [and] King William's Coronation-Oath was [practically] the same with that which was taken, by his Saxon predecessors ...

4. He neither at the beginning, nor in the course of his Reign, pretended in the least to be a Conqueror, but always insisted upon [the] Title ... (the Choice of the People) and this [was not disputed even] before his Victory over Harold; who was always look'd on as a usurper; ...

6. [Even] if our Ancestors had made as absolute a Submission to Will. I. as some pretend; in the Judgment of the Lord Clarendon, it would not extend to us: 'For, says he, if it can be suppos'd that any Nation can concur in such a Designation and divesting themselves of all their Right and Liberty, it could only be in reason obligatory to the present Contractors: Nor does it appear to us that their Posterity must be bound by so unthrifty a Concession of their Parents.'

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."⁴⁷

Understood in this way the original contract defined and guaranteed the legitimacy of the English Constitution. The constitution was legitimate because it arose from, and continued with, the free consent of contracting citizens. It consisted of fundamental laws set up in the distant past and it was thus both of considerable age and eminently reasonable. Its reasonableness was certain because our ancestors, being reasonable men like ourselves, must be presumed to have submitted themselves to a government for some good purpose. The original contract was still relevant to the seventeenth century constitution because it was represented not simply as a past event but rather as

a series of events (the taking of coronation oaths by each monarch) reaffirming the essentials of the original agreement.

But in representing the coronation oath as 'the contract', Atwood encountered a problem about the fundamental laws consented to by each new monarch. Could they alter over time? If the answer to this question were no, then further problems arose about explaining, and accounting for, the changes that had in fact occurred and which had been accepted as beneficial. If the answer were yes, then the whole point of his historical enquiries might be called into question. Atwood's concern, after all, was to explain the English Constitution of the late seventeenth century. If the main constitutional laws, the fundamental laws, might change over time why not simply portray those which were currently accepted as law rather than examine the Saxon and Norman Constitutions? Atwood's solution to these problems was a compromise: fundamental laws could change over time, but not so radically as to alter the limited nature of the government. There were, apparently, two levels of fundamental laws. For example, Atwood believed that in the early history of the English monarchy the people were protected against their king by powerful Tribune-like officials. These no longer existed in the seventeenth century and yet he was prepared to accept that it was "the Wisdom of this Government, to have the like Offices with us to be now only known in Story". The point of noting their past existence was simply as evidence of

what "English Liberties" are, since those liberties had not changed even though "the Subjects of the Monarchy have had greater Confidence in their Kings, than to insist upon having such settled Officers".⁴⁸

The idea that constitutional law could change provided it did not do so fundamentally was inextricably connected to the notion of an original, Constitutional Contract through the proposition that

'They that lay the first foundation of a Commonwealth, have Authority to make Laws that cannot be altered by Posterity, in the Matters that concern the Rights both of a King and People, For Foundations cannot be removed without the Ruin and Subversion of the whole Building.'⁴⁹

If this were interpreted strictly it meant that not all constitutional law was fundamental. Atwood did in fact adopt this position. The only law that could not be altered by posterity was the law of salus populi, for the public good itself was "the Foundation of the Agreement"⁵⁰ to form the constitution at the original contract. It was from this idea, as we have seen,⁵¹ that Atwood could argue that in all cases where the legality of an action was in question, it was 'legal', irrespective of the dictates of all other laws, provided it contributed to the public well-being. In 1690, for example, Atwood defended the East India Company⁵² on these lines:

But did not the Common and Statute Law of the Land, the Civil Law of the Romans, or other Maritime or Marshal Laws, afford sufficient Matter for an Apology [for the E.I.C.], we might have Recourse to the Foundation of them all, and what upon Emergencies superseeds all, the Salus Populi: To which the Interest of both Prince and People must give way; whenever there is a Competition.⁵³

But this notion of a 'foundation' for all positive law brought Atwood close to making the assertion that salus populi suprema lex esto because it was in accordance with natural law. He had consistently refused to make this kind of assertion in his analysis of the original contract and the fundamental law that it established. In one passage in The Fundamental Constitution, however, he did argue that "by the Law of Nature, Salus Populi is both the Supream, and the first Law in Government; and the scope and end of all other Laws, and of Government it self".⁵⁴ Yet his interpretation of the law of nature is a peculiar one. It is not an immutable standard of right and wrong, good and bad - the standards that contemporary philosophers were arguing God had engraved on all men's minds. Instead it simply provided additional authority for existing and changable positive law. Our knowledge of what accorded with the laws of God and nature was derived from existing positive law, and thus natural and divine law could change as positive law did:

"I will not deny," he argued, "that [kings] enjoy the Crown according to God's Law, Man's Law, and the Law of Nature: For, as the great Fortescue has it. All laws published by Men, have their Authority from God ... Yet who can say but these ... Ordinances of Men, may be altered, as they were made?"⁵⁵

The sort of argument that Atwood based on this view of natural and divine law often sounds astonishing. When discussing James I's title to the English throne, for example, he declared: "King James the 6th of Scotland having, upon an undoubted legal right, been recognised

King of England ... thereby the Right became Divino".⁵⁶

Salus populi, then, was the supreme fundamental law, but it was positive law for all that. It was essential for Atwood's purpose that it should be positive law, because only by means of such a vague or general concept as 'the public well-being' could the events of 1688 be declared 'legal'. But he could not allow it the status of a natural law because such things were "thin and metaphysical Notions, which few are Masters or Judges of".⁵⁷

Salus populi was supreme because it formed the foundation of the original contract. Atwood refused to believe that rational men could ever live freely under laws that they had not consented to specifically. Reason, then, was to be the test of law, and if the law in any circumstance was to be found wanting it must give way. But anyone who argued like this was immediately open to attack for being a 'Commonwealthman' and therefore the enemy of the English Constitution (in the next chapter we shall see Robert Ferguson being attacked in this way). Atwood would have repudiated these accusations as vehemently as any royalist, and hence the urgent need he felt to prove salus populi to be part of the law of the English Constitution.

Yet Atwood's salus populi could at most be described as a principle of law and not the law itself. It might thus be a criterion for changing law, but the act of change could only be described as legal if it were carried out through recognized constitutional channels. Rebellion or

force could never be such a recognized legal channel. When resort is taken to force the constitution, inso facto, has broken down. Revolt might be necessary to restore or alter a constitution but it could never be styled 'legal' according to the law of that constitution. The only standard by which rebellion might be called 'legal', is the standard of natural (or divine) law. But the legality of an act according to natural law is a very different sort of legality from that which arises from constitutional law. Having refused to take this possible way out of his dilemma, Atwood had to try and reconcile his rational standard of the salus populi with existing constitutional law. Hence his appeal to an original Constitutional Contract.

The idea that the English Constitution was in fact set up by a contract between rational men was an easily comprehensible way of uniting reason and history. It was not entirely satisfactory, as Miss B. Behrens has shown,⁵⁸ but it did provide a fairly plausible basis upon which to defend the legality of William's and Mary's reign. The task of interpreting the best relationship between government and governed was thrust back upon the original framers of the constitution. Their decision was enshrined in a set of constitutional laws, which could all be modified in some degree by posterity provided the essentials of the arrangement remained. Here lay a strength of the doctrine as far as Atwood was concerned. Any attempt to act in accordance with the salus populi could be interpreted as

an act necessarily in accordance with the spirit if not the letter of the constitution. Thus any change of constitutional law, even if effected through extra-constitutional channels, could be interpreted as a defence of the original constitution rather than an innovation. It was a defence of the 'intentions' of the original contractees.

Only constitutions founded by contract are legitimate. The English Constitution was founded by contract, therefore it is legitimate. Contractual constitutions have as their supreme law the salus populi because all rational men intend government to secure this. It followed from these propositions, Atwood's argument runs:

that where [government] ... is founded in Compact; the Nobles and Commons may join in the Defence of their ancient and accustomed Liberty, Regiment and Laws; nor may they in such Cases well be accounted Rebels.⁵⁹

The stigma of rebellion could thus be removed from the supporters of the 1688 Revolution.

The will of God revealed in the Bible did not provide evidence for refuting this deduction. Despite all the arguments of the Divine Righters from Biblical sources, Atwood argued, they had missed the point:

Christianity [does not] ... lay any Obligation upon the Subjects, beyond the Duty resulting from the particular Constitutions of the respective Governments; so he [Bishop Bedell⁶⁰] does fully admit that the Laws and [sic] customs of some Countries may allow of Resistance in some Cases.⁶¹

The English Constitution certainly allowed this right.

And so, in fact, had Denmark, Sweden, Norway, and France,⁶²

Venice and the German Empire,⁶³ and even classical Rome,⁶⁴ at some stage of their histories.

The resistance that the English had shown to James II was, therefore, legal because Atwood believed that it had been necessary:

the Oath of Allegiance ... is discharged or dispenced with, when Salus Populi ... is concern'd, and in danger. [And] ... an Alteration in the Course of [the] Descent [of the Crown], in Case of Necessity, is so far from a Change of the Constitution, that 'tis by vertue of the Chief Fundamental Law the Salus Populi.⁶⁵

This theory of an original Constitutional Contract, then, combined elements of seventeenth century rationalism with legal history. The elements were held in uneasy balance, with the former as the ultimate court of appeal in cases where the 'reasonable' conflicted with the legal. This was so even though what was deemed to be reasonable was apparently a matter for the individual's reason alone.⁶⁶ The extent to which the requirements of reasonableness might override those of strict legality is evidenced in Atwood's solution to the problem of Charles II's statutes which outlawed resistance to the monarch. These statutes, as I remarked earlier,⁶⁷ were a major difficulty in the way of those who wished to argue that the 1688 Revolution had been perfectly constitutional. They were Acts of Parliament, indisputably part of the constitutional law of the land, and they 'proved' that armed resistance to James II was illegal. This was precisely the conclusion that Atwood wished to avoid and hence he insisted that it was "the

common Fundamental Law" which was "in this case the Superior" and which was to "explain and limit the Sense of Acts of Parliament seeming to the contrary."⁶⁸ And this 'common Fundamental Law' was in essence, as we have seen, the salus populi.

This solution to the problem of Charles II's statutes is interesting not only because it rests on the idea of a fundamental fundamental law, but also because Atwood chose to call that law the "common" fundamental law. By the end of the seventeenth century it had become commonplace amongst assertors of parliamentary rights against the Crown that there existed a fundamental law guaranteeing those rights. The earliest theorists of fundamental law were mainly common lawyers like Coke and Hobart. Basically they believed that fundamental law was something like the 'reason of the common law' - an abstract set of principles that were embodied in the history of common law. From these ideas it was possible to argue that any Act of Parliament that contravened the 'reason of the common law' was void, the strength of the argument resting on the superiority of common over statute law.⁶⁹ And although this relationship was rapidly changing,⁷⁰ when Atwood described his fundamental law as the "common Fundamental Law" he was drawing on two sources of inspiration that helped to make his argument more persuasive to the less radically minded by concealing the ultimate rational basis upon which it rested. The main characteristic of Atwood's fundamental law was its

rationality, but this was no longer derived from the historical experience of the common law. Instead, the fundamental law was rational because it was consciously designed by rational men who, in the distant past, had decided that government under a set of fundamental laws would be beneficial to them. Thus for Atwood to assert the superiority of fundamental over statute law was tantamount to asserting that reason should be the test of law. This was a perfectly plausible assertion but one that Atwood did not wish to make in such an unequivocal way. He wanted to argue his case upon the view that the only acceptable test of 'legality' was positive law. Hence, when positive law definitely did seem to refute his argument, he appealed explicitly to the "common Fundamental Law", where 'reason' seemed linked to the accumulated wisdom embodied in positive law. But this, quite clearly was a very different sort of standard from that 'reason' involved in making the salus populi the ultimate test of legality.

As far as Atwood was concerned, then, resistance to the monarch would not only be justified but also legal if the salus populi were threatened. But two further problems remained before his 'proof' of the legality of resistance could be complete. These problems concerned first, who was to determine when the salus populi was endangered, and second, what was to happen to the constitution if armed conflict were necessary to resolve a dispute over the public well-being?

Although Atwood wanted to legalize some resistance, he did not want "to go about to loosen the Bond of due Subjection to the Powers which are over us."⁷¹ Thus he donned the cloak of moderation:

We may resist when the Original Contract is Notoriously broken, and we must not resist when the Original Contract is notoriously broken; are contrary and contradictory Propositions one of which I grant to be true; But we must resist in no case, and we may resist in any case, when every Man pleases .. are not Contraries, but Extrems; and tis odds but the Truth lies in the middle, that we may resist in some case, which cries aloud, and justly stirs up a Nation, as with the Voice of God.⁷²

This meant that "If single Persons, or many together be injur'd by the Prince, they are oblig'd to suffer quietly, rather than disturb the Publick Peace".⁷³ For injuries caused to individuals by the government did not constitute breaking the contract:

all the People collectively, or representatively, were but one Party in the Stipulation, and therefore those Acts, by which a King must forfeit [his throne] are [only] such as are likely to take away the Rights of the whole People, or aim at changing the Form of the Government, subverting the Laws.⁷⁴

Atwood believed, as we have just seen, that these occasions would 'cry aloud'. But, all the same, "There was and is an establish'd Judicature for the great Case in question".⁷⁵ This 'Judicature' was the "Lords and Commons in full Parliament."⁷⁶ Its role was testified to by precedents stretching back to Saxon times.⁷⁷

By the 1690s, then, Atwood was asserting the constitutional supremacy of Parliament. He had moved a

long way from his defence in the early 1680s of the Common Law view of the balanced, monarchical constitution. In summary the constitution now consisted of "the express Original and continuing Contract between Prince and People ... with the Legal Judicature empowered to determine concerning it".⁷⁸

The final problem that Atwood felt obliged to consider when arguing that the English Constitution countenanced resistance, involved 'proving' that resisting the monarch did not cause a breakdown in that constitution. If it did he would have been forced to admit that the Revolution was either unconstitutional but necessary, or 'legal' according to some other law than the purely positive. "The Kingdom I own is founded in Monarchy", he argued, but this did not imply "that the dissolution of the Contract between the immediate Prince and People, should destroy the form of Government".⁷⁹ The main difficulty in this respect concerned the status of the Convention Parliament which, after James II's escape to France, had determined that William and Mary should be offered the throne in his stead. On the one side, the defenders of James II argued that the Convention was an illegal body because a regular Parliament alone could resolve constitutional questions and the Lords and Commons could only be convened by the king's writ. Atwood attacked these arguments as excessively 'formal'.⁸⁰ On the other side were those who

suppose the Consequence of a Dissolution [of the] ...
Contract to be a mere Commonwealth, or absolute
Anarchy, wherein every body has an equal share in
the Government, not only Landed men, and others
with whom the Ballance of the Power has rested by
the Constitution, but Copy-holders, Servants, and
the very Faeces Romuli, which would not only make
a quiet Election impracticable, but bring in a
deplorable confusion.⁸¹

The error of these men lay in not having attended to
Pufendorf,⁸² and in particular his distinction between
two contracts. For "according to the Judicious Pufendorf,
by virtue of a double Contract, where the Fundamental
Constitution is Monarchical, as in England, a Monarchy
remains."⁸³

The neglect of Pufendorf's wisdom was the error of
Locke's Two Treatises of Government (1690). Locke had
published Two Treatises anonymously and there is no evidence
to suggest that Atwood knew him to be the author, even
though Tyrrell, a friend both of Locke and Atwood, definitely
was aware of it.⁸⁴ Atwood considered Locke's work to be
"the best Treatises of Civil Polity which I have met with
in the English Tongue".⁸⁵ It successfully refuted the
absurdities of Robert Filmer and established government
"upon the only true Foundation, the Choice of the People".⁸⁶
The only glaring omission of this otherwise great work
could be rectified by resorting to Pufendorf. And Pufendorf's
treatises, we may assume from the extent to which Atwood
falls back on their authority, comprise the best books on
civil polity in any tongue.

It is interesting, and instructive of Atwood's central concern with the English Constitution, that in discussing Locke he considered that "his Scheme of Government is not erected as the most perfect, but seems designedly adapted to what he takes our Government to be, tho not expressly named".⁸⁷ Since Atwood interpreted Locke in this way he could neglect that part of Two Treatises which examined the nature of pre-political man - his natural rights and the law of nature which guided him. He could then conclude that:

whereas he [Locke] argues, That the people are by the Monarch's Violation of the Constitution, restor'd to the state of nature, there being no common Judge in that state of War to which his injuries force them; no man who observes how clearly and consistently he always reasons, can believe that he would apply this to such a state of the Question, as I have shewn that our Constitution warrants; which depends not upon a single contract between the people, and a Prince and his Heirs, whom they had set over them, whose Authority ceasing, they were to new mold the Government ...

But there plainly was a farther contract among themselves, to prevent Anarchy and, Confusion, at any time when the Throne might be vacant; and by vertue of this Contract they have regularly made those Elections, which are frequent in our Histories, and are authentick Presidents for our late Proceedings.⁸⁸

In Atwood's view, then, Locke was correct in arguing that the only legitimate foundation of government was the consent of the governed, but his omission of Pufendorf's two contracts could have led to errors in understanding the English Constitution. But Atwood himself misunderstood, or misinterpreted Pufendorf's theory. Pufendorf had distinguished between the contract whereby a civil society

was established from the contract of submission which established and guaranteed a regular government.⁸⁹ Both these contracts were only comprehensible and justifiable in the light of logically prior beliefs in natural rights and natural law. But Atwood's interpretation of Pufendorf's meaning involved neglecting these ideas. Thus, by the first of Pufendorf's contracts the English made "a Provision ... for a Monarchy, before any particular Person was settled in the Throne". By the second, the people simply chose a king.⁹⁰ It then certainly did follow from the dissolution of Atwood's second contract, that the monarchical form of the constitution would remain unchanged.

I have now examined all the major propositions involved in Atwood's Constitutional Contract Theory. From the idea that the English Constitution was begun by a dual contract, he elicited the first, fundamental, constitutional law of salus populi. His completed theory made it perfectly consistent to argue the case of the constitutional legality of the 1688 Revolution. If the constitution were really as he wished to persuade his contemporaries, then an attempt to remove the incumbent monarch could be called 'constitutional' provided two conditions were satisfied. These were: first, that no attempt be made to alter the monarchical form of the constitution; and second, that the replacement of the monarch should be justifiable on the grounds of the salus populi (with the Lords and Commons acting as final judge in case of dispute). Atwood and

many of his contemporaries were convinced that both these conditions were satisfied in the case of the struggles against James II. But it was only possible to accept the satisfaction of these two conditions as evidence of the constitutionality of the 1688 Revolution by accepting a contractual view of the English Constitution as well. Thus many men, sympathetic both to the dangers of arbitrary government and to the difficulties involved in upholding the Constitutional Contract Theory were still faced with an unresolved dilemma. Atwood may well have persuaded some that "the People of England are actually discharged from their Oaths of Allegiance to James II and were lately restor'd to that Latitude of Choice which ... [is] their Original Right".⁹¹ But to those who could not follow him, allegiance still lay with the deposed king. For this group, the distinction between a 'de facto and a de jure king' became increasingly meaningful, and Atwood's solution to their problem by simply denying its existence was of little comfort.⁹²

The principal point of Atwood's Constitutional Contract Theory seems to have been to redefine 'rebellion' in such a way that the sort of resistance exhibited in the 1688 Revolution could be shown to be legal. Unlike many contemporary contractarians, Atwood did not concern himself with examining the principles of consent and contract in terms of natural law, natural rights, etc. The reason for this was certainly not that there was a blind-spot

in Atwood's theoretical vision. By 1690 he had read Locke, Tyrrell and their opponent Filmer, as well as the works of Pufendorf.⁹³ But Atwood simply took the refutation of Filmerism for granted and proceeded to follow his own purpose of providing a foundation of his English Constitution from the material of constitutional law alone. From this point of view, Filmer's notions of patriarchalism and divine right would appear as ridiculous, or at most simply 'stumbling blocks' in the way to a more concrete proof from records of law that the events of 1688-9 were constitutional. Thus Atwood dismissed the whole Filmerian debate:

As to the Nation's rightful Power [to act as it had in 1688], I shall not go about to refute the fond Notion of an absolute Patriarchal Power descending from Adam to our Kings in some unaccountable way; because, tho if it were true, there could be no more Compact between Princes and their People, than is between Fathers and Children for establishing the Rights of Fatherhood, yet the difference between a Patriarchal and Monarchical Authority, is so well stated and prov'd by my Learned Friend Mr Tyrril; that few besides the unknown Author of the two late Treatises of Government, could have gained Reputation after him, in exposing the false Principles and Foundation of Sir Robert Filmer and his Admirers....

Wherefore I may well think that I may pass over the Stumbling-Blocks which such Men [Filmerians] lay in the way to my Proof, that the Power whereby this Nation is govern'd, is originally under God derived from the People, and was never absolutely parted with.⁹⁴

There could be no political power before contract; Pufendorf, Tyrrell and Locke had proved that much. But they had done so by means of philosophical notions of a state of nature inhabited by men with natural rights and

guided by the dictates of natural law. Atwood was prepared to adopt their conclusions, but not to engage in that sort of enquiry himself. The conclusions, indeed, were necessary postulates for him but his scepticism of 'metaphysical' notions seems to have made him hesitate in accepting their 'proofs'. His concern, anyway, was with constitutional questions whose solutions he felt must be sought in constitutional law alone. If the original contract were historically valid, establishing fundamental laws that defined and protected the rights and duties of Englishmen, and if the fundamental constitution could be shown to be the present constitution, then the defence of those rights which Atwood wished to uphold could take an historical or pseudo-historical form without necessitating recourse to "thin and metaphysical Notions".⁹⁵

A justification of the 1688 Revolution, then, need only take the form of a correct examination of the constitution, especially as it concerned the monarchy. Disputes about Divine Right and Patriarchalism were needless - all that was required was a knowledge of the provisions of the fundamental constitution:

Men [who argue for Divine Right] will have it, that the Extent of the Power of a King, as King is ascertained by God himself, which I must needs say, I could never yet find prov'd with any colour. But to avoid a Dispute needless here, since the Question is not so much of the Extent of Power, as of the Choice of Persons; Whether any Choice is allowable for us, must be determin'd by the fundamental or subsequent Contract ...; and 'tis

this which must resolve us, whether the Government shall continue Elective, or Hereditary to them that stand next in the Course of Nature ... or limited only to the Blood, with a Liberty in the People to prefer which they think most fit, all Circumstances considered.⁹⁶

But the constitution, Atwood insisted, had to be examined correctly. By this he meant not only the careful selection of historical records but also that, in the absence of records 'proving' certain desired provisions to be constitutional, appeal could be made to 'the reasonable'. The validity of this view, however, depended on the ideas that government was rationally designed and that history embodied a rational purpose. Philosophical contractarianism examined most explicitly the first of these ideas.⁹⁷ Thus when Atwood explained the purpose and method of his The Fundamental Constitution (1690), he was utilising conclusions, the 'proofs' of which he refused fully to endorse:

"that the People of England have lawfully and rightfully renounc'd their Allegiance sworn to J.2 and transferr'd it to the most deserving of the Blood," he explained, "I shall evince, not only from the Equity of the Law and Reservations necessarily implied in their Submission to a King; but from the very Letter, explain'd by the Practice of the Kingdom, both before the reputed Conquest, and since."⁹⁸

The idea of History that gave Atwood's arguments coherence and credibility needs closer examination.

IV

Atwood's constitutional theory was predominantly, perhaps even completely, a construction of reason. At

its centre was the idea of a contract by which men designed a constitution for their own advantage. The enlightened self-interest of the designers occasioned the constitution, was embodied within its provisions, and was the chief fundamental law which all others must serve. The theory was produced for a practical political purpose - to show that resistance to a monarch who acted against the public interest was a legal duty according to the constitution. This conclusion did in fact follow from Atwood's premisses and thus the legitimacy of the William and Mary regime could be established. But the credibility of the whole enterprise depended upon the credibility of its premisses, particularly those concerning the place of reason in constitutional history and law.

One of the most remarkable features of Atwood's theory was his insistence that he was only concerned with positive law. Natural law and natural rights were explicitly outside his purview because he believed they were unnecessary complications that served only to confuse those wishing to know where their constitutional allegiance lay after the upheavals of 1688. The idea that legitimate government everywhere began by contract was crucial to his argument, but he believed that nothing more than a knowledge of constitutional history was necessary to establish it. Thus despite the clearly rationalist argument that he presents - the argument from rational origins and from design proving salus populi to be the chief fundamental

law - he claimed that it was founded upon historical evidence alone. If the original contract could be shown to be historically valid, then the salus populi was truly the chief fundamental law provided all of Atwood's other assumptions serving to relate past to present were acceptable.

We may assume that Atwood thought himself successful in proving the historical validity of the English Constitution's "express Original and continuing Contract". But, apart from the single reference to the unification of Saxon England that appeared in the Mirror of Justices, the only evidence that Atwood brought to support his contract turns out to be arguments from 'reason' and not from history. Historical evidence of the contract, in other words, took the form of arguments from the existence of governments to categorical statements of what must have been their origins. This, of course, was not to argue 'historically' at all. Beginning from historical evidence, Atwood proceeded to enunciate the necessary conditions for the appearance of that evidence. And whilst we might tentatively accept in historical narrative an argument from 'what was' to 'what might have been', the rationalist argument from 'what was' to 'what must have been' is of an entirely different order. Yet Atwood found his argument satisfactory and so did many of his contemporaries. Why was this so?

The problem confronting us here has been clearly outlined by Betty Behrens in her study of the Whig theory

of the constitution in the reign of Charles II. There was a clear contradiction, she claims, between arguments from reason and from history:

"In spite of assumptions to the contrary", she asserts, the argument from 'history' "was not to be reconciled with the argument from 'reason'. [The 'historical argument'] ... involved not merely the idea of a law equally applicable to and binding upon all men, and of justice impartially administered, but also the idea that, in a more extended sense, the law was supreme because its essential provisions regarding the constitution were unalterable.

How remote all this was from the conclusions dictated by 'reason' is easily apparent. If salus populi is suprema lex there can be no limit to the extent to which the constitution can be altered."⁹⁹

But in Atwood's work we find that the salus populi was the 'chief fundamental law', and yet there was a definite limit to how far the constitution could be altered. Before concluding, however, that Atwood was totally confused in claiming that his rational constitution was the product of historical evidence alone, it is necessary to re-examine those "assumptions to the contrary", to which Miss Behrens refers. From this re-examination it will appear that whilst Atwood may well have been 'mistaken' in the conclusions he reached, he most certainly was not confused. For whether reason and history lead to different conclusions depends on how their respective logics and inter-relationships are conceived.

Atwood's idea of the extent and limits of the individual's reasoning faculties creates little difficulty for our understanding. As I have indicated, his views seem to

coincide fairly consistently with the seventeenth and eighteenth century tradition of 'Constructivist Rationalism' which Professor Hayek has described.¹⁰⁰ But the extent of his rationalism was to some extent disguised by his frequent appeals to the traditional 'authorities' in religion and history. These authorities, Atwood believed, were as unquestioningly to be followed as they had been in previous centuries. But this did not mean that Atwood was any the less rationalist in his approach to these 'authorities'. He still claimed the exclusive right to determine the best interpretation of an 'authority' or to choose who was to be the best interpreter. Thus what was acceptable to Atwood's reason was not offered to his public as the logical consequence derivable from simple, explicit and 'undeniable' premisses. Instead it was offered as the true view of the 'traditional, customary or habitual'. Atwood, after all, was explicitly concerned with history - with the experience of the English past.

He often insisted, as he did in his Reflections upon a Reasonable Opinion (1696) for example, that his views were "for the most part, the Result of the Collective Wisdom of the Nation."¹⁰¹ And he clearly felt a great veneration for the antiquity of English political institutions. At one point he lauded the "English Parliament in comparison with which we are but of yesterday and know nothing".¹⁰² Whilst in a later passage he reaffirmed this idea, so thoroughly anti-rationalist though it seems, by asserting

that "Mankind ... have greater Benefit and Freedom by submitting to equal constitutions, long established, than they could reasonably propose to themselves by innovations of any kind."¹⁰³ But a closer examination of Atwood's historical arguments reveals that these anti-rationalist statements did not really conflict with the rationalism of the rest of his arguments. He was convinced that the past actually was as he described, even though it included an original contract and could not accommodate the Norman Conquest. His rationally constructed past was, for him, the genuinely historical past.

This view of history was founded upon two main premisses. The first was that "the People that is now, in common presumption is the same which first settled the Succession"¹⁰⁴ - that people in the past were exactly the same as people in the present. The second was that "where Authorities [in history] are received, and the only question is about the Sense of them, the true Sense is as capable of demonstration, as any proposition in Euclid."¹⁰⁵

From the first premise it was possible for Atwood to argue that since he could conceive of no obligation without consent,¹⁰⁶ men at the beginning of history must have thought the same. Furthermore, the actual propositions that Atwood would consent to in the late seventeenth century must have been those consented to in the past. Times did change, Atwood was not denying that, but the more reasonable the actors in history the less change would occur. New

problems might arise in politics requiring changes to existing laws, but the principal problems had been inviolably solved by the original contractors. It was these solutions that most concerned Atwood and his method of ascertaining what they had been was such that history was bound to reveal the answers he wanted. It was bound to do this because according to the second premise historical actions must be understood by the light of reason. Thus, for example, when analysing the relationship between England and Ireland according to the laws of the historical contract constitution Atwood could argue:

'Tis certain, that whether we consider the people of the same Nation, or the relation which one Nation has to another, their state or condition, must depend upon Constitutions and Agreements, express or tacit what Constitutions and Agreements are binding, and for what time, will fall under the considerations of Reason, either of itself, or aided and assisted by Revelation. 107

This declaration occurs at the beginning of a study supposedly concerned with the historical and legal relations of England and Ireland. But the ultimately rational basis of the forthcoming 'history' is plainly visible. For all his assertions that the constitution was the product of the "Collective Wisdom" of the ages, each constitutional provision had to stand or fall by the test of reason. It was not the antiquity of the provisions, it was rather "those Laws of Reasonable Nature, and of Nations, which [ultimately] oblige Men to keep to the Contracts their Forefathers entered into".¹⁰⁸ The assistance that reason

might possibly require from 'Revelation' in this did not spring from any inherent limitation in reason's power. Not only was it true that "the Scriptures meddle, not with particular Constitutions",¹⁰⁹ but any positive law "if it have due regard to ... the Supream Law, the good of the People, is that which Induces or Occasions the Divine Right".¹¹⁰ God was on the side of reason - indeed, He was rational - and anything in the political world which reason supported could ipso facto claim God's support. Divine help explained the endurance of legitimate government, not the reason for its legitimacy.¹¹¹ The majority of men were not sufficiently aware of their true interests, as the diversity of history proved, but history also showed that they could not be kept in subjection for all time.

God was truly the ruler of the universe but He ruled according to rational principles.¹¹² The principles by which He ruled were discoverable through the exercise of right reason alone. But because most men did not use their reasoning faculties to the full, and because reason could only claim to make 'Faith' redundant at the cost of charges of blasphemy, reason still required acknowledged assistance and confirmation from revelation.¹¹³ In Atwood's works this 'acknowledged assistance' was gained by drawing God into partnership with man and by attributing to Him the mental processes of man. God's will in respect of human affairs was knowable by His actions. But His actions were comprehensible because they accorded with what

rational man would do.

Divine intervention was 'proved' by the endurance of legitimate "Kingdoms and Common-wealths",¹¹⁴ but there was no possibility of arguing from endurance to legitimacy. Atwood's criterion of legitimacy was determined independantly of his historical studies and was used as the key to understanding, particularly, English constitutional history:

"Quod initio non valet, tractu temporis non conualescit."¹¹⁵
 The legitimacy of a government was determined by its 'birth'.¹¹⁶
 The idea of legitimacy, therefore, was the construction of reason and since the history of a legitimate government consisted of reaffirmations of its 'birth', that history too was a rational construction. The history of illegitimate governments was also an essentially rational construction because the same criterion of relevance had to be applied to whatever evidence existed. Available historical evidence did impose some limits upon what a particular history could contain. But since the discipline of history was conceived as a didactic enterprise in which meaning was "as capable of demonstration, as any proposition in Euclid", then those limits were so wide as to be practically insignificant.

As far as Atwood was concerned, then, the universe was actually created and ruled by God, but God was as a rational man. History was the story of God's rule, therefore history was rational. On this view of the world and the conclusions concerning the nature of history, it was perfectly consistent for Atwood to argue that since reason

taught that contract was the only proper foundation of legitimate government, then this must be historically valid. All legitimate governments existing in the world were actually founded by an historically specifiable contract. Furthermore, since all contracts embodied the will of the contractors it followed that the raison d'etre of all legitimate governments was the salus populi. Salus populi, therefore, was necessarily the highest law of the contract constitution.

These conclusions and the idea of History that gave them coherence, were widely shared in the late seventeenth century.¹¹⁷ But the practical political "message" associated with Constitutional Contractarianism was by no means always the same as appears in Atwood's works. I have so far considered the nature and coherence of the Constitutional Contract Theory. Atwood's writings have served as one of the clearest statements of the doctrine. If we now turn to examine the political career of Robert Ferguson we may begin to appreciate the extent of the theory's appeal and the variety of 'causes' that it was used to promote.

CHAPTER VROBERT FERGUSON : THE CONSTITUTIONAL CONTRACT AND
PRACTICAL POLITICS

The political career of Robert Ferguson was most amazing. He was educated in Scotland as a non-conformist divine but moved to England in the 1650s and began a controversial life as a publicist and political activist.¹ In 1663 he was imprisoned for three and a half months for "being concerned in raising money in support of ejected ministers, and for other treasonable practices."² This, however, was the only term of imprisonment that he served in his life: a remarkable achievement for one whose political activities during the 1680s and '90s gained him the nickname of "the Plotter". He was involved in practically all the conspiracies against Charles II, James II and William and Mary that were discovered, and he wrote a popular defence of each side involved in the constitutional upheaval of 1688.³ He seems to have had a passion for losing causes. All of the 'plots' in which he played a prominent part (including the famous Rye House Plot and Monmouth's Rebellion) were failures. He appears not to have had any significant involvement in the only successful 'rebellion' of the period - the 1688 Revolution - and after the Revolution he stopped supporting the victorious side and devoted his energies to the Jacobite cause.

This career of controversy and conspiracy falls into

three fairly clear divisions. And Ferguson's writings can best be examined in these terms. From 1668 to 1680 his works were all principally concerned with the religious controversies of the day. One of the books he wrote during this period warrants our attention because it contains a coherent attack on Hobbes, a reasoned defence of natural law and the first general statement of his contractarian position. The year 1680 saw the publication of his first purely political tract, and for the next decade his pamphlets were all concerned with justifying attacks on Charles II and James II. After 1690 he continued to write political pamphlets, but his scorn was turned against William III and the defenders of the Revolution.

The complete volte-face in Ferguson's political persuasion after the Revolution earned him the contempt of many of his contemporaries. In 1704, for example, an opponent reflected on Ferguson's activities and concluded:

Now since Mr. Ferguson's whole Life has been one continued Maze of Intricate Windings, Turnings, Shiftings, Doublings, Sculkings, playing Bo-peep, and Dissembling, Prevaricating and Betraying (like a perfidious Jesuite) all Mankind he has treated with, ... he has made it a Herculean Task to find out what he truly is.⁴

Although the writer was particularly concerned with Ferguson's change from an opponent to a supporter of James II, his bewilderment might also be taken to refer to Ferguson's ideas about the nature of government in general and of the English Constitution in particular. Ferguson's political writings all had an immediately 'practical'

character. Their main concern was to gain support for the variety of causes Ferguson championed, and to this end all else, including coherence and consistency in ideas, seems to have been subordinated. This makes any interpretation of the meaning of the concepts he employed somewhat difficult. There is a danger of imputing not only 'precision' where none in fact existed, but also of 'consistency' where the tactics of dispute might have necessitated contradictions.

But in a very general way, as we shall see, Ferguson's political arguments do entail a constitutional theory remarkably similar to William Atwood's. The central propositions of this theory were: that the English Constitution both embodied and was the product of an original contract, and that in disputes over the requirements of constitutional law reference must be made to the 'intentions of the original contractees' as well as to statute and common law. The distinctions between 'reason', 'natural law' and 'civil law' were accordingly blurred and almost anything that Ferguson believed 'reasonable' could be presented as 'legal'. Ferguson's attack on Hobbes in 1673 contains his early reflections on these essential concepts of 'reason', 'civil law', and natural law.

II

In 1673 Ferguson published A Sober Enquiry into the Nature, Measure and Principle of Moral Virtue, Its

distinction from Gospel-Holiness. His main purpose was to show that Grace was an essential part of the Christian Religion and thus: "that, the Law of Nature is no sufficient Measure of Religion: and consequently that all Religion consists not in the meer practice of Vertue ... And that the Christian Institution is not a meer digest of the Eternal Rules of Nature & right Reason".⁵ In order to do this, Ferguson felt it necessary to emphasise the limits of the power of human reason and to attack Hobbes' moral theory.

Ferguson began his examination of Hobbes' moral relativism with a view of man and his place in the universe that was widely accepted in the seventeenth century:

It is a contradiction for man to be such a creature as he is, and not to be obliged to love, fear and obey God. All creatures according to their respective and several natures, are necessarily subject to him that made them. It is impossible that whatever owes its entire being to God, should not also be in a suitable subjection to him. Man then being a Rational creature, must owe God a rational subjection. 6

Man's reasoning faculty, however, could never be a sufficient guide to the whole duty owed both to God and to God's creatures. Ferguson's dedication of the Sober Enquiry to Sir Charles Wolseley praised him for degrading "Reason from that Supreme Judicature that some would erect it into", and for having "rightly vested it in whatever belongs to it as an Instrument of discerning and conduct."⁷ And later he argued: "what a miserable condition the World had been in, even in reference to the most obvious duties of Morality,

had mankind been left to the sole conduct of Natural Light".⁸ Yet despite the limited power of human reason, man was still essentially a rational creature and therefore his obligations must be intelligible to him - "rational subjection" could mean nothing less than this. Man's natural obligations constituted the moral law and the moral law was the law of nature. The limitations of human reason arose because of original sin, and the confusion that resulted concerning moral duties was only to be cleared, and could only be cleared as far as Ferguson was concerned, by direct divine intervention:

our Reasons ... was a sufficient Instrumental conveyance [of the law of nature] while we abode in the state of Integrity. [But] It is true, since the fall it is otherwise, many Dictates of the Law of Nature being grown inevident, obscure, subject to controversy, not easy, if at all, to be defined, without the advantage and assistance of Scripture-light ... So that now the only sure universal, perfect System of natural Law, is the Decalogue of Moses. This is a true draught of what by the Law of Creation we were under the Sanction of; A transcript and written impression of the whole Original Law. 9

Natural law, then, was the moral law ordained by God when He created the world. It could be known in two ways: "either as 'tis Subjective in man, or as 'tis Objective in the Decalogue".¹⁰ But since man's reason was defective, the first way had to be supplemented by the second. Thus, "Grace is our Medicine by which our Aversion and Weakness in reference to the original Law is removed and healed".¹¹ This practical necessity for Grace in no way detracted from the "rational subjection" that men were under to obey the

moral law. For good men could still know the requirements of natural law through the exercise of right reason alone,¹² and anyway the Christian religion was eminently 'reasonable' as an explanation of the origin and nature of the universe.¹³

Because they were the law of Creation, "every Precept of the Law of Nature is of unchangeable and unalterable obligation".¹⁴ Thus Hobbesian ideas of moral relativism not only contradicted the nature of natural law, but also proved their assertors to be atheists:

not only Pyrrho, Epicurus, Etc. of old; but Hobbs and some other wild, Atheistically disposed persons of late, have managed an opposition to all natural Laws; contending that all things are in themselves indifferent; that Moral Good and Evil, result only from mens voluntary restraining and limiting of themselves; and ... that antecedently to the constitutions, appointments and custom's of Societies, there is neither Vertue nor Vice, Turpitude nor Honesty, justice nor injustice: that there are no laws of Right and Wrong previous to the laws of the Commonwealth, but that all men are at liberty to do as they please. 15

Hobbes had denied the existence of anything that Ferguson would have recognized as natural law. This denial was dangerous not only because Hobbes might mislead many readers concerning their moral duties, but also because there already existed confusion over the actual requirements of natural law. As we have just seen, Ferguson considered the latter problem easily resolved - the Ten Commandments constituted an objective record of the whole original law. But whilst the situation continued where "Learned men do wonderfully differ, and some of them strangely prevaricate, in stating the Measure of the natural Law and in defining

what Laws are natural",¹⁶ then Hobbes' radical notions might seem very persuasive.

The grounds for believing in Christian Natural Law, then, had to be reasserted and Ferguson entered into this task with all the assurance of a devout Christian Divine:

The Principles then upon which, as so many Pillars, we build our assertion of a natural Law, may be reduced to four. The first is this: There are some things in themselves dissonant and incongruous to the Divine Nature, and that dependence we have on God. 17

But since the refutation of Hobbes began from theological assumptions which Hobbes did not accept, it could no more constitute a proof of Hobbes' errors than Dr. Johnson's stone did of Berkeley's. Ferguson's remaining "Principles" were all based upon a theological view of the nature of man and his dependence on God, and thus they too are wide of the mark. For the theological understanding of man is not argued, it is merely asserted. Ferguson listed the rest of his principles as follows:

The second is this, God creating Man a Rational Creature, endowed him with Faculties and Powers capable of knowing what was congruous to the Nature of God and his dependence on him, and what was not ...

The Third is this ... It is impossible that God should allow us to pursue what is contrary to his nature, and the Relation we stand in to him; or to neglect what is agreeable to it, and the dependence we have on him ...

The Fourth and last is this; that God for the securing the honour of his wisdom and preserving the dependence of his creature upon him: annexed to this natural Law, in case of men's failure a punishment [of damnation] ... 18

Ferguson based his belief in the existence of an eternally binding natural law that governed the moral.

world on these four principles. But he did consider evidence of a different kind and from our point of view it is this evidence that warrants most attention because it concerns the relationship between natural law, original contract and civil law. After noting that there had never been "at any time ... a Nation or People that did not acknowledg a distinction of Good and Evil",¹⁹ Ferguson continued:

if there be no Law of Nature constituting what is Good and what is Evil, antecedently to Pacts and Agreements amongst Men, then all humane Laws signifie in Effect just nothing. For if there be no antecedent obligation binding to obey the just Laws and constitutions of the Commonwealth, then may they at any time be broken without Sin: and Rebellion will be as lawful as obedience, nor needs anyone to continue longer Loyal, than he hopes to mend his condition by turning Rebel. 20

Thus the danger of understanding Civil Society in a Hobbesian way was, according to Ferguson, that it denied any moral obligation to obey civil law. By making obligation conditional upon self-interest, Hobbes had rendered precarious the ties of Civil Society. It was thus to strengthen civil law that Ferguson saw the necessity of positing a natural law. But it must be emphasized that it was neither all civil law nor all commonwealths that Ferguson understood as commanding obedience based on natural law. It was only "the just Laws and constitutions of the commonwealth".²¹ Indeed, if the moral law were to be plausibly the ground for obedience to civil law (a human artefact) some distinction between

good and evil civil laws had to be admitted. A civil law requiring men to break the natural law could hardly be said to command obedience based on that natural law. Furthermore, as Ferguson later argued, "the Laws and customs of nations have been so different and opposite, that what hath been accounted vice by one nation, hath been held for vertue in another".²² These different and opposing laws could not all be held to command the same sort of obligation. Only those that assisted, or at least did not hinder, the implementation of the Ten Commandments could be held to be "just" according to Ferguson's understanding of the "unalterable and unchangeable" law of nature which was "the alone Rule and measure of Moral Vertue".²³ Thus although Ferguson argued that the obligation to obey all civil law was based on natural law, he nonetheless explicitly regarded only just civil laws as obligatory:

"All Humane Laws, suppose the Law of nature; and seeing Revelation extends not to every place, where Humane Laws are in force, that Civil Laws do at all oblige, must be resolved into Natural Law. Obligation of Conscience with respect to the Laws of Men, is a conclusion deduced from two premises; whereof the First is, the Law of Nature enjoyning Subjection and Obedience to Magistrates in whatever they justly command; The Second is, the Law of Man under the Character of the Just; from both of which results the obligation of Conscience to such a Law." ²⁴

The purpose of Ferguson's argument had been to rescue civil law from the potential anarchy that he saw implicit in Hobbes' theory. But he left civil law in as 'dangerous' a state as before. He introduced the condition that civil

law must be 'just' if it is to command obedience, but he found no adequate and unequivocal determinant of what constituted justice in the particularity of human affairs. We must assume that Ferguson would have argued that the Ten Commandments, the natural law as "'tis Objective", could fulfil this role. But the general nature of the Commandments and their restricted scope would leave a legislator or judge at a loss when specific decisions were required in specific cases. At all events, Ferguson never addressed himself to this question and we can only conclude that he believed he had successfully rebutted Hobbes and established the moral obligation to obey civil law. There is at least no evidence to the contrary. The merit of his argument lay in its practical usefulness not for the upholders of civil law and magistrates, but for their opponents. By making obedience conditional upon 'justice', and by seating justice in 'conscience' guided by the Decalogue,²⁵ a moral duty was implied not only to refuse to obey unjust laws, but to attempt to return to the ways of justice. Yet the decision as to what constituted an injustice was effectively left to the individual. In the troubled political conditions of England during the 1680s the potentiality of this theory of law for justifying the 'legality' of resistance to magistrates was increasingly realised. Indeed, Ferguson himself, in his own contractarian writings, was in the forefront of those who pushed this potentiality towards fulfilment.

III

In 1680 Ferguson wrote the first of a long series of political pamphlets designed, in the most general terms, to secure political safeguards for the Protestant religion.²⁶ More specifically, his pamphlets of the 1680s were intended to support the causes of the Exclusionists and the Duke of Monmouth, although after the succession of James II and the failure of Monmouth's Rebellion he turned simply to oppose the king and eventually (for a short period) he supported William of Orange.

Like practically all the anti-royalist writers of the time, Ferguson took considerable trouble to avoid possible charges of the 'illegality' of the activities he was defending. He insisted that he was "of most sincere loyalty to the King and the Government".²⁷ But this was hardly sufficient to prevent an opponent declaring that he and "his Party, ... would willingly be at the old game of Forty and Forty One again".²⁸ Indeed, attacks on the Shaftesbury Whigs, of whom Ferguson was the principal pamphleteer,²⁹ for being regicides and commonwealthmen were quite frequent. Another of Ferguson's opponents, for example, accused him of plotting "to have all things in Common, to have the Power in the People",³⁰ and of holding out "that Common-wealth Prize" as the "Reward"³¹ for anti-monarchical activities.

To be accused of being a 'commonwealthman' was a serious matter in the 1680s. Hardly anyone wished to

experience again the upheavals of civil war or to be responsible for causing them. Thus to combat these accusations Ferguson adopted the arguments of Sir William Jones, Attorney General at the time of the Exclusion Parliaments. Jones's pamphlet was originally published in 1681, and Ferguson republished it with minor alterations (but without acknowledgement) in 1689.³² In a clever and rather devious argument, Jones attempted to make the accusation of 'commonwealthman' rebound upon the accusers:

"It is strange" he noted, "how this Word [commonwealth] should so change its signification with us in the space of twenty years. All Monarchies in the world, that are not purely Barbarous and Tyrannical, have ever been called Commonwealths. Rome it self altered not that Name, when it fell under the Sword of the Caesars ... And in our days, it doth not only belong to Venice, Geneva, Switzerland, and the United Provinces of the Netherlands, But to Germany, Spain, France, Sweden, Poland, and all the Kingdoms of Europe. May it not therefore be apprehended that our present Ministers, who have so much decried this Word so well known to our Laws, so often used by our best Writers, and by all our Kings until this day, are Enemies to the thing? And that they who make it a brand of Infamy to be of Commonwealth Principles, that is, devoted to the good of the People, do intend no other but the hurt ... of that People?" 33

By thus redefining 'commonwealth' as a state governed for the good of its citizens, Jones and Ferguson were able to accuse their attackers of a "fondness of ... Arbitrary Power, and [a] ... design to set it up, by subverting our Ancient Legal Monarchy, instituted for the benefit of the Commonwealth".³⁴ But this was obviously achieved at the cost of redefining the term in a way that their opponents

would not have accepted. To Jones and Ferguson, assertors of 'commonwealth principles' had become "men passionately devoted to the Publick good, and to the common Service of their Country, who believe that Kings were instituted for the good of the People, and the Government ordained for the sake of those that are to be governed, and [who] therefore complain or grieve when it is used to contrary ends".³⁵ Although the royalists might well have disagreed with these 'principles', they certainly would not have recognised them as the essence of 'the commonwealth cause'. To them the distinguishing character of the 'commonwealthman' was not that his ideas might lead him to complain or grieve about abuses in government but rather it was exactly that design which Jones and Ferguson attempted to dissociate themselves from, i.e. the "design of setting up a Democratical Government, in Opposition to our legal Monarchy."³⁶ And the only answer Jones could give to this alleged motive of the Exclusionists was that it was "a Calumny ... in order to the laying upon others the blame of a design to overthrow the Government, which only belongs unto themselves."³⁷

In all his anti-royalist writings of the 1680s, Ferguson claimed that there was "no mark of an Intention to change any part of the Ancient Government, but to provide against the Violation of it".³⁸ Accusations of unconstitutionality were levelled against the opposition. Thus, for example, a parliamentary right to alter the succession - a legal

issue at the centre of the controversies of the 1680s - became a right never "questioned or gainsaid till a few Mercenary People about ten years ago [i.e. during the Exclusion Crisis], endeavoured to obtrude upon us a pretended Divine, and unalterable Right to the Succession".³⁹ These people, in Ferguson's eyes, were the ones "guilty of designing [constitutional] innovations."⁴⁰

Even the 1688 Revolution itself, as we have seen, was defended by many writers along these lines. The Ancient Constitution had at last been saved, they claimed, and their opposition to Charles II and James II over the previous decade had thus truly been grounded on positive law. Ferguson was amongst this number and his claim to be able to justify resistance to James II "from Principles which our Constitution and Laws do Administer",⁴¹ followed a familiar pattern. His argument focused on James II's "breach of all stipulations and Promises ... his violating the Original Contract."⁴² As explored and developed by Ferguson, this view clearly involved a constitutional theory similar in many respects to William Atwood's. But before examining in some detail Ferguson's Constitutional Contract Theory it should be noted that one crucial idea - that there was more to constitutional law than the records and law books revealed - was not solely subscribed to by the anti-royalists. A critic of Ferguson's, for example, attacked him in 1681 for contradicting constitutional law. But the criticism revealed a similar view of the relationship

between civil and natural law as that we have examined in Ferguson's writings of the mid-1670s:

"the Malice or Arrogance of my Antagonist, and sundry Others," the critic insisted, "has carried them so far, as to trample upon all the Positive and Fundamental Laws of the Land, by Publishing daily in Print, ... to the manifest Hazard of the State. That Monarchy is not so much as Jure Naturae, or unalterable by Human Power, without apparent Violence; but All Forms of Government are Changeable at the Will and Pleasure of the People".⁴³

Ferguson's theory of government and law which formed the basis of his case for the 'legality' (as opposed to the sheer 'necessity') of resisting the king, was implicit in his earliest political writings. In The Second Part of No Protestant Plot (1682), for example, he argued that:

As the Law is both the Measure and Bond of the Subjects Duty and Allegiance, so it is not only the best security which they have to trust unto for their peace and safety, and the established fence and hedg for the protection of their lives and properties; but it was intended, and always ought to be the Rule and Standard by which the Prince is to defend and govern his people. ⁴⁴

The law, then, was above both king and people. Yet the law was "designed for and ... relied upon for [the people's] ... preservation."⁴⁵ The people were thus "obliged by their Interest, as well as by the ties of Conscience, to honour and maintain all due Allegiance to their Supreme Governours."⁴⁶ Rulers were "not only bound by the Stipulation which they have made with their people, but by the respect which they bear to the preservation of the Constitution and the safety of their Crowns".⁴⁷ Thus it was effectively only the rulers who were under an onerous

obligation. For rulers had the duty to avoid ruling in such a way that their subjects might fear for their own safety. If rulers did not avoid this then they simply forfeited the "due Allegiance" of the citizen body since "whenever Laws cease to be a security unto men, they will be sorely tempted to apprehend [sic] themselves cast into a state of War, and justified in having recourse to the best means they can for their shelter and defence."⁴⁸

By 1688/9, however, a full and explicit justification of the 'legality' of resistance was required if the events of the Revolution were to be defended as lawful. This need spurred Ferguson to produce his single most extensive analysis of the nature of government and the English Constitution: A Brief Justification of the Prince of Orange's Descent into England And of the Kingdoms Late Recourse to Arms. Since government, he observed:

derives its Ordination and Institution from God, so it is circumscribed, and limited by Him, to be exercised according to the Laws of Nature, ... in subserviency, to the glory of the Creator, and the benefit of Mankind. ⁴⁹

Emphasis was still placed on the ruler's duties, but now those duties were formalised into a contract between God and the king. "All Rulers are thus far under Pact and Confinement", he asserted, "that they are obliged by the Almighty and Supreme Sovereign, to exert their Governing Power, for the Safety, Welfare, and Prosperity of those over whom they are Established."⁵⁰ Ferguson's argument here seems to be an abridgement of the theory of natural

law that he examined in detail in his A Sober Enquiry into the Nature, Measure, and Principle of Moral Vertue. Thus, since natural law provided a sufficient moral and practical limit on the authority of rulers, Ferguson could argue:

There need no previous Compacts, and Agreements, between Princes and Peoples as to these [i.e. that government should be conducted for the good of the people and the honour of God] forasmuch as they are settled and determined by the Law and appointment of the Divine Legislator, and of the Universal Sovereign. Whosoever refuseth to Govern in Subordination unto and for God, and in order to the protection and benefit of the Community, ceaseth to answer the Ends unto which Magistracy was Instituted. 51

And ceasing to answer these ends meant losing the right to the subjects' obedience.

But it seems that the contract between God and ruler, was of a far too general nature to provide a community with a workable constitution. God simply laid down the general character of government when he ordained it and no-one subsequently had a right "to enlarge and extend the power of those whom they constitute Rulers, beyond the Limits and Boundaries, unto which God hath staked and confined Magistrates, in the Charters of Nature and Revelation."⁵² The constitutional detail necessary if the government ordained by God were to be practical, had to be established through a 'Constitutional Contract':

Now God having in the Institution of Magistracy, confined such as shall be chosen Rulers, within no other limits in reference to our civil concerns, save that they are to Govern for the good of those, over whom they come to be Established, it remains free and entire to the People at their first Erection

of, and Submission to Government, to prescribe and define what shall be the measures and boundaries of the publick Good, and unto what Rules and Standards the Magistrate shall be restrained, in order to his defending and promoting the benefit of the Society, of which he is created the Civil and Political Head. And every one being equally Master of his own Property and Liberty, antecedently to their Agreement with one another, and to the compact of the Universality, or at least of the Majority, with Him or Those whom they call to Rule over them; it evidently follows, that those who come to be cloathed with Magistracy, can lay claim to no more Authority ... than what the Community conferred upon them, ... upon the prospect of the advantages arising unto them from their living in Societies and under Magistrates. 53

The familiar contractarian ideas and assumptions about the origin and purpose of government are all contained in this passage. Government originated from the conscious design of the prospective citizens who, realising the potential advantages of civil society, decided to set one up. The act of combination consisted of outlining and agreeing to a body of constitutional laws and naming the principal office-holders. The main concern of the contractors was to protect their 'antecedent' property and liberty; the form of government erected was inevitably some kind of 'limited government'. The only extraordinary aspect of Ferguson's theory thus far was the emphasis placed on the role of God in these proceedings.

This theory, however, was far from comprehensive. Many enquiries were left unexamined (for example, questions concerning the state of nature, natural rights, and the 'artificiality' of civil society based on contract⁵⁴), but Ferguson's concern was essentially the practical one

of justifying the activities of William of Orange. His attention was thus focused on the English Constitution even though he was compelled, because of the peculiar case that he wished to defend as 'constitutional', to enquire into more general questions about the nature of government. Thus he began his A Brief Justification of the Prince of Orange's Descent into England by remarking that the "Consideration of Government in general, is none of my Province at this time; farther than to observe ...",⁵⁵ but then proceeded to devote a quarter of the lengthy pamphlet to summarizing his contractarian view of "Government in general". The reason for so long an introduction to the main concern of the pamphlet was, as we shall see, that his principal 'constitutional' arguments depended upon it for their coherence and persuasiveness.

In the course of Ferguson's outline of government in general, it becomes clear that "Force and Conquest give no just nor legal Title over a People, ... until they by some consent either tacit or explicit, declare their submission ... and acquiescence ... upon the best Terms which they can obtain".⁵⁶ In this notion of legitimacy Ferguson once again coupled the 'just' with the 'legal', but now it was made clear that it was via "consent", an idea crucial to that of contracting, that the two were related. Because the consent of the contracting parties ensured a 'just' settlement, Ferguson could argue that:

no Government is lawful, but what is founded upon Compact and agreement between those chosen to govern, and them who condescend to be governed; ... [and] the Articles upon which they stipulate the one with the other, become the Fundamentals of the respective Constitutions of Nations, and together with superadded positive Laws, are both the limits of the Rulers Authority, and the Measures of the Subjects Obedience. 57

Like many of his contemporaries, Ferguson believed that the English Constitution was unique. But that uniqueness he understood in a way that only contractarians could have accepted. Yet it was essential for the coherence of his arguments against Charles II and James II:

"England has been the most provident and careful of all Nations", he asserted, "in reserving unto its self, upon the first Institution of, and its submission unto Regal Government, all such Rights, Priviledges and Liberties, as were necessary to render it either Renowned and Honourable abroad, or Safe, Happy and Prosperous at home; so it hath with a Courage ... peculiar to it, maintained its Priviledges and Liberties through a large and numerous Series of Ages". 58

It was by reference to this rationally constructed constitution of the original contract, preserved and augmented throughout history, that Ferguson examined the 'legality' of the anti-royalist movements of the 1680s. He did this secure in the knowledge that if a conflict arose between 'law' and 'reason' then the latter must override the former. After all, to subordinate positive laws to the dictates of reason was simply, on this view, to remove inconsistencies from the constitution by referring to the most basic constitutional laws. The problem, then, of the 'legality' of resistance could be easily resolved. The assertion that

English kings "can plead nothing for what they enjoy, or claim, but fundamental and positive Laws; and ... the Subjects Interest to his Liberty and Property are conveyed unto him by the same Terms and Chamels",⁵⁹ did not really signify a restriction to the scope of constitutional debate. Whilst much effort was still expended in finding authority in Law Books and precedent for various political activities, disputes were not settled according to the strongest legal case. Whenever Ferguson ran into legal or historical difficulties,⁶⁰ he took recourse to 'reason', which, according to the Constitutional Contract Theory, was simply a higher or more basic judge, and not in the least less 'legal'.

Ferguson understood the English Constitution in terms of a balance between king and parliament, although ultimately, as we shall see, the balance was tipped in the latter's favour. His 'justification' for this view was essentially that same strange mixture of arguments from the 'Ancient Constitution' and from 'reason' as we have examined in detail in Atwood's writings. Thus the Norman Conquest was not a conquest at all: William I conquered no-one save Harold and his few associates.⁶¹ The absence of records indicating the founding of an institution deemed 'good' by the writer, proved that institution to have been "co-eval with the first Constitution of our Government"⁶² and thus inviolable. Englishmen's rights were derived from the original contract and the immemorial constitution, not from

the grant or concession of the king.⁶³ And finally, Magna Carta was not forced from King John but was simply a reaffirmation of the "ancient Rights of the People."⁶⁴

Thus Ferguson's 'balanced constitution', like Atwood's, was always depicted as issuing from the wisdom of our ancestors. "Thus wisely did our Ancestors provide that the K. and His People should have frequent need of one another", he argued, "and by having frequent opportunities of mutually relieving one another's wants, be sure ever to preserve a dutiful affection in the Subject, and a fatherly tenderness in the Prince."⁶⁵ The executive power is "both by our Common and Statute Laws, conveyed unto and vested in the King, but at the same time there is sufficient provision made both in the Terms of our Constitution, and in our Parliamentary Acts, to prevent this from being hurtful to us." The executive power, that is, is "delegated ... as a Trust".⁶⁶ The constitutional limitation on the executive was the "Right of overseeing the Execution of the Laws",⁶⁷ a right established by the wisdom of "our Predecessors and Ancestors who have ... left nothing to the King's private discretion, much less to his Arbitrary Will, but have assigned him the Laws as the Rules and Measures he is to govern by".⁶⁸

The House of Commons, "among other capacities in which they sit and Act, are by the Constitution to be the great Inquest of the Kingdom, to search into all the Oppressions and Injustices of the King's Ministers".⁶⁹ And in order

to ensure the effective performance of this function, even against the wishes of the king, Ferguson declared that the "Wisdom of our Ancestors has provided, by divers Statutes, both for the holding Parliaments annually, and oftner if need be; and that they should not be Prorogued or Dissolved till all the Petitions and Bills before them were answered and redressed."⁷⁰ The House of Lords, "among their several other Rights and Priviledges", Ferguson argued, "stand cloathed with the Power and Authority of the High Court of Judicature of the Nation of this all Ages afford us Presidents".⁷¹ But the most interesting general function of the Lords, indeed, "the very end of a House of Peers", was to maintain the balance between king and Commons, "to be a skreen between the Monarch and the Commons, to prevent his Invading the Priviledges of the People, and them usurping upon the Prerogatives of the Crown".⁷²

These frequent references to the 'wisdom of our ancestors' played a vital role in Ferguson's constitutional theory. His highly questionable views about the nature of the English Constitution gained plausibility from them. The constant reference of each pretended law to the intentions of 'our ancestors' meant, in the last resort, that attention was directed away from the judgements of legally qualified contemporaries to the supposed 'designs' of the original contractors.

The question of the succession to the throne was one of the central constitutional issues of the 1680s, and

Ferguson's attempts to justify an ultimate parliamentary right to determine this question led him to modify the harmony of his balanced constitution. His 'proof' of the constitutionality of this supposed "Parliamentary right" followed a familiar pattern. He claimed that the right existed "from the first Original of the Government",⁷³ and had continued to exist despite "the coming in of the Norman Race."⁷⁴ And even in his first political pamphlet Ferguson asserted along these lines that "Tis of no great concernment, who is the immediate apparant Heir in the Regal Line, if we do but consider that the Parliament of England, hath often provided a Successor to the Government, when the Interest of the Publick hath required it."⁷⁵

Although historical examples could show that the Crown had at times descended in irregular and unusual ways and that the principle of heredity had not always governed the succession, it is difficult to see how those historical examples constituted 'legal precedents'. Ferguson claimed that they did⁷⁶ and to give credence to that claim "the Parliamentary right" was extended beyond the sphere of succession. Thus instead of attempting to make out a strong legal case for the ultimate parliamentary right to determine a successor, Ferguson proceeded to elicit a parliamentary right to determine any constitutional question. Parliament was both the interpreter of the "Interest of the Publick" and the ultimate interpreter of the constitution. To have a parliament now appeared as "the

most Fundamental and essential" of all "the Rights and Priviledges appertaining unto us":

For thereby we are inabled to make such successive and continual provisions, as the preservation of the Society, and the Temporal or Eternal Welfare of the Subject, shall be found to render needful or expedient. 77

Parliament alone was the proper interpreter of the constitution, or rather it was "the immemorial course of Administration, with the sense of the whole Society signified by their Representatives in Parliament upon emerging occasions". At all events, in disputes over the requirements of constitutional law "the Opinions of particular men of what Rank or Order soever they be" were not to be admitted.⁷⁸

Parliament, as distinct from the king, thus became the dominant partner in Ferguson's constitutional theory. It was both the interpreter and the guardian of that Ancient Constitution which had been set up by contract in order to fill in the details of the 'lawful' government ordained by God. On this view of the English Constitution Ferguson could show that the 1688 Revolution had been perfectly legal.

James II, Ferguson argued, had committed a number of "unlawful" acts and these were the things "whereby a lately departed King hath unqualified himself".⁷⁹ They were listed by Ferguson as: dispensing with the Oath of Supremacy and therefore opening the door to papal domination, overthrowing "the whole Legislative part of the Government"

and subverting "the very Fundamental Constitutions of the Realm", and reducing the Courts to "Ministers of his Will, Pleasure, and unruly Lusts".⁸⁰ These were the activities that caused:

the legal and regular Monarchy of the Nation, [to be] ... swelled into an Arbitrary and Despotick Power. So that all the Franchises and Rights, which by Original Contracts and Subsequent Laws had been reserved unto the People, were entirely overthrown, or enjoyed precariously. 81

To suffer such absolute power was "a plain destroying of all natural as well as Civil Liberty".⁸² And this destruction of the constitution meant, according to Ferguson's theory, putting "us from the ties, which by vertue of fundamental Stipulations, and Statute Laws we formerly lay under".⁸³

Yet even in this "state of nature" as he called it, Ferguson insisted that it was 'lawful', albeit "both Lawful and Necessary, to recover that by Force, which had been wrested from us by Usurpation".⁸⁴ The only possible law that could give this a legal character was 'natural' not 'constitutional' law. But Ferguson himself did not understand the 'legality' of the Revolution in only moral terms. He had declared his ability to justify the Revolution "from Principles which our Constitution and Laws do Administer".⁸⁵ The general constitutional theory that he subscribed to, enabled him to reconcile this claim with his belief that James's actions had resolved England into a 'state of nature'. For James' actions had only rendered the English Constitution inoperative, they had not dissolved the body politic. The English government had been 'dissolved'

but the former citizens remained Englishmen. This fact severely limited the range of possibilities open to them in 'the state of nature'. Thus he argued:

But though James the Second stand unqualified, and morally disabled from being any more King, yet it is indispensably necessary we should have One, a King being no less essential in the Body Politick of England, than the Head is in the Body Natural. To dream of reducing England to a Democratical Republick, is incident only to persons of shallow Capacities, and such as are unacquainted with the Nature of Governments, and the Genius of Nations. For as the Mercurial and Masculine Temper of the English people, is not to be moulded or accomadated to a Democracy; so it is impracticable to establish such a Common-wealth, where there is a Numerous Nobility and Gentry. 86

The community was dissolved into a state of nature where the only rule as to what should be done was the people's "Will, guided and regulated by the Measures of what is most conducible to the publick good".⁸⁷ But this apparent liberty amounted to little, for it soon appeared that all that "remains to be done, is to declare the Prince of Orange King".⁸⁸ "For until then, the Government can exert it self but in few of its proper operations; nor can it either Repeal ill Laws, nor Enact such good ones as we want and need."⁸⁹

What appears remarkable about Ferguson's "state of nature" is how little it signified. James II's actions had resulted in "the depriving himself of all Right to claim any thing, and a restoring of the People to their State and Condition of Primitive Freedom."⁹⁰ Yet all that was required to rectify this situation was to make William king!

IV

Within eighteen months of the success of William's expedition to England, Ferguson was suspected of being engaged in Jacobite plots.⁹¹ This suspicion was probably well founded. Although Ferguson escaped arrest once again, when he next appeared in print it was as an ardent opponent of the Revolution. He acknowledged that the reader might be "surprised to hear this kind of Theology and Politics from me", but explained that he had been "heretofore misled by false Notions, and ... Hypotheses about Government neither reconcilable to our Laws, nor to the Peace of Communities".⁹²

The 'mistaken ideas' that Ferguson now wanted to repudiate were of considerable practical importance. But what is most significant for our purposes is that he never abandoned the idea that the essence of the English Constitution was its contractual nature. His opposition to William III, his defence of James II and his calls for a "legal" revolt against the new regime were all defended on exactly the same basis as their opposites had been in the 1680s.

Ferguson's re-evaluation of James II's reign almost completely reversed the judgments he had made at the time. It seemed to him that he had not only misinterpreted the intentions of James, William of Orange and the Whigs, but also the exact requirements of the constitutional law. He became convinced that "it was neither King James's Interest to destroy, or the Prince of Orange's to protect the Protestant Religion".⁹³ England had been "deluded"

by William III and as a result its citizens were "translated out of a Canaan, where only too much Safety, Ease and Plenty, made them complain, and brought into an unpresidented and intolerable Thralldom."⁹⁴

The Revolution had been justified on religious grounds. It had been necessary, it was claimed, for the preservation of Protestantism. But this too, Ferguson believed, was an error. The "Whig Party", who were "the warmest Promoters of the Revolution", appeared to him now as a "Compound of the Atheistical of all Opinions and Persuasions whatsoever."⁹⁵ Ferguson even attempted to persuade his readers that the Revolution had been a Catholic plot rather than a Protestant one. The Catholics, he insisted "undertook the deposing a Prince of their own Church, because he would not support the Supremacy of the Pope." They then "procured Resolutions from Rome ... to authorize the Catholics in England to transfer their Allegiance from King James to King William."⁹⁶ And this was not as self-destructive as might appear, because king William was a Catholic in "disguise"!⁹⁷

As well as reversing many of his judgments of James II's policies, Ferguson modified his interpretation of English constitutional law. Whilst re-examining the religious motives behind the Revolution, for example, he went so far as to assert that:

in no Circumstances of Danger into which our Religion and civil Liberties could be brought nor under any Hazards we could fall into of losing and having them suppressed, we were either permitted or impowered, by the Fundamentals of our Government, the rules of our Constitution, or by the common or statute Law of the Kingdom, to rebel against the King, or to dethrone or drive him away. 98

Ferguson felt that he had either neglected or misinterpreted three essential 'constitutional laws' during the period up to his conversion to the Jacobite cause. These laws constituted the main legal grounds upon which the Jacobites had opposed the Revolution and which were therefore the principal legal 'problems' that the Whigs had attempted to overcome. Ferguson continued to assert that "the great End of the Laws [was] ... the Publick Good" and that "the first and the highest Law of the Society ... is that of Salus Populi",⁹⁹ but he refused to draw the constitutional conclusions that he had before the Revolution. Instead he insisted, first that "no Law or Contract, existent in the King's Time, had provided that we might fly to Arms" to protect legal rights.¹⁰⁰ Second, he accepted that "there were divers express Statutes then in being, by which it was made and declared to be Treason to take up Arms against [the king] ... upon any Pretence whatsoever."¹⁰¹ And finally he admitted that since the "Wisdom of our Ancestors made it an Axiom of our Government and State, That the King could do no Wrong", it followed that "therefore no Accusation of him could be justified, and much less any Force against him lawful."¹⁰²

The 1688 Revolution, then, had been unconstitutional. But Ferguson still retained his basic belief that the Constitution was essentially the product of an original contract, though supplemented and modified through time. The 'source' for determining the legal rights and duties

of citizens thus remained at bottom the intentions of the original contractors and the rational constitution that they must be supposed to have established. It was, then, the Revolution parliaments of 1688/9 that had:

in defiance of all the Rules and Measures of the Constitution, and in a treacherous Violation of all the Trust and Confidence reposed in them by their Country, changed the whole Essential and Fundamental Frame of the Government of England, and from an Hereditary Monarchy [had] made it an Elective one ... and by dissolving that Link in the Instrument and Machine of our Government, they have destroyed it as to what it was, and what it still ought to be, according both to the Fundamentals of our first Establishment into a Polity, and the Common and Statute Laws of the Kingdom. 103

The royalist constitutional theories of Robert Brady and Edmund Bohun, which formed the basis of the most frequently voiced attacks on the Revolution, played no part in Ferguson's Jacobitism. Such theories as these, declaring that Englishmen's rights derived from the concessions of absolute monarchs whose titles to rule depended either on 'conquest' or 'patriarchalism', were in fact explicitly rejected by Ferguson. In 1695, for example, he made this point in a manner that could well have appeared in any of his pre-Revolution tracts:

For, Sir, suffer me to tell you, That a Right and Title to the Freedom of our Persons ... doth not accrue and arise unto us either from Magna Charta, the Petition of Right, or the Statute of Habeus Corpus; but it was reserved unto us, and we were kept in Possession of it, by the very Nature and Frame of our Constitution. For our whole Government was founded upon the Supposal and Concession, That it was to be a Government of and over Free-men ... And the Great Charter, and the other Laws, which I have mentioned, did not create and give us a Right to the Freedom of our Persons; but they did only assert, vindicate, and fence it about. They were not Laws of manumission from Bondage, but Declaratory of our antecedent and inherent Title to Liberty. 104

Royalist constitutional history, then, was deficient as an account of the origin of Englishmen's rights. But Ferguson did make one concession to it and in doing so he implicitly outlined a solution to a major contemporary problem of constitutional interpretation. The extreme royalists were arguing that Englishmen's rights originated in concessions from monarchs. They then believed it 'lawful' for monarchs to withdraw those concessions. Many of the anti-royalist, as we shall see,¹⁰⁵ believed that Englishmen's rights were something like 'the natural rights of man, modified and made practicable by the original contract establishing the English Constitution'. They then proceeded to argue that the 'defence' of these rights provided a constitutional justification for armed resistance. Both sides argued from fixed points of historical origin to the provisions of the seventeenth century constitution, without allowing for any significant changes in the intervening centuries. When, however, Ferguson argued that "unquestionably many Things were at first vested in the Crown" he went on to allow for the possibility of a divorce between historical origins and later justifications of laws and institutions. He did not, however, make use of this distinction in his constitutional analysis. To have done so would have implied that the historical original contract was largely irrelevant for understanding the contemporary constitution. Instead of this he effectively reinterpreted the concept of an original contract and its

relation to the constitution. The 'original contract' became simply one of many contracts agreed by rulers and ruled throughout history, whereby the constitution was altered as circumstances required.¹⁰⁶ In this fashion Ferguson defended James II not only for having had no "ill Design against our Religion" but also for having been prepared "to have granted a Stipulatory Law, which should have had the Force and Virtue of a Magna Charta, or Constitutional Contract, and to have made the Protestant Religion ... a Fundamental in the Government of all other Reigns."¹⁰⁷

The idea of a constitutional contract was thus reduced to little more than a synonym for constitutional law. The elaborate groundwork for the Whig theory of the 'legality' of the Revolution was further swept away when Ferguson declared that constitutional laws and precedents did not justify the enforcement of the contract against a recalcitrant king. He now asserted:

Indeed the Constitution both instructs Princes for what end we pitched upon this Species ... of Regal Government, and directs them to rule for the Safety, Interest, and Prosperity of their Subjects; but there is no Original Contract, nor stipulatory Agreement, by which it is provided, That if Princes do not as they should, they do either forfeit their Sovereign Authority, or that we may lawfully rebel against and dethrone them. Nor do any Presidents or Examples ... shew, that it was lawful, or a Thing that either the Constitution, or subsequent Laws, did authorise and countenance; but they only declared what a provoked People will sometimes do ... And via facti is not always via juris.¹⁰⁸

Appeals to the original contract of the Ancient English Constitution, then, were no longer acceptable for legitimizing

resistance. Even if James II had broken a 'constitutional contract', it could "never be allowed either to Officers or People to resist, be the King's Commands what they will".¹⁰⁹ The only legitimate courses of action open to citizens in these circumstances were "to address God by Prayers, and [the king] ... by Petitions; and after ... refusing to be our selves the Instruments in executing his Arbitrary and Illegal will, both to complain of those that are, and to persue all the Methods of Law for getting them punished."¹¹⁰

Yet Ferguson still believed that the constitution that had been overthrown in 1688 had been based on a contract. The principal reason why that constitution had worked so well up to the early seventeenth century at least,¹¹¹ was because no-one had abused the "trust" which "is the Basis of every Society, and the Foundation of the Fabrick of all Governments".¹¹² But he interpreted the contract embodied in that constitution in a much looser way than before:

And as for that Contract (if it might be called one) which was involved and tacitly wrapt up in the Constitution, the whole Import of it was, to declare the Ends for which our Princes were to rule ... and to teach and instruct them, that they were to govern us by Laws; but it in no ways provided, that they should be accountable unto, or arraignable by their Subjects, if they did not; leaving them for that only responsible to God. 113

Contractualism, passive obedience and divine right were harmoniously incorporated in the pre-Revolutionary constitution. But the case was otherwise with the 'new constitution' of 1688. For "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."¹¹⁴

The arrangements made at this new contract were, according to Ferguson, defective in two major respects. The first was precisely the advantage he had once claimed for the old contractual constitution: the king was placed in a precarious position. King William, Ferguson argued, "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 Humor and Caprice takes them, to treat him in case of Miscarriages after the same rate".¹¹⁵

The second defect arose because the legally binding Ancient English Constitution had been replaced by an illegal, de facto regime. King William's government, Ferguson declared in 1695, had "no more legal Power to dispose of the Property of the Subjects, than the Committee of Officers have who sit in the Guard-House by Whitehall."¹¹⁶ The Revolution had dissolved the lawful constitution and although there had been a new contract with William of Orange, it afforded no legal obligation. William was "only King de facto, not de jure."¹¹⁷ The Parliaments that had contracted with William had had no authority to do so because, by attacking "some Essentials and Fundamentals of the English Government", when they deposed James II, they "thereby immediately destroy[ed] themselves, and ... [became] divested of all Power and Authority they have or claim; because,

deriving all their Jurisdictions from the Constitution ... whensoever that is overturned and subverted, all other Powers sink and fall with it."¹¹⁸

Since this de facto government had become nothing less than "the Prince of Orange's Tyranny",¹¹⁹ it was necessary, in Ferguson's opinion, to oppose force with force. Yet once again he justified this course in terms of its 'legality'. The principle that he appealed to was "What hath its Existence meerly by Fact, may by Fact be lawfully overthrown."¹²⁰ But this time, when counselling the use of force against the William and Mary regime, Ferguson was very specific about the kind of 'legality' involved. In one passage in his first attack on the Revolution Settlement, he explicitly declared that when constitutional law had been violated recourse must be taken to natural law:

when the Laws of a Constitution are publicly violated, ... we may have recourse to the Laws of Nature, which put us upon a common Level with those that were antecedently our Rulers, and give us Liberty to oppose them, and defend our selves and our Government by Laws established. 121

Ferguson's justification of the 'legality' of resisting William III thus rested on the same basis as many had justified opposition to James II. Indeed, the passage I have just quoted was taken by Ferguson from Burnet's The Measures of Obedience, a Williamite tract published in 1688. Ferguson quoted the argument with approval, characteristically priding himself for being able to turn the opposition against itself! But in adopting the argument he merely further underlined the peculiarities and limitations of the Constitutional Contract Theory as a way of justifying the

'legality' of resistance.

V

Ferguson's use of the Constitutional Contract Theory is interesting in a number of ways. His political writings were all designed to persuade his audience to take sides in the political and constitutional controversies of the time. They were all, that is to say, more concerned with the practice of politics than its theory. In the preceding sections I have attempted to outline the theory that lay behind Ferguson's arguments, and the uses to which he put it. Perhaps what emerges most clearly is the considerable extent to which ideas of a constitutional contract penetrated into the political debates of the 1680s and '90s.

I have emphasised the practical usefulness of the theory as a means of providing 'legal' justifications for the anti-royalist cause. Ferguson's writings provide, in fact, one of the clearest indications of the connection between constitutional law and 'original contract' in the political ideas of the late seventeenth century. His insistence that "no government is lawful, but what is founded upon Compact", and that "the Articles upon which [the contractors] stipulate the one with the other, become the Fundamentals of the respective Constitutions of Nations"¹²², provided, as we have seen, exactly the connection between civil law and reason that enabled 'reasonableness'

to be credited as a legal standard for judging action.

The loose way Ferguson used the idea of contract indicated both that he was more concerned with 'practice' than with consistency in ideas and that he felt considerable capital could be made by employing the term. As we have seen, he sometimes used the idea of contract to explain the historical origin of the English Constitution; sometimes to explain the historical origin of all 'just' constitutions; and sometimes, indeed most frequently, as little more than a synonym for constitutional law. These ideas were nowhere examined in a rigorous way. They were simply used to provide coherence and weight to the cause Ferguson was championing. This lack of rigour can be seen even more clearly in respect of the ideas that were closely associated with that of a constitutional contract: for example 'fundamental law', 'fundamental rights' and 'fundamental duties'. Although Ferguson constantly used these notions, he never examined them critically. And this, despite the fact that the idea of fundamental law was the focal point of his changed political persuasion after 1690.

But the most significant outcome of our examination of Ferguson's career is the light it sheds on the polemical importance of ideas of contract in the Revolutionary period. For this reason alone his ideas would seem to deserve greater attention than historians have hitherto devoted to them. Charles Bastide is one of the few historians who

have examined contract ideas in England during the late seventeenth century in any detail. But he simply dismissed Ferguson as one of "les vulgaires conspirateurs"¹²³ who were part of an English refugee colony at Rotterdam in the 1680s. But to dismiss him in this way could lead us to miss an important point. It is often assumed that the 1688 Revolution represents the victory of Non-conformist, Low Church Protestant and Whig groups employing notions of 'contract' and 'consent', over High Church, Anglican and Tory groups employing notions of 'divine right' and 'absolute monarchy'. But in Ferguson's writings we have seen a Non-conformist divine using ideas of contract to show that William of Orange's regime was illegal and pressing for the return of James II whose authority and right to rule rested upon the contract "implied" in the Ancient English Constitution. Thus Ferguson's political career indicates that during the 1680s and '90s there was no inevitable connection between having 'Whig' sympathies, viewing the constitution or the nature of the state in terms of a contract, and supporting William III and the Revolutionary Settlement.

PART III

PHILOSOPHICAL CONTRACTARIANISM

CHAPTER VI

THE SOCIAL CONTRACT THEORY

In a paper written the year before his death, Locke set down his Thoughts Concerning Reading and Study for a Gentleman. The paper contained, amongst much else, an examination of the nature of political studies and a selected list of suggested reading.

"Politics", Locke declared, "contains 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." 1

Locke might be interpreted here as distinguishing between an historical enquiry into the origin of government and a practical, 'manual for governors', sort of enquiry. But this turns out not to be the case. His reading lists and further comments on the two different parts of political study indicate that the 'origins' he was concerned with were rational, not historical. History and experience were relevant to the second part of politics - the part concerned with the study of particular constitutions, with law making in particular circumstances and, in general, with 'policy making'. Thus Locke continued after the passage just quoted:

The first of these hath been so bandied amongst us for this sixty years backward that one can hardly miss books of this kind. Those which I think are most talked of in English are the first

book of Mr. Hooker's Ecclesiastical Polity, and Mr. Algernon Sydney's book of Government; the latter of these I never read. Let me here add Two Treatises of Government, printed 1690, and a treatise of Civil Polity, printed this year [1703, written by Peter Paxton]. To these one may add Puffendorf De Officio Hominis et Civis, and De Jure Naturali et Gentium, which last is the best book of that kind.

As to the other part of politics which concerns the art of government, that I think is best to be learned by experience and history, especially that of a man's own country. And therefore I think an English gentleman should be well versed in the history of England, taking his rise as far back as there are any records of it, joining with it the laws that were made in the several ages as he goes along in his history, that he may observe from thence the several turns of state, and how they have been produced. In Mr. Tyrrel's History of England he will find all along those several authors which have treated of our affairs and which he may have recourse to concerning any point which either his curiosity or judgement shall lead him to enquire into.

With the history he may also do well to read the ancient lawyers. (such as are Bracton, Fleta, Henningham, Mirroure of Justices, My Lord Cook on the second Institutes, and the Modus Tenendi Parliamentum, and others of that kind whom he may find quoted in the late controversies between Mr. Petit, Mr. Tyrrel, Mr. Atwood, etc., with Dr. Brady; as also, I suppose, in Sedler's treatise of The Rights of the Kingdom, and Customs of our Ancestors, ...) wherein he will find the ancient constitution of the government of England. There are two volumes of State Tracts printed since the Revolution in which there are many things relating to the government of England. 2

I have quoted Locke's fullest single statement on political studies almost without abridgement because it reveals something of the distinction in Locke's mind between a constitutional, and a philosophical contractualism. In accepting the traditional distinction between theoretical and practical political writing, he recognized that both contained arguments using the concept of 'contract'. The theoretical and practical treatments are distinguished by

their terminology. In the practical literature that Locke recommends we constantly run into terms like 'fundamental law', 'fundamental rights', 'fundamental liberties', 'fundamental' or 'original contract' and 'ancient' or 'fundamental constitution'. In the theoretical literature, we constantly meet terms like 'state of nature', 'natural law', 'natural rights', 'original' or 'social contract' and 'civil' or 'political society'. These differences in vocabulary reveal much more substantive differences between the two types of contractarian argument. The questions posed in each were different. Social Contract Theory was addressed to questions of a much more general kind than those which concerned Constitutional Contract Theorists. No doubt the questions and issues actually at stake were often the same. But at least in appearance, Social Contract Theory was concerned with questions of a universal kind whereas Constitutional Contract Theory was concerned with particular issues and events. Social Contract Theory asked: why is civil society necessary, what is the essential nature of civil society and what sort of government should men have? It was not concerned with the questions that preoccupied Constitutional Contract Theorists - i.e. how did the English (or any other particular) Constitution originate, what sort of constitution was it, what specific rights and liberties did its laws define and guarantee and what did all this imply for the conduct of present political affairs?

Just as the different vocabularies of the two Contract

Theories reveal that different questions are being asked, so they highlight that different evidence is being appealed to. For the Constitutional Contractarians the evidence of Law Books and history was essential (even though such evidence might be interpreted in a very cavalier fashion): Social Contract Theory did not depend on this evidence for its coherence and persuasiveness. In Social Contract Theory the crucial concept was that of the 'natural', in Constitutional Contract Theory it was the 'fundamental'. By tradition, speculation about the 'natural' concerned Reason and Divine Law whereas the 'fundamental' was firmly wedded to history and human law.

We have here, then, an initial characterization of two very different Contract Theories. Locke's use of the traditional distinction between practical and theoretical political writing has revealed some awareness on his part of these two types of theory. But 'theoretical' here does not mean 'philosophical'. Much of the reading that Locke recommends to the would-be student of the theoretical part of political studies turns out to be fundamentally 'practical' in character. Nonetheless, I have called the Contract Theory that appears in this writing 'Philosophical Contractarianism'. I have done so in order to capture the distinctive connotations (rather than denotations) of the terms and concepts employed. Those terms and concepts were part of a philosophical language. Frequently they were 'borrowed' and put to use in practical political

writing. It will be an important part of our enquiry to assess when this is being done. Some distinction must be made between 'genuine' and 'sham' philosophy, since the understanding of 'contract' exhibited in each will be different. This point will become clearer as our enquiry advances. But sufficient has been said to expose the limitations of our initial characterization of the differences between Constitutional and Philosophical Contractarianism. Differences in vocabulary may serve to indicate differences in meaning, but the use of a 'standard' vocabulary is no guarantee of a similarity in meaning.

In the remainder of this chapter, then, we will be concerned to portray what sort of theory this Philosophical Social Contract Theory was during our period. We must exhibit the soil of speculation in which the late seventeenth century modifications of the theory grew. We must consider how radically the theory differed from Constitutional Contractarianism. And we must examine whether all examples of the consistent employment of the vocabulary of Philosophical Contractarianism were genuinely 'philosophical' writings.

First, we need to consider the basic character of Social Contract speculation. In the seventeenth century, Social Contract Theory sought to explain the rationality of civil society by locating its 'source' or 'origin' in the nature of the individual. The enterprise was informed by the resolute-compositive method of the famous Paduan methodologists. Thus the complex relations of civil

society were broken down into their simplest parts and were then reconstructed from them. The process of analysis was essentially one of rational abstraction. The process of reconstruction essentially involved the pursuit of the logical consequences of the interaction between 'natural men'. This was the kind of enquiry that I have referred to above as 'rationalist constructivism'.³ But although the procedures of analysis were abstractive and hypothetical, although the 'state of nature' to which civil society was reduced was in essence a rational construction, this did not mean that history and empirical evidence were irrelevant to the enquiry. The Social Contract writers of the seventeenth century did not make rigid distinctions between reason and history. At the very least most of them believed that the evidence of history and experience should not contradict a true account of the state of nature and the characteristics of natural man. In some works this interweaving of rational, historical and empirical enquiry reveals that a particular Christian view of the universe is being appealed to. This view presented the universe as the creation of a Divine Will; it presented human affairs as guided by that Divine Will; and it understood the Divine Will as a Rational Will. In other works, this interweaving reveals simply that the writer is engaged in political controversy and is concerned to cover his flanks from all anticipated attacks. We shall meet some peculiar results of the appeal both to reason and history when

examining the literature of what I have called 'Integrated Contractarianism'.⁴ But even the great seventeenth century Social Contract Theorists like Grotius, Hobbes, Spinoza, Pufendorf and Locke were not always clear about the role of historical and empirical evidence in their theories.⁵

In our period, Pufendorf's reputation clearly marked him out as the foremost proponent of Social Contract Theory. He provided the model of the standard theory and worked it out best. Of English writers, Locke alone had the distinction of writing in purely Social Contract terms. Both Pufendorf and Locke, then, demand our close attention if we are to comprehend the nature of Social Contract thought in late seventeenth century England. I will examine Locke's work in detail in the next chapter. He is by far the most famous of the English contractarians with whom we are concerned and the status of his work has been the subject of great disagreement. An examination of Pufendorf's theory will provide a clear view of the distinctiveness of Social Contract Theory. This, in turn, will cast light on the disagreements over the intellectual status of Locke's Two Treatises of Government. After all, as we have just seen, Locke believed that Pufendorf had written the "best book" of the same kind as his own Two Treatises: a book, that is to say, which would instruct the reader "in the natural Rights of Men, and the Original and Foundations of Society, and the Duties resulting from thence."⁶

Pufendorf's importance derives from his immense stature in the European 'Republic of Letters' of his time. Practically all of his works on philosophy, law, politics, history and religion were reviewed favourably in contemporary learned journals like Pierre Bayle's Nouvelles de la République des Lettres, Henri Basnage's Histoire des Ouvrages des Scavans and J.C. de la Crose's The History of Learning. His excellence was so widely acclaimed that it moved Andrew Tooke to note in the Preface to his English translation of De Officio Hominis et Civis in 1691 that:

Concerning the Author 'tis enough to say, that he has surely had as great regard paid him from Personages of the highest degree, as perhaps ever was given to the most learned of men. 7

Most of Pufendorf's major works were translated into English, or summarized in English, between 1690 and 1705. They were all well received. In particular his political works were found most illuminating by Atwood and Locke. Indeed, to Atwood Pufendorf appeared as the "judicious Civilian Pufendorf, one of the Ornaments of the present Age"⁸ and his De Jure Naturae et Gentium was "that Book of his which is counted the Standard of the Law of Nations".⁹ Locke's and Atwood's Contract Theories contained distinctive echoes and explicit references to Pufendorf's works and so did many of their contemporaries' works. We must consider the differences particularly between Locke and Pufendorf later. But first we should examine the character of Pufendorf's Social Contract Theory.

Pufendorf himself regarded the speculations contained in his three main works - Elementorum Jurisprudentiae Universalis (1660), De Jure Naturae et Gentium (1672) and De Officio Hominis et Civis (1673) - as contributions to the same kind of enquiry as had engaged the attention of Grotius and Hobbes. Pufendorf, that is to say, self-consciously set out to portray the rationality of civil society by constructing a Natural Law Theory. After the impact of Grotius' writings early in the seventeenth century, Natural Law Theory was concerned to ground Natural Law on reason alone since this was regarded as a more self-sufficient foundation than theology. The attempt to do this was seen as involving the explanation of the moral and political world by reference to the undeniable facts of individual human existence alone. Human reason alone was capable of demonstrating with mathematical certainty the requirements of the moral law. In its essentially political enquiries, Natural Law Theory attempted to reconcile its methodological individualism with community and sovereignty. Pufendorf's Natural Law Theory exhibited these characteristics of the post-Grotius Natural Law tradition. In the Preface to De Jure Naturae et Gentium, for example, Pufendorf declared "this study concerns not Christians alone but all mankind". Thus he could not begin an account of the moral law from the Christian doctrines of the Fall and Original Sin. Instead he had to start from "such a principle as no one,

provided he be of sound mind, can deny", i.e. that man is by nature sociable.¹⁰ And in his Elementorum Jurisprudentiae Universalis Pufendorf asserted that his purpose was to establish certain knowledge of the moral law where hitherto it had generally been felt that "all knowledge of such matters rests upon probable opinion only." Previous arguments about the moral law had been defective because they were "not embodied in sure demonstrations".¹¹

These characteristics of seventeenth century Natural Law Theory reflected two more general and distinctive features of the century's intellectual life: the passion for certainty and the rejection of traditional authorities. As Professor Krieger has noted, in "politics as in natural science and philosophy the characteristic intellectual of the seventeenth century sought a new axis of explanation."¹² And these changes have been summarized by K.R. Minogue in terms of the rise of a "quite new mood in intellectual history, one in which men for the first time rejected their intellectual heritage and began the work of understanding (as they thought) anew." He continues:

Perhaps the best way of bringing out this point is to observe that the seventeenth century is pre-eminently the time when knowledge was conceived of as if it were a building; rationalist philosophy was the attempt to construct new foundations. Any such redevelopment involves a good deal of destruction, so that the site may be cleared... The new division in philosophy was between those who put their faith in observation of the world, and those who sought to build the house of knowledge upon the solidities of reason: a division, that is, between empiricists and rationalists. 13

Even though we might acknowledge, with W. von Leyden, that the difference between "classical empiricism and rationalism" was a different of "degree" or "tendency" rather than of kind,¹⁴ the essential point remains: in the distinctively seventeenth century schools of philosophy the search for certainty took the form of a search for the irreducible 'sources' or 'origins' of knowledge, and the mechanical 'construction' of the world from them.

Pufendorf endeavoured to 'construct' the political world after the fashion of Grotius and Hobbes and he used materials taken from them. He believed that Grotius had been correct to emphasise man's natural sociability and to base his account of civil society upon it. But Grotius' account was defective for a number of reasons: it underrated the great force of self-interest in human motivation and it perpetuated traditional confusions by upholding the doctrine of divided sovereignty and property. Hobbes, on the other hand, had overplayed his selfish individualism. Thus his analysis of the state of nature and his rigorously logical account of political obligation suffered from a narrow one-sidedness. Although, Pufendorf felt, De Cive was "for the most part extremely acute and sound",¹⁵ and although Hobbes had been right to insist that the state was an "artificial man", still his writings "savoured" of the profane and he had confused matters by regarding the terms 'supreme power' and 'unlimited power' as interchangeable. Pufendorf wanted to uphold the supreme authority of rulership, but he also wanted to insist that the ruler's supreme

authority was not necessarily unlimited. Both God's Will with man and the evidence of contemporary European states seemed to him sufficient reason for this. He agreed with Hobbes that the governed community could not possibly have any rights against its governor, but he insisted against Hobbes that individuals had substantive, defensible rights against their government.¹⁶

It was partly because Pufendorf felt the justice of both Hobbes' and Grotius' basic conceptions of man's nature, and partly because he wanted to reconcile abstract and imagined hypothetical statements about natural man with empirical and historical evidence, that he developed a dual notion of the state of nature. In some form or other this understanding of the state of nature appears in all the English Social Contract Theorists of the late seventeenth century. Pufendorf considered first of all the "purely natural state" - the state of individual man abstracted from all human (social) and divine relation. This state, he acknowledged, never really existed. In the 'purely natural state' man appeared with appropriate physical and moral characteristics: man's nature was defined by his "weakness and natural helplessness" and "self-love" was the moral quality appropriate to this condition. But even here it was man's very weakness and self-love that gave rise to, or added point to, his "sociability" - the characteristic most apparent in the "modified" or "mixed" state of nature and the characteristic which ensured that

that state of nature should not be Hobbesian. The 'purely natural state', then, was juxtaposed against the 'mixed state of nature'. And this 'mixed state' signified the natural state of men in social relations with one another but in the absence of a political relation. The 'mixed state of nature', Pufendorf believed, had once existed and still did exist in the form of the relations between independent political communities.

The 'pure state of nature' was inhabited by naturally free and equal moral persons. Natural equality consisted of the absence of relations of authority between individuals and natural liberty was expressed in the right of self-preservation. The 'mixed state of nature' was characterized by the social relations that arose from man's natural sociability. Its organizing principle and governing rule was the law of nature: the moral law whose fundamental prescription declared that "Every man, so far as in him lies, should cultivate and preserve toward others peaceful sociability, which is suitable to the nature and the goal of universal humanity."¹⁷ This fundamental prescription was the source of many less fundamental dictates. These dictates Pufendorf classified "under three main heads: the first of which instructs us how, according to the dictate of sound reason alone, a man should conduct himself toward God, the second, how toward himself, the third, how toward other men."¹⁸ The duty of man toward God comprised essentially "that we have right views of God, and secondly that we order

our acts in conformity with His will."¹⁹ These were duties of natural rather than divine law because they arose immediately from the consideration of natural sociability. It was reason considering the object of religion solely as the "ultimate and strongest bond of human society"²⁰ that discovered them, and they were duties "limited to the sphere of this life" and were of "no avail to secure eternal salvation."²¹ The duty of man toward himself consisted of the duty of self-perfection so that man may the better perform his duties toward God and to others. The third set of duties, duties of man toward his fellows, Pufendorf divided into two kinds: "absolute duties, i.e., of anybody to anybody" and "conditional" duties, i.e. those owed "only toward certain persons, a certain condition or status being assumed."²² The absolute duties consisted of first, not injuring others (although if injury did occur it should be followed by "a voluntary offer of restitution");²³ Second, of recognizing the natural equality of men, i.e. "each esteem and treat the other as his equal, that is, as a man just as much as himself";²⁴ third, that "every man promote the advantage of another, so far as he conveniently can."²⁵ The conditional duties of man toward his fellows comprise all the other obligations that a man might enter into with others, for "all the duties not already enumerated [i.e. all duties other than the absolute ones] seem to presuppose an express or tacit agreement."²⁶ And with all these conditional duties, "the general duty which we owe under

natural law is, that a man keep his plighted word, that is fulfill his promises and agreements."²⁷ This postulate of a natural law duty to keep promises was of crucial importance for the logic of Pufendorf's account of a social state of nature and of his theory of political obligation.

Pufendorf felt that Hobbes' portrait of the state of nature as a war of all against all was mistaken both because it disregarded man's natural sociability and because it misrepresented the obligation to obey natural law. Although the rules of natural law were deduceable by reason reflecting on the requirements of social life, those rules were not binding because of their utility alone. "Obligation", Pufendorf noted, "is commonly defined as a legal bond"; to be obliged to do something was to have "a kind of bridle ... put upon our freedom". Obligation, he insisted, could only be "introduced into the mind of a man by a superior, that is a person who has not only the power to bring some harm at once upon those who resist, but also just grounds for his claim that the freedom of our will should be limited at his discretion." But this notion of obligation in no way contradicted man's natural liberty. For it was only in so far as man had free will that he was capable of being morally obliged at all:

It follows then that he is capable of an obligation who not only has a superior, but also can recognize a prescribed rule, and further has a will flexible in different directions, but conscious of the fact that, when the rule has been prescribed by a superior, it does wrong to depart from the same. Such is evidently the nature with which man is endowed. 28

In the state of nature the only 'superior' capable of obliging men was God. The dictates of natural law acquired their obligatory character only when God was recognized as their author:

although those precepts of natural law have manifest utility, still, if they are to have the force of law, it is necessary to presuppose that God exists, and by His providence rules all things; also that He has enjoined upon the human race that they observe those dictates of the reason, as laws promulgated by Himself by means of our natural light. For otherwise they might, to be sure, be observed perhaps, in view of the utility, like the prescriptions of physicians for the regimen of health, but not as laws. 29

"Natural reason" alone could discover that man's obligation to obey the rules of sociability (both 'absolute' and 'conditional') ultimately rested on the will of God. In virtue of this, the natural state of human relations - the 'mixed state of nature' where natural inclination was allied with duty - could be portrayed as a very social state indeed. The institutions of property, marriage, family and even slavery (which Pufendorf believed was just the extreme form of the master-servant relationship) were all appropriate to this state of nature. All of these institutions were in essence contractual. They were founded by, and embodied, the mutual consent of individuals who voluntarily abridged their natural liberty for a reason. They were natural institutions in the sense that they did not depend for their existence and right upon civil law. The function of civil law was simply to protect these conventional institutions and to specify the practical

rules necessary for their peaceful conduct.

The institutions themselves all involved relationships of an authoritative kind - based immediately upon consent but ultimately on natural law and God's will. Thus the natural equality of the 'purely natural state' was compromised in the 'mixed state of nature'. But this compromise hardly constituted a negation of natural liberty. Natural men limited their own rights to all things in the interest, ultimately, of self-preservation when they consented to the institutions of the 'mixed state of nature'. But the limitations arose from enlightened self-interest and were confined to the ends for which the institutions were established. The 'end' of the institution of property was the satisfaction of physical need, and for this private property was necessary "to avoid quarrels and to introduce good order".³⁰ The 'end' of marriage was the propagation of children and the 'end' of the family was the care and education of those children. The 'end' of slavery (including the master-servant relationship) was the advantage to be gained by all parties from "exchanging material necessities for material conveniencies."³¹ Each of the institutions of the state of nature - marriage, family and slavery - had a form of government peculiarly its own. And all differed from the government of civil society.

The primary distinction between the institutions of the 'mixed state of nature' lay in their respective 'ends'.

Political society too had a distinctive 'end' - "mutual defense" - and it was this which all the pre-political institutions were incapable of securing and which therefore necessitated transcending the state of nature.³² Pufendorf addressed himself to these matters when he came to examine "the Impelling Cause for the Establishment of a State."

He noted his problem as follows:

Although there is scarcely any pleasure and advantage which it seems cannot be obtained by the duties and situations so far enumerated [i.e. those arising from natural institutions] it remains for us to investigate the question, why men nevertheless, not content with those little first societies, have established the great societies which go by the name of states. 33

He rejects as inadequate the notion that human nature compels the formation of states. For on the one hand man's natural selfishness makes human association difficult and on the other man's natural sociability could be satisfied by pre-political social life. The reason, then, for the voluntary establishment of civil society "must" arise because man "has had regard to some utility which he will derive from it for himself."³⁴ This utility had to be sufficiently great to outweigh the considerable 'cost' that citizenship involved since:

The man who becomes a citizen suffers a loss of natural liberty, and subjects himself to an authority which includes the right of life and death, - an authority at whose command one must do many things from which one would otherwise shrink, and must leave undone many things which one greatly desired to do. And then many actions must be referred to the good of the society, which often conflicts with the good of individuals. 35

In explaining why these burdens should be willingly undertaken,

Pufendorf adopted a Hobbesian characterization of natural man - a characterization he had rejected earlier when insisting, against Hobbes, that men's natural relations were essentially friendly and peaceful rather than hostile and warlike. It now appeared to Pufendorf that:

no animal is fiercer or more untameable than man, and more prone to vices capable of disturbing the peace of society....

Therefore the genuine and principal reason why the patriarchs, abandoning their natural liberty, took to founding states, was that they might fortify themselves against the evils which threaten man from man. For, after God, man can most help man, and has no less power for harm. 36

Natural institutions could not effectively protect man from man because the 'consent' and 'agreement' embodied within them could not be relied upon. And the natural law which ultimately sanctioned sociability was not sufficiently respected by the "great multitude of those to whom every right is worthless, whenever the hope of gain has enticed them, or confidence in their own strength or shrewdness" leads them to believe that they may "be able to repel or elude those whom they have injured."³⁷ Natural law was still law - Pufendorf did not deny this basic proposition - but he now chose to emphasise that:

although the natural law sufficiently teaches men that those who inflict injury upon others will not go unpunished, nevertheless neither fear of the Divinity nor the sting of conscience is found to have strength to control the malice of all sorts of men. For with many, through defect of training and habit, the force of reason grows deaf as it were. The result is that they aim at things present only, indifferent to the future, and are moved only by what strikes upon the senses. But since divine vengeance commonly walks with slow foot, for that reason wicked men are given an opportunity to

attribute the evils which befall the impious to other causes ... But to check evil desires, the prompt remedy, and one well adapted to human nature, is found in states. 38

Thus civil society was necessary because the state of nature was incapable of providing the security essential for civilized life. Although the 'mixed state of nature' might allow a more comfortable existence for man than the 'purely natural state', still that life

could not be compared in any way with civil life, not so much on account of want, which the household, with its limited desires, seems fairly well able to banish, as because security is not fully provided for there. And, to be brief, in the natural state each man is protected by his own powers only, in the community by those of all. In the former no one has a certain reward for his industry; in the latter all have it. In the one there is the rule of passion, war, fear, poverty, ugliness, solitude, barbarism, ignorance, savagery; in the other the rule of reason, peace, security, riches, beauty, society, refinement, knowledge, good will. 39

Security itself was a problem because of the perversions in the make-up of natural man. In order to show how these cunning, short-sighted, self-seeking, perverse individuals could be integrated into the moral and political community of the state, Pufendorf elaborated a complex series of contracts. This exercise, he acknowledged, was not historical. The historical origin of most states was "unknown, or at least ... not entirely certain." The 'origins' that he was concerned to portray were thus not historical ones but neither were they "imagined". They were, rather, the "necessary" origins of the state - 'necessary', that is, for the understanding of contemporary political society and political obligation. The contracts

that he enumerated were necessary truths known "by reasoning" about the origin of states from the existing fact of them⁴⁰;

for a state to coalesce regularly, two compacts and one decree are necessary. For first of all, when the many men, who are thought of as established in natural liberty, gather to form a state, they individually enter into a joint agreement, that they are ready to enter into a permanent community, and to manage the business of their safety and security by common counsel and guidance, in a word, that they mutually desire to become fellow-citizens. They must all together and singly agree to this compact; and a man who shall not do so, remains outside the state that is to be.

After this compact a decree must be made, stating what form of government is to be introduced. For until they have settled this point, nothing that makes for the common safety can be steadily carried out.

After the decree concerning the form of government, another compact is needed, when the person, or persons, upon whom the government of the nascent state is conferred are established in authority. By this compact these bind themselves to take care of the common security and safety, the rest to yield them their obedience; and by it also all subject their own wills to the will of that person or persons, and at the same time make over to him, or to them, the use and employment of their powers for the common defense. And only when this compact has been duly executed, does a perfect and regular state come into being. 41

This, in essence, was Pufendorf's understanding of the state. The state united the private wills of each citizen by subordinating them to the single will of the sovereign authority. At the same time that sovereign was endowed with the power to punish offences against its will and thus, in the last resort, to either force the private will's compliance or eliminate it. From these considerations Pufendorf declared that "a state is defined as a composite

moral person, whose will, intertwined and united by virtue of the compacts of the many, is regarded as the will of all, so that it can use the powers and resources of all for the common peace and security."⁴²

The only way that such a uniting and intertwining of wills could legitimately arise was through the consent of all those concerned. This fundamental proposition of contractarian thought, however, was not intended by Pufendorf to have any radical, anti-governmental implications. There was no suggestion that the private will might withdraw its consent and forcefully resist established government and there was no insistence that the consent necessary for legitimate government must in some way be formally and freely ascertained. On the contrary, he was quite prepared to accept that "sometimes a people is compelled by the violence of war to consent to the authority of the victor".⁴³ We have already encountered a version of this somewhat strange argument amongst some of the defenders of the 1688 Revolution. Pufendorf's work was just becoming well known by the Revolution and may well have been the inspiration for these pro-Revolution arguments. But it should be emphasised that the idea that 'consent' can be 'forced' empties the notion of 'consent' of much of its meaning. And to go on to insist that only government founded by 'consent' is legitimate, is not to say very much.

Pufendorf appears to have been at least one of the sources for another important contractarian doctrine widely

held in England during the late seventeenth century. This was that the 'original contractors' - those whose consent was essential for the legitimate foundation of a state - were only "the heads of households",⁴⁴ or the 'fathers and masters of families'. Democracy he defined as that form of government in which "the supreme authority is in the hands of a council composed of all the heads of households", and this section of the population alone was what was meant by "the people".⁴⁵ We will meet similar ideas in the writings of Algernon Sidney and James Tyrrell where they are used to identify that section of the community which can legitimately determine when the sovereign has broken his contract. In Pufendorf's theory the ideas play a rather confusing role. On the one hand they represent the logical outcome of his development from the 'purely natural state' of isolated individuals, to the 'mixed state of nature' of family life, to finally the civil state. But, on the other hand, it is difficult to see why paternal authority should convey a right to consent to political obligations for the whole of a family when paternal and political authority were by definition so very different one from the other.

Considerations of interest and convenience led the heads of households to enter civil society. But the obligation to obey civil authority was neither grounded on prudence nor utility. Consent was essential for incurring obligations but, as with natural law, ultimately

the obligation to continue obeying civil authority was rooted in conscience conforming to God's will. Thus Pufendorf concluded his discussion of the origin of civil society by noting that:

what has been laid down with regard to the origin of states does not prevent us from saying with good reason, that civil authority is from God. For it is His will that the natural law be observed by all men; and in fact, after the race had multiplied, life would have come to be so barbarous, as to leave scarcely any place for the natural law, whereas its observance is greatly promoted by the establishment of states. In view of all this, and since he who orders an end is understood to order also the means necessary to the end, God too, through the medium of reason's mandate, is understood antecedently to have enjoined upon the now numerous human race to establish states, which are animated, so to speak, by their highest authority. 46

The point was heavily underlined in Pufendorf's discussion of the limits of political obligation - the right of resistance. A properly constituted civil authority was "supreme" and unaccountable "to any human being", Pufendorf insisted.⁴⁷ It was the source of all civil law. But this meant neither that government was necessarily unlimited, nor that all commands issuing from the sovereign must be obeyed. Salus populi was indeed the "general law of rulers" since "authority was conferred upon them, with the intention that the end for which states have been established, should thereby be insured".⁴⁸ But experience had shown that under absolute monarchs this 'end' might easily be perverted and thus "it has seemed wise to some nations to circumscribe the exercise of this authority by certain limits." Coronation oaths, fundamental laws,

regular parliaments appear to be what Pufendorf had in mind here.⁴⁹ Natural law and the Divine Will provided the

limit on what a sovereign could legitimately command, for:

every power is understood to be conferred upon any person without prejudice to the rights of a superior, so ... upon the establishment of a supreme civil power citizens were neither able nor willing to renounce God's sovereignty over them, and are, therefore, not bound by any commands of the civil sovereignty, which are confessedly and openly repugnant to a command of God. 50

Yet as individuals, citizens could not forcefully resist their sovereign's encroachments upon their rights, save if they were faced by imminent death. Pufendorf's advice to the oppressed subject was: endure the abuse of supreme authority or flee the country rather than disturb even further the stability and quiet of civil life. A whole people, on the other hand, did have the right to resist its sovereign when its safety was seriously endangered. But this was heavily circumscribed: it did not mean that a people might resist whenever a sovereign ruled against its wishes. Pufendorf rested the solution to popular rights of resistance upon the terms agreed in the original contract. Those terms established the practical arrangements necessary for securing the 'end' of the state - the safety of the people. Only in the most exceptional circumstances, when the 'end' of the state was perverted could there be rightful resistance to the sovereign authority.⁵¹

Although Pufendorf's argument is sometimes unclear and confused,⁵² its general character is not difficult to see.

Unlike any of the Constitutional Contractarian literature, his was not concerned to counsel intervention in the practical affairs of his day. Nor was he concerned to justify any particular political activities. He was interested instead in portraying and accounting for the phenomenon of the state as a complex of interrelated powers, rights, and duties. His enquiry was conducted for the sake of a better understanding of the state rather than to recommend or justify changes within any particular state. His dispute was with other theorists like Grotius and Hobbes. It was not with current politicians. Now how far could this be said of those English writers in the late seventeenth century who employed the vocabulary of Social Contract?

In many cases it most clearly could not. Perhaps the best example of this body of Social Contract literature is T.H.'s Political Aphorisms: Or, The True Maxims Of Government Displayed ... By way of a Challenge to Dr. William Sherlock (1690). Here the author was concerned to transcribe (though without acknowledgement) passages from works by contractarian writers that might prove useful in practical arguments about the Revolution. His chosen sources ranged from Pufendorf, Hooker and Locke to Gilbert Burnet. And the point, as his title indicates, was a very practical one. Examples of even more specifically 'practical' Social Contract arguments appear in the two anonymous pamphlets An Argument for Self-Defence (1689) and A Political Conference between Aulicus, a Courtier; Demas, a Countryman; and

Civicus a Citizen (1689). The first endeavoured to prove that the threat of violence against James II was perfectly legitimate. The second attempted to prove to men of "Ordinary Capacity" that government originated by contract, or rather by a Pufendorffian 'dual contract', and thus resistance could be justified. And the author of A Discourse concerning the Nature, Power, and proper Effects of the Present Conventions in both Kingdoms (1689), introduced actions of 'state of nature', 'natural law', and 'double contract' into an argument designed to prove that the Conventions were legitimate bodies. This is the typical expedient of pamphleteers to resort to handy higher principles, and it does, of course, have the effect of transforming the 'philosophical' arguments into something quite different. For those arguments are lifted out of their context and are placed in another. They are informed with particular meanings; a narrow and specific relation to particular events or institutional arrangements is imposed upon them; and they are employed as 'weapons' in the cut-and-thrust of a practical debate that has meaning only for a particular place at a particular time.

A practical concern, then, predominates in much Social Contract literature of the late seventeenth century. But what of the more famous contractarian writings of the time - those of Sidney, Tyrrell, Locke and Paxton? Were they more akin to Pufendorff's writings or the pamphlet literature that I have just noted? At first glance Locke's work at

least seems very similar to Pufendorf's. Did he not rely exclusively upon the 'vocabulary' of Social Contract and did he not suggest that his own work was like Pufendorf's?⁵³ But on closer examination this similarity appears more and more superficial. Tyrrell's and Sidney's works, too, contain extensive sections of a highly theoretical kind. Yet once again when their complete works are considered, the theoretical sections acquire a very different character from Pufendorf's. We will consider these writings in detail in the following chapters but it should be noted at the outset that the most obvious characteristic that these writings share and that separates them from Pufendorf's is their urgent concern to refute a specific practical argument: that of Filmer. And their 'urgency' is only comprehensible when it is recalled that Filmer had become the theorist of a powerful political faction: a faction strongly opposed by Sidney, Tyrrell and Locke. Thus theirs was an attack on "Filmerism" - Filmer's theory as it appeared in the practical implications that were currently being drawn from it.

Of these more famous writings, only Peter Paxton's Civil Polity (1703) which was written relatively late in our period, escapes from the concern with Filmer. The tone of his argument is more reflective and he is not concerned to recommend or justify changes in the English polity. But even though much of what he wrote might well have commanded the assent of Sidney, Tyrrell, Locke,⁵⁴ or

Pufendorf, his work was devoted to the answering of different questions from any of these others. It was intended to portray "from what Source such a Diversity of Customs, Manners, Usages, Laws, and Methods of Living, that are daily to be observed amongst the Sons of Adam, do proceed".⁵⁵

English Social Contract writing, then, appears varied in nature but is generally more concerned with current political practice than Pufendorf's De Jure Naturae et Gentium and De Officio Hominis et Civis. Locke's Two Treatises is clearly the most famous late seventeenth century English work in this genre. If we now look more closely at his theory and the controversies that surround its intellectual status, we may begin to see more distinctly the implications of Social Contract Theory for Englishmen during our period.

CHAPTER VII

JOHN LOCKE AND THE SOCIAL CONTRACT

Studies of Locke's political works have multiplied enormously in recent years. But a very confusing picture of Locke has emerged. The once undisputed exponent of the 'principles of 1688' and the 'champion of constitutional democracy'¹ has become a much more complex, contradictory and devious character. Occasionally the more 'traditional Locke' - the champion of individualism and the elaborator of modern Liberalism² - still musters support. But that Locke now contends with a series of 'new Lockes' - a champion of majority rule, an ideologist of the emergent bourgeoisie and a tacit exponent of Hobbism.³ Again, although the Locke who was once an original and profound political thinker still has his defenders,⁴ he is now challenged by Lockes who expressed nothing but "parochial political orthodoxy",⁵ or who simply restated the "familiar principles ... forged by the heirs of John Calvin".⁶ Indeed, one of these 'new Lockes' so disappointed his creator that the Two Treatises appeared as "too quaint and insubstantial to deserve the admiration it has received."⁷ Now practically all of these interpretations of Locke acknowledge that the argument of Two Treatises is presented in a loose and unrigorous way; and, at least in part, it is this acknowledgement that has sometimes led to Locke's 'relegation' from the rank of political philosopher to that of party pamphleteer or tract writer. It is the issues

involved in this question that will occupy much of our attention in this chapter. Is the understanding of 'contract' presented in Two Treatises essentially the same as that presented in Pufendorf's De Jure Naturae et Gentium, or is it not?

I propose to examine this very broad question by considering a number of narrower, more specific ones. First, what occasioned Locke's writing the Two Treatises? What effect did he hope his writing and publishing the work would produce? Second, what was the character of Locke's notions of the 'state of nature' and the 'social contract'? Were they understood historically or, as by Pufendorf, as hypothetical and necessary concepts for a proper understanding of the state? Third, is the argument of Two Treatises more appropriately viewed as political philosophy or as political rhetoric? And finally, how did Locke's contemporaries view the argument of Two Treatises? What impact did the work have on political debate, especially in England, during the first fifteen years after its publication? I will look at each of these questions, or sets of questions, in turn.

Locke students are now practically unanimously agreed that the Two Treatises was largely written some ten years before the 1688 Revolution. Peter Laslett's detailed research during the 1950s revealed that the two essays of the Treatises were conceived as a single work, that they were simply revised for publication after Locke's return from exile in 1689, and that they had initially been written between 1679 and 1681.⁸ The considerable textual, biographical

and historical evidence which Laslett presents for the earlier dating appears sufficient to uphold his thesis. But it is worth remembering that the case has not been established beyond doubt. Much of Laslett's historical evidence about the relevance of Locke's arguments to the Exclusion Crisis rather than the Revolution, for example, is suspect.⁹ Yet from his enquiries, Laslett convincingly argues that Locke wrote the Treatises as a propaganda piece for a projected rising by the Earl of Shaftesbury.

The contention that Two Treatises was a pièce d'occasion, a propaganda piece, does not preclude, as E.S. De Beer has recently suggested, that it was also a "speculative treatise written in answer to a speculative treatise".¹⁰ It clearly was the case that one of Locke's purposes in writing the work was that which is expressed in their title. The first treatise was designed to 'detect and overthrow' the "False Principles and Foundation of Sir Robert Filmer and his Followers"; the second was intended to display the "True Original, Extent, and End of Civil-Government." The connection between the first and second parts was quite simply, as the first review of Locke's work pointed out, that the first revealed the shortcomings of the principal royalist theory of political legitimacy whilst the second provided an alternative and supposedly much more adequate theory.¹¹ Locke himself explained the purpose of the Second Treatise along these lines in its first paragraph. It was an enquiry designed to "find out another rise of Government, another Original of Political Power, and another

way of designing and knowing the Persons that have it, then what Sir Robert F. hath taught us."¹²

The anti-Filmer design clearly runs through the whole of Two Treatises, and it is difficult to see why commentators like R.I. Aaron should want to insist that Hobbes as well as Filmer was Locke's 'target' in the Second Treatise.¹³ Locke and Filmer in several respects were much more akin to one another than either were to Hobbes. Both accepted that Man was a creature made by, for and in the image of God, that God had ordained government in the world, that the Bible contained a valid, and in no sense simply metaphorical account of the first ages of the world, that the Bible was absolutely authoritative in all moral questions, and both agreed on the methods of argument appropriate to resolving disputes.

It was precisely this considerable agreement between Locke and Filmer on certain fundamental ideas that made the republication of the latter's works such a serious challenge to the Shaftesbury Whigs with whom Locke was associated. The arguments of Hobbes' De Cive and Leviathan for the necessity of absolute sovereignty simply did not carry the same weight as Filmer's during the late seventeenth century. The judgment of Filmer himself on Hobbes might be taken as representing that of even the most ardent royalists. "I consent with him about the rights of exercising government," he declared, "but I cannot agree to his means of acquiring it ... I .. praise his building, and yet mislike his foundation".¹⁴ Indeed, the seemingly

atheistic, immoral theory of Hobbes was practically universally spurned in the very religion-conscious age of the Restoration and Revolution.¹⁵ As we have seen, almost the only references to Hobbes in political debate, particularly after the mid-1680s, were as contemptuous labels for categorizing opponents. It was Filmer and not Hobbes who was the principal authority for late seventeenth century royalists.

Hobbes' political writings, then, did not attract any significant following during the late seventeenth century, whereas Filmer's did. Filmer's major works were first published at the height of the Exclusion Crisis apparently as an act of policy by the royalist, anti-Exclusionists. At all events the works were warmly recommended to the public by the official paper "the Publick Gazet".¹⁶ It was, furthermore, Filmer and not Hobbes who appeared as the principal opponent of all those pro-Exclusionist writers who were concerned to raise their argument above mud-slinging and gossip.¹⁷ And finally, it was Filmer and not Hobbes who remained the principal authority of all those defenders of the English monarch's absolute power during the two decades following the Exclusion Crisis - men like Edmund Bohun, Jeremy Collier and Charles Leslie.¹⁸ In these circumstances it is not surprising that Filmer should have appeared as the most significant exponent of absolutist theory in the late seventeenth century, and that a writer of a different persuasion, like Locke, should have found

it necessary to devote considerable effort to attacking Filmer so that his own theory would stand more chance of acceptance.

Two Treatises, then, appears to have been written by Locke with a clearly practical political end in view: to undermine the theory of the principal royalist authority and establish an alternative theory to which Whig politicians could appeal. This end Two Treatises shared with a number of other political works composed at approximately the same time - most notably, Sidney's Discourses Concerning Government and Tyrrell's Patriarcha Non Monarcha. But Locke's work differed from these others in the 'narrowness' of its critique of Filmer and the 'generality' of its alternative theory. Sidney and Tyrrell, as we shall see,¹⁹ were concerned to refute not only Filmer's theory of political legitimacy but also his notions about the English Constitution. And the general Social Contract Theory that they outlined was integrally connected to their views on English constitutional history and law.

Filmer's political works were indeed much more wide-ranging than Locke's Two Treatises. Apart from the famous enquiry into the nature of political power, Filmer's writings contain commentaries and critiques of Aristotle, Hobbes, Milton and Grotius, as well as detailed examinations of the power and inter-relations of the various constitutional authorities in England. His general theory of the necessity for an arbitrary, unlimited, sovereign, monarchical power, however, pervades the whole of his work. Indeed, the

work in which he most carefully outlines this general theory was conceived, as its sub-title indicates, with English affairs in mind.²⁰ And his argument proceeds in a single development from a refutation of "Natural Freedom" (the basic principle of his opponents), to a justification of the 'naturalness' of absolute monarchy, and on to an examination of the English constitution 'proving' it to be such a 'natural' constitution.

Locke's attack on Filmer did not take him into an examination of specific English constitutional law, at least the text which Locke published did not contain such an enquiry. But we can never be sure that Locke did not attempt to follow Filmer into the consideration of English law (at least until the 'missing' part of the Treatises is recovered). For in the preface to the Treatises Locke informed his reader that a considerable part of his work - "more than all the rest" - had been lost. And this 'middle' section of his work supposedly followed Filmer "through all the Windings and Obscurities which are to be met with in the several Branches of his wonderful System."²¹ Yet if there were any such missing papers (Locke's word alone has always been accepted for it) it is difficult to imagine what they could have contained if not, in part at least, a refutation of Filmer's theory of the English constitution. The papers supposedly answered "the several Branches" of Filmer's thought. And yet one of the most outstanding 'branches' of his enquiries - occupying about one third

even of the Patriarcha itself - was concerned with the English constitution.²² Laslett's contention, then, that since Locke was never very interested in the constitutional debates of his day it is unlikely that the missing part of Two Treatises considers them,²³ seems itself unlikely.

There certainly are grounds for assuming that Locke was not as interested in the particular laws, customs and practices of the English constitution as he was in many other things. But these grounds are not sufficient for the further assumption that the lost part of the Treatises, following the plan Locke suggested in his preface, would not have involved an examination of English constitutional affairs.

But no matter what the missing papers may or may not have contained, the Treatises as published was unique. Locke published, as he wrote, with a practical political end in view. The work, he hoped, was "sufficient to establish the throne of our Great Restorer, Our present King William".²⁴ But Locke, unlike any of the other defenders of the Revolution,²⁵ made no attempt to prove that the establishment of William and Mary on the English throne had been warranted expressly or tacitly by English constitutional law. His reference to William as the "Great Restorer" was certainly a reference to the 'constitutional justifications' of the Revolution - where William appeared as a legal king according to the law of the 'ancient English constitution' which he had 'restored' after James II's attempts at 'subverting' it - but Locke's

argument did not pursue the constitutionalist line further.

It seems, then, that in terms of the circumstances of their creation and publication Two Treatises and Pufendorf's works were very different. But what of the character of the concepts of 'state of nature' and 'social contract' that each examined and built upon? As we have seen, Pufendorf understood these concepts to relate to neither the historical nor the conjectured 'origin' of the state - they were rather the necessary concepts for a proper understanding of the nature of contemporary civil society. Locke's understanding of 'state of nature' and 'social contract', however, has been the subject of numerous, conflicting interpretations. If we now look at these controversies we may gain a clearer view of the nature of Locke's Social Contract Theory.

Commentators hardly differ over the function of the 'state of nature' in Locke's argument. It is accepted as establishing the natural, pre-civil rights and duties of man and as indicating why civil government is necessary for social life. The controversies have arisen about its status. Some have argued that it is a purely expository device,²⁶ others that it is partly expository and partly historical,²⁷ and others still that it is principally historical.²⁸ Again, it has been viewed as an exposition of the pre-social,²⁹ pre-political,³⁰ or pre-civil³¹ condition of man. It has also been argued that Locke has not one, but two conflicting notions of the 'state of nature' - the one a state of peace, the other a state of

war.³² And finally, Locke's 'state of nature' has been considered as either an abstract construction of reason, or as based on "experience and on the observation of the actual behaviour of men",³³ or as essentially a theological axiom.³⁴

Some of these characterizations are plainly wrong according to explicit statements by Locke, but others have strong textual evidence to support them. Locke's views on the status of the 'state of nature' are far from unambiguous and it is thus unlikely that any account will prove finally conclusive. Perhaps the most that can be hoped for is an account which does least injustice to the evidence of the texts.

We may begin by considering what the 'state of nature' most clearly was not. In the first place it was not a pre-social condition. Life in the 'state of nature' was depicted as one in which family life existed on a grand scale - with families consisting of relationships between "Man and Wife, which gave beginning to that between Parents and Children; to which, in time, that between Master and Servant came to be added".³⁵ It was also a form of social life in which "Promises", "Compacts" and "Bargains" could be effectively made since "Truth and Keeping of Faith belongs to Men, as Men, and not as Members of [civil] Society."³⁶ This, then, was as social a 'state of nature' as Pufendorf's 'mixed state of nature'.

Secondly, the 'state of nature' was not a 'Golden Age'

in the development of mankind - a virtuous, harmonious state into which corruption penetrated, eventually necessitating the harsh controls of civil society. There are elements of this view in Locke,³⁷ but he mentions the "Golden Age" as rather the early stages of government than any pre-governmental period.³⁸

Locke most frequently defines the 'state of nature' in terms of it not being "Politick Society". It is the state "all Men are naturally in ... and remain so, till by their own Consents they make themselves Members of some Politick Society".³⁹ But still, the 'state of nature' is not a pre-political society in the sense that political power does not exist within it, at least in embryo. For "Political Power is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours".⁴⁰ Political power is derived from the aggregation of the executive power of the law of nature which each exercised independently in the 'state of nature'. Thus the 'state of nature' is examined as the state of mankind in the absence of organized government. And the point of the enquiry is to show first, that man stands in dire need of government; second, that he is capable of organizing it; and third, that only a certain (though very general) form of government organization can properly be seen as government at all - in particular, that arbitrary, absolute rule is, properly speaking, not a form of government.

Here then are three things which the 'state of nature' most definitely was not. But from what sources did Locke derive his conception of the 'state of nature' - and in particular, what role did historical evidence play? Locke was aware that 'state of nature arguments' and 'original contracts' had been objected to on the grounds that they were not evidenced in human history.⁴¹ Yet he believed the objection could be easily countered. His answer was twofold: first, there was ample evidence in history and current practice of the 'state of nature' and 'original contracts'; and second, even if history appeared to lend support to the patriarchalist case this could not undermine his own argument. It is this last point, that his contractarianism was immune from historical criticism, that linked Locke's theory with Pufendorf's De Jure Naturae et Gentium and separated it, as we shall see, from the apparently similar works by Sidney and Tyrrell.

Locke insisted that "the World never was, nor ever will be, without Numbers of Men in that State [of Nature]."⁴² And he pointed to the rulers of independent states and to Hooker's authority for evidence of this.⁴³ He often spoke of the 'state of nature' and its supersession by contract as an historical event, and here he countered the objection that history did not support him. In the first place, he argued, "it is not at all to be wonder'd, that History gives us but a very little account of Men, that lived together in the State of Nature." But this was not because it had not happened in the past. The reason was

rather because the period of the 'state of nature' was exceedingly short and anyway had been superseded before there were any records. Yet what little evidence did remain of the origin of governments, Locke claimed, did support his argument. The accidental records "we have, of the beginning of any Polities in the World," he declared, "excepting that of the Jews, where God himself immediately interpos'd, and which favours not at all Paternal Dominion, are all either plain instances of such a beginning as I have mentioned, or at least have manifest footsteps of it."⁴⁴ And he pointed to Rome, Venice and the emigrants who left Sparta with Palantus as historical examples of original contracts;⁴⁵ and to "many parts of America"⁴⁶ (which was "still a Pattern of the first Ages in Asia and Europe"⁴⁷) as evidence of the continuing existence of 'states of nature'.

Despite all this evidence from history and contemporary experience, Locke denied that such evidence could either support or refute in any conclusive respect the principal argument of Two Treatises. This argument was about right rather than fact. Thus Locke noted that even if history supported the Paternalist case "one might, without any great danger, yield them the cause". He could concede that in the past governments began in paternal rule, and yet the argument of Two Treatises would be substantially unaffected. The argument there was about right and, according to Locke, "at best an Argument from what has been, to what should of right be, has no great force." The only

occasion when such an argument might have force was where "the want of such [historical] instances be regarded an argument to prove that Government were not, nor could not be so begun".⁴⁸ Since this was not the case, and since anyway history did provide instances of original contracts, then one main argument against contractarianism could be rejected.

Throughout his argument Locke's appeal was primarily to Reason. History was evoked simply as evidence that the conclusions of Reason were not at variance with the practices of mankind. Reference to history was important because of the current state of debates about 'contract'. As we have seen, practically all Locke's contemporaries who appealed to 'contract' believed it to have been an historical occurrence, and one of the most troublesome criticisms was the absence of historical evidence. Thus in arguing that History and Reason were not at variance, and at the same time immunizing his idea of contract from historical criticism, Locke's Contract Theory could accommodate any historical evidence whatsoever. Indeed, having considered the historical objection to his theory, Locke proceeded to note the historical evidence of the rise of government. His point was to prove that Reason and History were not discordant by showing "that as far as we have any light from History, we have reason to conclude, that all peaceful beginnings of Government have been laid in the Consent of the People."⁴⁹

Locke began this examination by acknowledging, with the Patriarchalists, that the earliest recorded governments

were usually monarchies. He was even prepared to admit that in certain circumstances the monarch might well have been the father of his people.⁵⁰ But this evidence, Locke insisted, "destroys not that, which I affirm, (viz.) That the beginning of Politick Society depends upon the consent of the Individuals, to joyn into and make up one Society; who, when they are thus incorporated, might set up what form of Government they thought fit."⁵¹ The evidence merely suggested that there must have been good reasons why the first framers of government should have decided upon, and been content with, monarchy rather than any other form of government. These reasons, Locke felt, were so simple and obvious⁵² that in "the first Ages of the World" it was "almost natural" for family government to change into political government. It would be brought about by a "scarce avoidable consent" and the change would be "insensible".⁵³ Thus the historical evidence advanced by anti-contractarians could be accepted without destroying Locke's basic contentions about the 'state of nature' and the 'original contract'.

It would seem, then, that those interpretations which insist that Locke's 'state of nature' and 'social contract' are based on historical or empirical evidence are wide of the mark. Recently, however, an alternative view of these concepts has been suggested: that the 'state of nature' is essentially a theological axiom. Now whilst both Polin and Dunn have both convincingly argued that a religious

conception lay at the bottom of Locke's reflections on the nature of man and the law of nature, this does not warrant the further contention that it was religious conviction rather than rational enquiry that led Locke to his views on the 'state of nature'. For Locke himself believed that his basic religious ideas were themselves capable of rational demonstration. God was a rational being whose existence could be rationally proved, and his ways for man portrayed a rational design.⁵⁴ Thus only by expanding the notion of a theological argument to include any discussion about the nature of man as a rational being could we conclude, with John Dunn, that the "state of nature is a topic for theological reflection, not for anthropological research."⁵⁵ But in doing this the distinction between anthropology and theology collapses.

Locke's 'state of nature', as I have suggested, seems rather to have been essentially an expository device. It established the natural rights of man, indicated the necessity for civil society, and provided the key for distinguishing between the legitimate and illegitimate exercise of political power. Both the 'state of nature' and the 'original contract' which occasioned its supersession, were viewed by Locke as evidenced in history, but their status in the argument of the Treatises was not dependent upon that. They served as crucial concepts in a rational explanation of the nature of political society, rather than an historical account of the rise of government. As

rational constructions they were not susceptible to refutation by anything but similar arguments from reason, as far as Locke himself was concerned. His description of life in the 'state of nature' supposedly accorded with the evidence of reason, history, experience and theology. And though evidence from the last three of these 'sources' could conceivably cast doubt on the validity of his arguments, none alone could disprove them.

So far we have seen that Locke's Two Treatises were conceived and published as contributions to political arguments that were very closely related to the practical political conflicts of late seventeenth century England. In this respect the Treatises was very different from Pufendorf's De Jure Naturae et Gentium and De Officio Hominis et Civis. But the understanding of 'state of nature' and 'social contract' expressed in the argument of the Second Treatise appears very similar to Pufendorf's. Considerations such as these have given rise to widely different interpretations of the general nature of Locke's Social Contract Theory. On the one side it is asserted that Locke's theory represents a genuine philosophical enquiry into the nature of the state, whilst on the other it is insisted that the Second Treatise is essentially sham philosophy, a work of political rhetoric. The debate is important for our purposes because the character of Locke's appeal to 'contract' depends upon it. What then are the sources of these disagreements and how might Locke's argument best be represented?

I shall argue that in part these disagreements arise from the preconceptions of Locke scholars, and in part from the writings of Locke himself. In outlining the first of these I shall concentrate upon the two opposed accounts which seem the most coherent and substantial: those of Peter Laslett and Raymond Polin. In examining the second, I shall concentrate on Locke's notions of natural law and consent because these notions have been at the centre of most disagreements over the general nature of the *Treatises*.

In the introduction to his critical edition of Two Treatises, Laslett asserts that to call this work "'political philosophy', to think of [Locke] as a 'political philosopher', is inappropriate."⁵⁶ The observations he makes in defending this view are persuasive. Two Treatises, he shows, was most probably first written as a response to the Exclusion Crisis and not to the 1688 Revolution. It was intended as a call for revolutionary action rather than as a justification for a revolution that had already occurred. It was intended to justify the activities of the Shaftesbury Whigs. It was a pièce d'occasion and that alone.⁵⁷ According to Laslett Locke, on his own testimony at the time he was writing the *Treatises*, believed that true knowledge of things political was impossible. Politics was the sphere of opinion and probability which by its nature eluded the philosophical understanding.⁵⁸ And thus, Laslett asserts, with this view of politics it was unlikely that Locke would have attempted to write political philosophy. Locke's

indisputably philosophical work, the Essay Concerning Human Understanding, expresses ideas especially in respect of natural law which are irreconcilable with the views contained in Two Treatises.⁵⁹ It is only posterity that has looked upon the Essay and the Treatises as "complementary", Locke himself was anxious they should be seen apart⁶⁰ (he was in fact most reluctant to admit his authorship of the political work⁶¹). The Two Treatises was not written according to the 'plain, historic method' of the Essay. Had it been, Laslett asserts, it would have insisted on the limitations of our social and political understanding. It would have demonstrated its conclusions by arguments proceeding from definitions of 'simple ideas' to the construction of 'complex ideas' in a way capable of "entering into a mathematically demonstrable morality."⁶² Instead of this, most of the notions that are crucial to the argument of the Second Treatise - notions of natural law, consent, freedom, law, reason, will, government, justice - are "nowhere discussed as subjects in themselves". The ideas of 'political power' and 'property', Laslett admits, are defined in the Second Treatise, but they are defined "not in philosophic terms, on nothing like the principles laid down in the Essay."⁶³ From all these observations Laslett concludes that Two Treatises should be viewed as the work of a man who wrote on economics, on toleration, on religion, on education, who was also an epistemologist. Each enterprise was different and

therefore it is "pointless to look upon Locke's work as an integrated body of speculation and generalization, with a general philosophy at its centre and as its architectural framework."⁶⁴

It was precisely this final point of Laslett's that Polin sets out to reject in his La Politique Morale de John Locke. All Locke's speculations on matters moral and political, Polin argues, were informed by a rational theology. Locke's philosophy, he asserts, is "inseparable from his religion"⁶⁵ because "throughout his philosophical works Locke appealed to God, and without this recourse to God, all the coherence of his philosophy would dissolve."⁶⁶ Thus in Polin's work, Locke's enquiries into morals, politics, religion and epistemology are portrayed as just so many parts of a single philosophic enterprise. Polin accepts Laslett's arguments that the Treatises was composed around 1680 as part of the attempt to exclude the Catholic Duke of York, the future James II, from his right to succeed to the throne. But he refuses to follow Laslett in taking the further step of arguing that because Two Treatises was thus a pièce d'occasion, a work of circumstance, it could not be philosophy. In Polin's view, the circumstances of the Exclusion Crisis simply gave Locke the impetus to consider the "universal problems of politics". The constant interest which philosophers have shown in the Treatises is indicative, he argues, of the extent to which the work 'escaped' from the circumstances of its creation.

Yet, as well as being an enquiry into the eternal truths of morals and politics, the work had a practical message too. It was concerned both to counsel and justify a set of present political activities and to explain the essential nature of moral and political experience.⁶⁷

It is apparent from these sketches of Laslett's and Polin's interpretations of the general character of Two Treatises, that they express different conceptions of the nature of philosophic enquiry. To Laslett philosophical enquiry is necessarily non-practical - it is enquiry conducted in a particular way for the sake of truth, and this inevitably precludes a concern to justify or counsel intervention in practical affairs. To Polin philosophy can both justify or condemn political practice and illuminate universal and eternal truths. Political philosophy and political doctrine are one and the same, or can be - all that matters is that the argument be pitched at a sufficiently general level. In Polin's work philosophy and Weltanschauung are equivalents (or at least compatible), in Laslett's work they are mutually exclusive categories. It is this sort of disagreement that constitutes one of the main sources of confusion in the current literature on the character of Locke's work on government. Recognition of this basic point helps explain why so many contemporary Locke scholars can agree that Two Treatises, considered in isolation from the rest of Locke's writings, appears confused, repetitive, unrigorous and so on, and yet they can differ so widely in their interpretations

of the general nature of the work.

The second source of confusion for Locke scholars arises from Locke's own writings and reflections about the general character of the argument of Two Treatises. Locke was a very self-conscious writer. His journals and letters contain interesting reflections on the nature of political studies, the nature of philosophic argument in moral and political affairs, and on the sort of work that he believed Two Treatises represented. A consideration of these reflections and an examination of the argument of the Treatises in the light of them will help to clarify the nature of Locke's Social Contract Theory.

We have already seen that Locke distinguished between theoretical and practical enquiries into politics and classified his own Two Treatises as a theoretical study, the best example of which was Pufendorf's De Jure Naturae et Gentium.⁶⁸ It seems that this distinction between the theoretical and the practical has a counterpart in Locke's general distinction between the two kinds of knowledge that the human mind is capable of acquiring. He outlined this general distinction in a note in his Journal of 1681. It is this note which Laslett interprets as an argument against the possibility of certain knowledge in political affairs and uses as evidence that the Two Treatises could not have been intended as political philosophy. Locke's note contains the following observations:

There are two sorts of knowledg in the world, generall and particular, founded upon two different principles, i.e. true Ideas and matter of fact or History. All generall knowledg is founded only upon true Ideas and soe far as we have these we are capable of demonstration or certain knowledg. [Just as in mathematics] he that as [sic] a true Idea of God, of himself as his creature, or the relation he stands in to God and his fellow creatures, and of Justice, goodnesse, law, happinesse, etc., is capable of knowing morall things or Laws, [of having] a demonstrative certainty in them. But though I say a man that hath such Ideas is capable of certain knowledg in them, yet I do not say that presently he hath thereby that certain knowledg ... He may believe others that tell him ... but know it not till he himself hath ... made to himself the demonstration i.e. upon examination seen it to be soe. 69

If we interrupt Locke's reflections at this point we may emphasise a number of considerations that are important for his conception of philosophy, morals and politics. In the first place, for Locke the philosophical concern with knowledge and truth was a concern with 'true ideas' - and this concern involved a clear understanding of the limited capacity of the human understanding for apprehending 'true ideas', and hence the necessity and grounds for opinion and belief. The Essay Concerning Human Understanding, of course, had this as its central concern. Secondly, the essential nature of true knowledge was that it was 'general' and 'demonstrable'. Thirdly, "morall ... Laws" were presented as capable of mathematical demonstration, and hence were proper subjects for philosophical enquiry. And finally, some aspects of human experience were inherently incapable of the demonstrative certainty necessary for true knowledge. In the remainder of Locke's reflections he notes that "physique [medecine], politie, and prudence"

are three such areas in which 'demonstration' is impossible and hence they concern merely 'opinion' and 'probability'.

His conclusion is instructive:

Knowledg, then, depends upon right and true ideas; Opinion upon history and matter of fact. And hence it comes to pass that our knowledg of generall things are *eternae veritates* and depend not upon the existence or accidents of things ... But whether this course in publique or private affairs will succeed well, whether rhubarb will purge or Quinquina cure an ague, is only known by experience; and there is but probability grounded upon experiance or analogical reasoning, but no certain knowled [sic] or demonstration. 70

It is clear that what Locke means by "politie" here is policy, not all things political. Thus Laslett's inference that Locke excluded politics from the proper field of philosophical enquiry cannot be sustained. Indeed, Laslett was forced to argue that Locke changed his mind on this point. For only in this way could he account for Locke's view, expressed in 1697, that "True Politics I look on as a part of moral philosophy".⁷¹ And anyway, in the Essay Concerning Human Understanding Locke did present two examples of how certain knowledge was ascertainable in political studies. He considered two propositions - "'Where there is no property, there is no injustice'" and "'No government allows absolute liberty'". Provided we have true ideas of the concepts of 'property', 'justice', 'government' and 'liberty', Locke asserted, and provided we use the terms consistently, then the truth of these propositions can be demonstrated.⁷²

So far we have seen that Locke believed his Two Treatises

was a contribution to that branch of political studies that was "very different from" the concern with policy; that Pufendorf's De Jure Naturae et Gentium was the best treatise of the same kind as his work; that within this branch of political studies certain knowledge was possible; and that the purpose of a philosophical enquiry into morals and politics was to demonstrate, according to the mathematical method, the eternal truths that this area of enquiry admitted. But if we now look at the way the arguments of the Treatises are constructed it becomes extremely difficult to see how Locke could have considered the work philosophy of a Pufendorffian kind. The First Treatise is nothing more than its title indicates - an attempt to 'detect and overthrow' "The False Principles and Foundation of Sir Robert Filmer and his Followers". It is a classic example of a piece of rhetorical writing with arguments of all kinds and from all sources being introduced to persuade the reader that the principal text of Locke's Royalist opponents was worthless, even ridiculous. The Second Treatise, however, is more problematical. Its title asserts that it is concerned to portray "The True Original, Extent and End of Civil-Government", a genuinely philosophical concern according to Locke's view of political studies. The chapter headings seem to indicate that the argument will parallel the middle part of Pufendorf's De Jure Naturae et Gentium. And the Treatise begins, as it must if Locke were going to pursue a philosophical enquiry according to his own method, with

a definition of 'political power' and a declaration that his task was "To understand Political Power right, and derive it from its Original".⁷³

The general outline of Locke's argument after this point is quite familiar and I do not propose to labour yet another summary of them. What is most significant for our enquiry here is that the argument does not proceed from definitions and the establishment of fixed and definite ideas to the demonstration of more complex but equally certain truths concerning politics. Several ideas crucial to Locke's argument - like, for example, natural law, consent, liberty, and obligation - are not defined at all. Others, of similar importance, are not employed consistently according to the definitions initially established. 'Property' is a well known case in point. Also, the notions of "Society", "Politick Society", and "Civil Society" are often used interchangeably even though a crucial point of Locke's argument is to indicate how 'natural society' differed from 'civil society'. And still other notions, like the nature of man and God's purposes for him,⁷⁴ are introduced in a casual way almost as an after-thought, yet they are essential for the coherence of the argument.

Considerations such as these do indeed invite us, as Laslett has suggested, to look upon Two Treatises as something other than political philosophy. How is it, then, that Locke could insist that his work was of the same kind as Pufendorf's? Was he simply mistaken? Or was Two Treatises

so bad an example of the sort of work represented by Pufendorf's De Jure Naturae et Gentium, that it is difficult to see any but the most superficial similarities? Or can some other considerations explain Locke's view? If we look at Locke's references to natural law and consent in the Treatises and compare these with Pufendorf's supposedly similar references, we may begin to gain a clearer perspective on this problem.

In the schema of the Second Treatise natural law guarantees to natural men their natural rights and teaches them their duties in respect of one another. It provides an eternal standard for judging the rectitude of positive human laws. And it provides the ultimate grounds for resistance. But neither the First Treatise nor the Second is concerned with the questions which concerned Pufendorf about natural law. In his De Officio Hominis et Civis - Pufendorf's shortened version of the mammoth De Jure Naturae et Gentium - he noted that his concern with natural law was to portray its "character" and "necessity" by examining "the nature and disposition of man".⁷⁵ And this involved enquiring into the nature of human action, exhibiting the characteristics of moral experience and distinguishing between the spheres of rational morality, civil legality and moral theology - all of which had become confused, he thought, in the moral discourse of his day.⁷⁶ Locke's Treatises, however, was concerned with no such enquiry as this. Indeed, Locke claimed that "it would be besides my

present purpose to enter here [in the argument of the Second Treatise, that is] into the particulars of the Law of Nature, or its measures of punishment".⁷⁷ All that Locke was interested in was that his reader should acknowledge that "it is certain that there is such a Law, and that too, as intelligible and plain to a rational Creature, and a Studier of that Law, as the positive Laws of Commonwealths, nay possibly plainer".⁷⁸

The essential point here, which neither Laslett nor Polin consider, is that Pufendorf's work contained a consistent argument deriving the rights and duties which 'defined' natural law from an initial characterization of the nature of man and of moral experience, whereas Locke's did not. The point that divides Laslett and Polin is whether Locke's statements about natural law were inconsistent both within the Two Treatises and between the Treatises and Locke's other writings. Laslett, as we have seen, argues that Locke's references to natural law in the Essay and the Treatises are inconsistent and this provides him with one of the main reasons for denying that Two Treatises represents Locke 'the philosopher's' understanding of politics. Polin argues that Locke's religious ideas provide the common ground to which his statements about natural law must be referred: statements, that is, in the early Essays on the Law of Nature (1664), in the Essay Concerning Human Understanding (1690), in the Two Treatises (1690) and in The Reasonableness of Christianity (1695).

If this is done - and here Polin has John Dunn on his side⁷⁹ - Locke's references to natural law portray a remarkable coherence and consistency stretching over the last 40 years of his life. But in so far as these disputes amongst Locke scholars are intended to clarify the general character of Locke's Social Contract Theory they miss the essential point that emerges most readily from a comparison of Locke's and Pufendorf's works.

Pufendorf's discussion of civil society arose out of a concern to explain the kinds of rights and duties that men in contemporary society possessed. The purpose of this enquiry is encapsulated in his concluding chapter entitled "On the Duties of Citizens". Locke's discussion of civil society in the Treatises arises from no such concern as this. His purpose appears rather to be to characterize political society in such a way that the common association of resistance with sinfulness (notions tied together in the Church of England's doctrine of Passive Obedience) could be severed, and thus an acceptable justification be rendered for resisting incumbent magistrates. That this was Locke's point seems to emerge from the argument running from his summary chapter "Of Paternal, Political, and Despotical Power, considered together", to his conclusion "Of the Dissolution of Government". In arriving at his conclusion, Locke utilized propositions and arguments from his own philosophical works and, indeed, from Pufendorf's as well. But these propositions and arguments were neither

employed nor established to demonstrate the eternal truths of moral and political experience. They simply served as maxims or premisses from which to argue a case that was published in order to persuade his audience that the 1688 Revolution was justified and that William and Mary were legitimate monarchs.

If, then, an essentially rhetorical purpose gave rise to the argument of the Second Treatise it is no longer surprising that that argument does not follow Locke's own philosophical method. It is not surprising, in respect of natural law, that Locke declared it 'besides his present purpose' to examine the "particulars" of that law. It certainly can be persuasively argued (as Polin does) that Locke's references to natural law in the Treatises are all consistent with his extended discussions of that law in other works. But even if this is accepted it does not provide sufficient reason for categorizing the Treatises as political philosophy. Yet neither does the argument that the statements in the Treatises are irreconcilable with those elsewhere (i.e. Laslett's argument), provide sufficient reason to deny the Treatises that status.

Similar problems arise from Locke's references to 'consent' in the Second Treatise as those we have just examined. Most contemporary Locke scholars have followed Hume in believing that Two Treatises contains Locke's explanation of the nature and grounds of political obligation. Locke, it is thought, reduces the obligation to obey government

to the obligation to keep promises:⁸⁰ and this is supposedly the central feature of his discussion of consent. This belief tends to perpetuate the view that the Treatises is really a work of political philosophy. It is perhaps not too unfair to represent a prevailing view as follows: all works of political philosophy are concerned with 'political obligation'; Locke's discussion of 'consent' in the Second Treatise is an account of 'political obligation'; therefore Locke's Second Treatise is a work of political philosophy.

Now, not only is this a false syllogism but also Locke's discussion of 'express' and 'tacit' consent is misunderstood if it is regarded as his account of political obligation.⁸¹ Locke did not commit the errors of which Hume accused him (of reducing one sort of obligation to another, whilst explaining neither), nor was he guilty of the confusions and inadequacies of which many of his more modern critics accuse him. His discussion of express and tacit consent is not a confused attempt to reconcile the express consent involved in contracting with the grounds of political obligation in post-contractual situations. Yet Locke has often been accused of this confusion.⁸²

It is certainly true that Locke's references to 'consent' in the Second Treatise have something to do with political obligation. But that they do not express the grounds of political obligation is manifest from the rest of Locke's writings. Locke seems to have distinguished between the question why men are obliged to create government, and the

questions how particular governments were established and what constituted the legitimate limits of political power. The Second Treatise was concerned more with the last two of these questions than the first. 'Consent' explains how it is that men incur obligations to any particular governments. It explains the limits of political power and how legitimate government can arise. But it does not explain why men are obliged to obey the governments they have thus consented to. Locke's explanation of this referred to natural law, to the necessities of organized social life and to the instincts of man; but ultimately the explanation rested on God's command. The obligation to obey legitimate government (i.e. government that elicited the consent of its citizens) was ultimately an obligation to God. In his Journal for 1679, for example, Locke noted:

If [man] finds that God has made him & all other men in a state wherein they cannot subsist without Society & has given them the judgment to discern what is capable of preserving & maintaining that society can he but conclude that he is obliged & that god requires him to follow rules which conduce to the preserving of Society. 83

Men are created by God, they are His servants, and they are set in the world about His business. They belong to God and hence they cannot have a right to destroy themselves. Indeed, the right of self-preservation is itself a duty to God. All men's responsibilities and duties are ultimately owed to God. Hence, as Locke noted in his early Essays on the Law of Nature, "all obligation leads back to God".⁸⁴

But if Locke's discussion of 'express' and 'tacit'

consent was not an account of the grounds of political obligation, what was it? One possible way of interpreting this discussion is to see it as a theory of 'citizenship', which has significance in the argument of Two Treatises because it identifies that section of society that might properly be styled members of political society whose judgement will determine when government is "dissolved". In other words, it can be seen as an attempt to theorize the activity of being a citizen in late seventeenth century England, rather than as an attempt to theorize the condition of being under an obligation. And that this is not too unlikely an account of Locke's discussion is suggested by the apparently similar concern of Sidney and Paxton with the distinction between 'citizens' and 'mere inhabitants'.⁸⁵ In the late seventeenth century only a small proportion of the population was accorded the fullest rights and duties of citizenship and the import of Locke's discussion of 'express' and 'tacit' consent was precisely that it explained how this situation could arise. That this was at least one purpose of the discussion can be seen from the conclusion Locke draws:

submitting to the Laws of any Country, living quietly, and enjoying Priviledges and Protection under them [i.e. tacit consent], makes not a Man a Member of that Society ... Nothing can make any Man so, but his actually entering into it by positive Engagement, and express Promise and Compact [i.e. express consent]. This is that, which I think, concerning ... that Consent which makes any one a Member of any Commonwealth. 86

Membership of civil society was reserved for those who

had expressly consented to it, although at any given time the government of that society could exact obedience from all those residing within, or passing through, its territory. All those who were thus subject to the government, but who were not fully members of the society, had 'tacitly consented' to obey. Men became subject to a government by their own consent (either express or tacit), but they only became members of a society through 'express consent'. But this notion of 'express consent' Locke nowhere explains. He simply asserts that "no-one doubts" that 'express consent' entitles an individual to full membership of a commonwealth.⁸⁷ His meaning can only be guessed or interpreted as referring to 'social presuppositions' and the like⁸⁸ - to ideas such as, that it was 'gentlemen' who 'expressly consented' at their coming of age by accepting (or rejecting) their political responsibilities; or that taking oaths of allegiance, as practically all public officials did in seventeenth century England, constituted the 'express consent' Locke had in mind here.

But no matter what use we make of Locke's "social presuppositions" to elucidate his meaning, it is clear that his discussion of 'express' and 'tacit' consent is not an account of what it means to be under an obligation to someone. Yet this is precisely the point of Pufendorf's superficially similar discussion of 'consent' in his De Officio.

It appears, then, that Locke's discussion of 'consent'

in the Second Treatise, like his discussion of 'natural law', did not arise from considering the same questions as Pufendorf. Apparently similar statements that occur in Pufendorf's and Locke's works are only superficially similar. Locke's Second Treatise, like the First, is fundamentally a piece of rhetorical writing. Despite its 'generality', it does not portray the characteristics of philosophical enquiry that Locke himself outlined. Despite Locke's assertion that it was a work of the same kind as Pufendorf's, a comparison of their writings reveals considerable differences. Despite the almost complete absence of any direct references to English politics, the argument was concerned to persuade Englishmen to take a particular stance in relation to the major political conflict of the day. It was published to defend the 1688 Revolution, some of its arguments are only properly intelligible within the social context of late seventeenth century English politics, and as we shall see, the first reactions to the work interpreted it as directly related to English constitutional conflict.

But if the Treatises is essentially a piece of political rhetoric, how are we to explain Locke's view that it was a work of the same kind as Pufendorf's De Officio and De Jure Naturae et Gentium? Two considerations seem relevant here. The first concerns Locke's notion of the 'theoretical study' of politics, the second concerns a common misunderstanding of the nature of rhetoric. We may conclude this part of our enquiry by briefly examining these.

The reading that Locke suggested to the would-be student of the theoretical part of politics indicates that Locke himself made no distinction between philosophy and rhetoric. Pufendorf's De Jure Naturae et Gentium was represented as the best book of the same kind as not only the Two Treatises, but also Hooker's Ecclesiastical Polity, Sidney's Discourses and Paxton's Civil Polity. Now none of these works, apart from Pufendorf's, even begin to construct arguments along the lines that Locke believed necessary for the establishment of 'certain knowledge'. All of them were 'general', in the sense that they contained theories about government, society and law, but two of them at least were 'particular' and 'practical' as well. These were designed, that is to say, to persuade their audiences to adopt a particular stance in relation to major 'issues' of their day: to reject Puritan opposition to the Elizabethan Church Government in Hooker's case, to reject Filmerian Royalism and establish (or re-establish) parliamentary supremacy in Sidney's case.

These other works, then, in Locke's first kind of political study were themselves rhetorical. But by calling them 'rhetorical' I do not mean that there was anything necessarily insincere or misleading about their arguments. Many writers in the modern world have emphasised these connotations of the idea of rhetoric. Kant, for example, in his Critique of Judgement (1790) notes a common meaning of rhetoric as "the art of persuasion, i.e. the art of

deluding by means of a fair semblance".⁸⁹ Perhaps one of the main reasons why 'rhetoric' - the art of persuasive discourse - has been associated with insincerity and deception is because of the experience of Scholastic disputation, or at least its degeneration into disputation merely for its own sake. Locke shared this common belief that rhetoric was somewhat disreputable - he tended to associate it with the excesses of Scholastic disputation and did not regard it as a suitable subject to be taught.⁹⁰ We may surmise, then, that Locke would not have welcomed an interpretation of his work as a piece of rhetoric. He believed that the principles and propositions employed in the Treatises - especially those concerning natural law - could all be established as 'certain knowledge' through 'mathematical demonstration'. But this belief, as I have argued, is not sufficient to warrant interpreting the Treatises as political philosophy, even according to Locke's own view of what philosophical argument should look like.

By 'rhetoric' here, then, I mean simply a piece of writing that has as its principal 'organizing idea' the concern to persuade its readers to think and act in a particular way.⁹¹ There are, of course, many different ways of pursuing this aim and there are, accordingly, many different kinds of rhetorical works. So simply to call Two Treatises 'rhetoric' does not add much to our understanding of the work. But it does clarify some of the problems concerning the nature of Locke's Social Contract Theory.

If we do regard that argument as rhetoric rather than political philosophy then many of the disappointments that Locke scholars have encountered, and that I have noted, can be removed: they are born of confused expectations!

Two Treatises, then, presented an argument in Social Contract terms designed to have a specific impact on late seventeenth century English political practice. But how effective was it as a piece of rhetoric? I will conclude this survey of Locke's theory by attempting to answer this question.

Clearly the Treatises was eventually very successful. It came to be regarded as containing the "Principles of 1688" and it supposedly supplied the Whig party of the mid-eighteenth century with its "philosophical or speculative system of principles".⁹² Yet the immediate reaction to the work seems rather surprising. It occasioned no replies until 1703,⁹³ and it was not until 1705 that any extended attempt was made to refute Locke's arguments.⁹⁴ The work did not become straight-away the principal authority of the Whigs. In fact, it did not introduce any startlingly new ideas into political debate. Its main outline was to be found in Tyrrell's Patriarcha Non Monarcha (1680), Sidney's Discourses Concerning Government (published in 1698 but written before 1683) and Pufendorf's De Jure Naturae et Gentium (1672) and De Officio Hominis et Civis (1673). The first two of these contained much more besides, but this will be examined in the last part of our enquiry. In most Whig writings it was as much, if not more, to these

'authorities' (and the 'authorities' like Hooker and Grotius that they had used) as to Locke, that reference was made. Indeed, it appears that Locke was so far from occupying the front place amongst Whig 'authorities' that Benjamin Hoadly could write a work in the same idiom as Locke's (in 1710), and be commended by the Commons for it, with only one reference to Two Treatises. And that reference simply recommended the reader to look at the First Treatise for a criticism of "Some Branches" of the "Patriarchal Scheme".⁹⁵ That part of Hoadly's argument that paralleled the Second Treatise was presented simply as a "Defence of Mr. Hooker's Judgement".

In the learned periodicals and book reviews of the day, Two Treatises had a similarly far from excited reception. On the Continent the Bibliothèque Universelle et Historique, produced by Locke's friend Jean le Clerc, received both the English first edition and the first French translation (of only the Second Treatise) very enthusiastically.⁹⁶ But Henri Basnage's Histoire des Ouvrages des Scavans was not taken by it at all. The review of the French edition simply concluded coldly:

C'est dommage que l'Auteur n'a pas toujours bien dégage ses pensées, ni bien développé ses sentimens. 97

The most notable of the English journals, including Peter Motteux's The Gentleman's Journal, J.C. de la Crose's The History of Learning, John Dunton's Athenian Gazette, Richard Wooley's The Compleat Library, the Mercurius Reformatus and

Mercurius Britannicus, and the mammoth History of the Works of the Learned, were all apparently unimpressed by the Treatises: none either reviewed any of its editions or mentioned it in any of their other reviews. Yet each of these journals carried notices of political works, and some reviewed in detail books by Pufendorf, Tyrrell, Sidney, and Paxton as well as Locke's own Essay Concerning Human Understanding and his educational works.

This remarkable lack of immediate response seems to indicate that hindsight has inflated our sense of Locke's importance as a political writer during the late seventeenth and early eighteenth centuries. One recent historian, John Dunn, has noted this. But his account is both exaggerated and away from the point.⁹⁸ From the more ephemeral party literature and from contemporary letters and reports of conversations, a slightly more familiar picture of Locke's influence emerges. But it is a Locke who is as significant for his First Treatise as his Second, and one who shares a growing reputation with Sidney whilst both he and Sidney were overshadowed by the 'judicious Pufendorf'.

That Locke's work did not pass unnoticed from the press is evidenced from a number of sources. In August 1690 Two Treatises was apparently the subject of admiration and speculation amongst some circles of learned society in both Oxford and London;⁹⁹ a popular Whig pamphlet entitled Political Aphorisms (1690) summarized and quoted extensively (without acknowledgement) from the work;¹⁰⁰ William Atwood,

as we have seen, adopted some of Locke's arguments in his Fundamental Constitution (1690) and referred to the work as "the best Treatises of Civil Polity I have met with in the English Tongue";¹⁰¹ and by 1693 Pierre Bayle could report to his Italian correspondent Minutoli that the theory of government outlined in the Second Treatise was "l'Évangile du jour à présent parmi les Protestans".¹⁰²

During the early years of the 1690s, James Tyrrell kept Locke's Treatises in the public eye by numerous references and quotations from them in his popular compendium of political argument, the Bibliotheca Politica (1692-4). But it is interesting to note that the references all occur in the first three dialogues (i.e. those concerned with the refutation of Patriarchalism and the establishment of a right of resistance), and that by far the majority of them were from the First Treatise. In 1694 Locke appeared to Matthew Tindal, the Deist, as a "wonderfully Ingenious and Judicious Author" who could readily be followed in arguments about consent and citizenship.¹⁰³

In the late-1690s Locke's Treatises continued to feature as an authority in some political argument. A second edition of the work was published in 1694 and a third in 1698. During 1698 the argument of the Second Treatise became the subject of a minor 'sectarian' quarrel. The quarrel began when Locke's friend, William Molyneux, adopted the arguments of the Treatises to make a case for Irish independence. In particular, Molyneux used Locke's

authority to deny that the English could have any right of Conquest over the Irish, and to assert that the Irish had a natural right to a government of their own choice.¹⁰⁴

The argument rapidly occasioned replies from Simon Clement, John Cary and Charles Leslie. Clement and Cary acknowledged that they were supporters of Locke but they refused to allow that his arguments applied to the Irish situation. Simon Clement, for example, insisted that Molyneux's

plausible Arguments for the Liberty and Right of all Mankind; that Conquests cann't bind Posterity, Etc. are wholly misapply'd in this Case, and he abuses Mr. Lock, or whoever was the Author of that Excellent Treatise of Government, in referring to that Book on this occasion; for that Worthy Gentleman doth therein argue the Case of the People whose just Rights are violated, their Laws subverted, and the Liberty and Property inherent to them by the Fundamental Laws of Nature, (which he accurately describes) is invaded and usurp'd upon, and that when this is as evident and apparant as the Sun that shines in a clear day, they may then take the best occasion they can find to right themselves. This is a Doctrine that all good Men may assent to, but this is in no wise the Case of Ireland. 105

Charles Leslie entered the dispute against Molyneux. He was no Lockian but his argument against Molyneux played on the 'authority' of Molyneux's master. Locke had founded political authority on consent, Leslie noted, and two successive Irish Parliaments (1692 and 1695) had submitted their allegiance to William and Mary. Since the Irish parliaments had thus 'consented' to English rule Molyneux's 'authority' in fact testified against him and he should concede the argument!¹⁰⁶

The reputation of Two Treatises was thus certainly growing throughout the 1690s. Practically all references

to the work were favourable, and more often than not the author was referred to as "Learned and Ingenious",¹⁰⁷ or the like. But this evidence only serves to modify the initial impression that the Treatises occasioned no great immediate response. In all the arguments where appeal was made to Locke, he appeared simply as one amongst a number of 'authorities' and never as the 'authority'. His work never attracted the attention of journal reviewers whereas the similar works of Pufendorf, Tyrrell and Sidney did. And it was not until as late as 1703 that any Tory or Jacobite considered it worth his pains to engage in a critical examination of the Treatises.

One explanation of Locke's relative insignificance in the 1690s is that the Treatises was written in the same tradition as the works of two men of outstanding contemporary reputation - Pufendorf and Sidney. The one was a man of continental reputation. The other was a great 'martyr' for English liberty, whose reputation initially depended more upon the circumstances of his death than on anything he wrote. Furthermore, the reputation of the Treatises was probably slower in gaining ground because its author was not widely known until Locke's death in 1704 (even though the truth had been suspected from the very beginning). The book's official anonymity may well have adversely affected the attention paid to it, and its 'authority'. For Locke's reputation as philosopher and educational writer was great and the Treatises may have been more widely read had it

definitely been known that he was its author.

Perhaps a more substantial explanation, however, lies in the argument of the *Treatises* itself. It was not, as Dunn suggests, that the *Treatises* contained nothing but "principles of the most indubitable and parochial political orthodoxy"¹⁰⁸ that they did not create a considerable stir when first published. It was rather that they were not exactly fitted to perform the task Locke intended - the justification of 1688. The acuter minds of the time saw that too "philosophical" a justification could not but overreach itself. What it gained in scope and grandeur it lost in precision and application to all the relevant details of the actual situation. Their political wisdom was clearly more sophisticated than Locke's, for Locke had been led astray, as it were, by rationalist tendencies derived, in part, from Pufendorf. That this was the 'problem' with Locke's argument for the defenders of the 1688 Revolution can be seen most clearly in William Atwood's qualified praise of Two Treatises. The *Treatises*, Atwood suggested, was unacceptable as a justification of 1688 even though it contained the best examination of "Civil Polity" in English. If it were accepted, then the Ancient Constitution would be endangered because the people would be at liberty to alter that constitution as they thought fit. Even though Locke's argument was clearly written with English affairs in mind, the Revolution required a more legalistic justification. It required an argument

that did not rest upon appeal to natural law, natural right, and the dissolution of government, but which appealed instead (or as well) to the constitutional rights of Englishmen and which restricted the limits of constitutional change to the 'restoration' of the Ancient Constitution.¹⁰⁹

The Lockian argument that resistance to constitutional authorities might be morally justifiable or even a moral duty if those authorities encroached upon men's natural rights was altogether unacceptable to the Convention Parliament. Serjeant Maynard at one point interrupted the complicated legal disputes about the place of "abdication" and "vacancy" in English law and suggested that perhaps the attempt to reconcile resisting James II with the strict requirements of constitutional law, was misguided:

"If we look but into the law of nature (that is above all human laws)", he argued, "we have enough to justify us in what we are now a doing, to provide for ourselves and the publick weal in such an exigency as this. 110

But his voice was simply ignored, the debate continued, and his argument formed no part of the Commons case argued by Somers, Holt, Sacheverell and Pollexfen.

The argument of the Second Treatise was thus felt not to be "sufficient", as Locke had hoped, to justify the Revolution. The First Treatise, however, was far less contentious even though it was 'incomplete'. It was from this that Tyrrell quoted most extensively when compiling his Bibliotheca Politica. According to Atwood, it was the brilliant exposure of "the false Principles and Foundation

of Sir Robert Filmer and his Admirers" that accounted for the Treatises 'gaining reputation'.¹¹¹ It was to the First Treatise that Hoadly directed his reader in 1710. And the first detailed answer to the Treatises - An Essay Upon Government (published anonymously in 1705 and reprinted in 1706) - was almost entirely concerned with the First Treatise.

Although the Second Treatise was quite widely read and admired, as we have seen, still the evidence suggests that the reputation of the whole work depended as much, if not more, on the First Treatise. Patriarchalism and Divine Right were by no means extinguished by the Revolution. In the early years of the eighteenth century they in fact gained one of their most able and effective champions, Charles Leslie. Thus the issues discussed in Locke's First Treatise remained points of contention until well into the eighteenth century.

The Second Treatise did eventually eclipse the reputation of the First. The Treatises became the principal authority of the mid-eighteenth century Whigs and the argument of the Second Treatise was regarded as the 'core' of the work. The beginnings of this fascinating change can be seen from 1698 to 1705. In 1698 Walter Moyle, one of the more radical Whigs, described the Second Treatise as containing "the first Rudiments" of politics; he even knew of someone he said "who calls it the A.B.C. of Politicks." But the point of so characterizing it was not to recommend it as

an unquestionable authority, but rather as a good introduction to the study of Sidney.¹¹² Sidney's reputation stood very high in Whig circles and, indeed, he was the only contemporary authority referred to in the most prominent Whig political newspaper (J. Tutchin's bi-weekly Observer) between 1702 and 1705. Sidney there appeared as the writer who best understood "the constitution of the ENGLISH Government."¹¹³ Even when the Observer defended the right of resistance, it invoked the authority of Grotius, not Locke.¹¹⁴ But it is from Charles Leslie's rival paper, The Rehearsal of Observer, and from Leslie's political pamphlets, that Locke's growing reputation can be seen.

In 1698, whilst opposing Molyneux's Case of Ireland, Leslie simply noted that Molyneux had taken over from "Mr. Lock, &c." arguments which could more plausibly be used against him.¹¹⁵ By 1703, however, when Leslie turned once again to consider Locke's arguments, it was the "Great L-k in his Two Discourses of Government" who was attacked, and whose notion of consent was declared "Nonsense".¹¹⁶ And when he returned to the attack in the following year it was against "Mr L-K ... in his so much Fam'd Two Treatises of Government",¹¹⁷ In his weekly Rehearsal, begun the same year (1704), Leslie rebutted again and again the "Great Lock". Locke and Sidney were singled out as the two "men of Wit" in the Whig party.¹¹⁸ But it was as the "Great Lock, and Sidney" that they appeared,¹¹⁹ and it was the "great Oracle Mr. Lock" whose Treatises was subjected to

a detailed scrutiny and criticism which occupied the bulk of eight weeks' issues.¹²⁰ Yet even still, although it was Locke's notion of consent that Leslie most frequently criticized, the detailed examination of the Treatises was concerned mainly with arguments from the First Treatise!

As a work of political rhetoric, then, Two Treatises was not an immediate success. Its argument was too general to satisfy the contemporary demand for a legalistic justification of the Revolution. It was most successful in its critique of Filmer and in this the First Treatise was at least as significant as the Second. But the 'weakness' of the Second Treatise in the particular circumstances of the late seventeenth century turned out later to be the 'strength' of the work as a whole. It was precisely the 'generality' of the doctrine outlined in it that enabled the work to become the principal 'text' of the Whigs in the very different circumstances of mid-eighteenth century politics.

We have seen that Locke's Contract Theory was very different from Pufendorf's. Locke's work shared the same practical interest as Constitutional Contract Theories but its type of argument was very different. The argument 'borrowed' its central notions from philosophy rather than constitutional law. It is in this sense (that the connotations of Locke's notions were 'philosophical' rather than 'constitutional') that Locke's Social Contract Theory is an example of "Philosophical Contractarianism". His

argument most certainly was not 'philosophical' in any other sense. Two Treatises was unique amongst English contractarian writings of the late seventeenth century. It alone relied exclusively upon the 'vocabulary' of Social Contract. But I have suggested that our period witnessed a third kind of contractarianism, and it is to a consideration of this that I now wish to turn.

PART IVINTEGRATED CONTRACTARIANISMCHAPTER VIIITHE COHERENCE OF INTEGRATED CONTRACTARIANISM

At first glance what I have called 'Integrated Contractarianism' appears nothing less than an unaccountable confusion. In several political works we find arguments from natural rights, natural law and social contract explicitly invoked to answer questions recognized as concerning constitutional law. Despite the very clear differences between Constitutional Contract Theory and Social Contract Theory, many writers used arguments that intermingled them both. Often this intermingling can be fairly easily explained. Political argument has a tendency to be as coercive and as all embracing as possible in order to persuade and convince its audience. What may not have appeared thoroughly convincing when advocated in Constitutional Contract terms may have become so if further supported by Social Contract arguments, and vice versa. But this kind of consideration seems insufficient to account for a number of rather perplexing arguments and statements that appear in the contractarian literature of the late seventeenth century. We find Algernon Sidney, for example, insisting that Englishmen's civil rights "are innate, inherent, and enjoyed time out of mind".¹ We find Lord John Somers arguing that the right to petition

parliament is a "Natural Right of Mankind".² We find several writers, in this instance Jeremy Collier, the non-juror, presenting arguments from "the Laws of Nature; which are part of the Constitution of this Realm".³ And a Whig political bi-weekly can be found asserting:

For I dare engage to prove that the Law and Constitution of England is according to the Law of Nature, and prescrib'd by it: Nor are the Rights of Englishmen in point of Natural Rights, different from the Right of all Mankind. The farthest Corners of the Earth, and the nearest Parts to Us have all the same Priviledges: They differ only in Form, not in Essence. We call Ours the Magna Charta of England; not to distinguish Our Selves from Others in Point of Native Rights; but because it is a Summary of what the People of England do claim as their Hereditary Right and Property, and which is indeed the Right and Property of the whole People of the Universe: And consequently as all Mankind have ab Origine the same Rights with Englishmen: So ought they to have the same sort of Kings with Us: They ought to have the same Currency of Law as now we have in England, they ought to have a Prince on their several Thrones as is our Queen Anne.⁴

I will argue that statements like these are not always just loose or confused uses of a technical vocabulary. In many writings, arguments from Social Contract and Constitutional Contract, from natural law and from fundamental law, appear integrated within a coherent framework. But an objection might be levelled against our enquiry at this point. It could be argued that any apparent 'integration' is either a mere rhetorical device or else the product of confused minds. If it is a device of rhetoric then we can easily account for it: in political argument there is nothing strange in appealing from

particular cases, laws, events or arguments to general principles. If the apparent integration is the product of confused minds then the arguments themselves can be 'written off' as confused. It is certainly true that these two responses are appropriate in some cases. But we meet integrated arguments very frequently and it is difficult to see them always as mere confusions or rhetoric. At all events, we cannot 'write off' this literature without omitting from our consideration perhaps the majority of late seventeenth century appeals to 'contract'. The persuasiveness of the rhetoric must be explained.

As we look closer into this rhetoric, it becomes increasingly clear that Social Contract Theory and Constitutional Contract Theory are being associated together in a very specific way. Ideas of 'state of nature', 'natural law', 'natural rights' and 'social contract' are merged into the same flow of argument with ideas of 'ancient constitution', 'fundamental law', 'fundamental rights' and 'fundamental contract'. But this is not all. For the assumption behind this merger was that the 'fundamental' laws and rights could be derived from their 'natural' counterparts. Yet we have seen a very clear distinction between Social Contract and Constitutional Contract Theory: a distinction evident in the sort of questions asked and the kind of evidence appealed to. We must attempt to explain, then, how integration was possible and what made it plausible to both writer and audience. In the end we

might still want to assert that Integrated Contract arguments rested on a 'confusion'. But having explained and accounted for the attractiveness of these arguments, we will have explained a very prominent strand of late seventeenth century contractarian thought. We may begin our explanation by considering why Integrated Contract arguments should have been presented.

The primary impetus towards integration came from the character of royalist argument during our period. For royalist literature often appeared to marry philosophical, rationalist and constitutional arguments. The republication of Filmer's political works in a single volume is significant here. Filmer's works ranged over many levels of political argument (from the constitutional to the seemingly philosophical), yet there was a quite explicit connecting thread running through them all. James Tyrrell drew attention to this 'thread' in the Preface to his 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 Consciences, and enslave the Reasons of all his unwary Readers. 5

Tyrrell proceeded to devote his own 'single volume' to a rebuttal of all Filmer's works.

A specific example of typical royalist argument can

be seen in a pamphlet by Robert Brady written against Somers' A Drief History of the Succession (1681). Brady, the prominent constitutional historian, was confronted by a dispute over the English law of Succession. The question, then, concerned constitutional law. But to defend the hereditary Succession, Brady felt it necessary "to prove" that hereditary right was lawful according to both the moral law as well as the law of the English Constitution. His task, he declared, was to show:

First, That not only all Government, but particularly Monarchy does owe its immediat Foundation and Constitution to God Almighty.

Secondly, That by the Law of God, Nature and Nations the Crown ought to descend according to Priority of Birth, and Proximity of Blood.

Thirdly, That if an Act of Parliament were obtained to exclude his R.H. [it] would be unjust, unlawful, and ipso facto void, as contrary both to the Law of God and Nature; and the known Fundamental Laws of the Land. 6

The Integrated Contract response to this kind of argument is exemplified by Brady's opponent, Lord John Somers. In his Jura Populi Anglicani (1701), Somers set out to defend the Kentish Petitioners.⁷ His pamphlet blended Social Contract Theory and an enquiry into English constitutional law. His point was to show that petitioning was rightful both morally and according to specifically English law. But Somers, unlike Brady, attempted to extract constitutional law from the moral law. He interpreted English constitutional history in the terms and categories of his Social Contract Theory. And a principal conclusion that he drew from this exercise was that the right to petition the Commons was an inviolable

"Natural Right of Mankind". Thus he argued:

If this Right be natural, the People of England, who have lost as little by entering into Society as any others, must have as just and ample a Claim to it as any Nation in the World. That they have a Right to represent their Sufferings, and pray for a Relaxation of them, is evident from the Opinions of our Sages of the Law, from what our Kings have permitted and declared, and what has been declared and enacted in Parliament. 8

Legal history confirmed what Social Contract Theory had posited. The moral law and positive law were amalgamated together in the same flow of argument.

This amalgamation was effected in two ways. The first way involved loosening the conditions of current legal theory. The ambiguities and difficulties concerned with the notions of natural law, Equity and 'the Reason of the law' were of particular importance here. The central conclusion that Integrated Contract legal theory upheld was, as one writer asserted, that "the Municipal Laws" were "grounded upon and derived from" the laws of nature and nations.⁹ The second way moral theory and constitutional law were amalgamated involved loosening the Social Contract from its rationalist moorings and interpreting it as an historical event. The plausibility of this 'historical' enterprise arose from the current state of historical scholarship. It was, then, in the two areas of legal theory and history that 'bridges' were constructed between Constitutional and Social Contractarianism. In the remainder of this chapter I will examine each of these 'bridges' in more detail and suggest why they might have

appeared plausible and coherent to many Englishmen in the late seventeenth century. I will begin by examining the legal ideas of Integrated Contractarianism.

We may best appreciate the peculiarities of Integrated Contract legal ideas by contrasting them with the principal legal doctrines of the Social and Constitutional Contract Theories. Social Contract Theory examined the relationship between natural law and positive law. The most characteristic view of this relationship is expressed in Locke's Essays on the Law of Nature. Natural law was the ground upon which obligation to obey civil law rested. Without natural law, no compacts would be kept for long and peace could only be secured by force not right.¹⁰ Natural law stood as a constant guide to legislators and subjects: it provided an eternal standard to which positive laws and human action should strive to conform.¹¹ Natural law was the criterion for assessing the justice of positive law. In what we have discussed as Constitutional Contract Theory, by contrast, positive law consisted only of those pronouncements of a properly constituted legislature that furthered the 'intentions' of the original contractees: i.e. the salus populi.¹² Salus populi was the criterion for determining the validity of positive law. In Integrated Contract Theory these two very different criteria of natural law and salus populi were merged. Natural law, or the law of reason, explicitly entered the English Constitution and became the most important criterion for determining what was and what was not valid as positive law. The effect of this juncture

can be seen, for example, in Defoe's The Original Power of the Collective Body of the People of England (1702). Defoe asserts that one of the 'maxims' of his argument is:

That Reason is the Test and Touch-stone of Laws, and that all Law or Power that is Contradictory to Reason, is inso facto void in it self, and ought not to be obeyed. 13

The author of A Brief Account of the Nullity of King James's Title (n.d.) 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".¹⁴ And Timothy Wilson reversed the Social Contract relationship between positive and natural (or divine) law when he asserted that it was the possession of a "Legal and Humane Right" that gave a prince "Gods Authority".¹⁵ It was, apparently, no longer divine law that determined which positive law right was valid, but rather it was positive law that determined Divine Right!

We are confronted here with the rhetoric of political debate. As I have already suggested, it is not always obvious whether a simple confusion of concepts is occurring, or whether there is a genuine integration of constitutional and natural law arguments. But since we meet assertions like those just noted so often, it seems unwise to write them off immediately as mere confusions. Indeed, if instead of writing them off we take them seriously, we find that we can account for their plausibility and coherence to men in the late seventeenth century. How was it possible, then, for the integration of fundamental and natural law

arguments to appear coherent?

The answer is complex. The coherence of the legal arguments of Integrated Contractarianism seems to have derived from three main sources: first, one common interpretation of Natural Law Theory; second, a common misunderstanding of the nature of Equity; and third, an interpretation of lawyers' arguments from "the reason of the Common Law". The author of a pamphlet Of The Fundamental Laws or Politick Constitution of this Kingdom (n.d.) illustrates the first two of these sources. He wrote:

The Fundamental Laws of England are nothing but the Common Laws of Equity and Nature reduced into a particular way of Policy, which Policy is the ground of our Title to them, and Interest in them: For though it is true, that Nature hath invested all Nations in an equal right to the Laws of Nature and Equity ..., yet the several Models of external Government and Policy renders them more or less capable of this their common Right: ... where the outward Constitution or Polity of a Republick is purposely framed for the confirming and better conserving this common Right of Nature and Equity (as in ours) there is not only a common Right, but also a particular and lawful Power joyned with this Right for its Maintenance and Supportation. 16

Civil laws were simply "confirmations, or explications of the Law of Nature, or conclusions drawn from it".¹⁷ Ideally all governments in the world would have the same constitutions. Civil right and natural right were really just two sides of the same coin, or should be. From this theory of natural law it was a short step to the view that natural law determined which civil laws were properly laws at all. And the step was that much shorter when the common misunderstanding of Equity was taken into account.

'Equity', an eminent lawyer asserted, was the "opposite to regular law".¹⁸ It was a necessary and recognized branch of English law. It was necessary because, as the Common Lawyer Sir Robert Atkyns argued, "No Makers of Law can foresee all things that may happen, and therefore it is convenient that the fault be reform'd by Equity."¹⁹ There appeared, then, room in English law for the exercise of discretion to ensure justice. But how far did this go? It certainly did not involve the recognition that natural law should determine what positive laws should be accepted as valid - the view implied in Integrated Contract arguments. Judgments in cases of Equity were not given by considering divine law, natural law, salus populi or some abstract conception of 'the just'. Rather, as Lord Nottingham explained, in "suits in equity before the Chancellor, the Lord Chancellor must order his conscience after the rules and grounds of the laws of this realm."²⁰ Yet since judgment in Equity was given by reference to 'conscience', 'reason' and 'the just', those judgments might appear to support Integrated Contract arguments. For, to the mind untutored in legal technicalities, it did seem that lawyers themselves recognized 'conscience', 'reason' and 'the just' as arbiters of what law meant and which laws were valid.

In similar fashion, the appeals of great Common Lawyers like Coke and Hobart to "the reason of the common law" might appear to support Integrated Contract arguments. The lawyers understood by "the reason of the common law" something quite specific. The 'reason' they referred to

was supposedly embodied within the history of common law. Only through a knowledge of that history could the 'reason', the 'principles', of common law be understood. Yet here, once again, was evidence of lawyers appealing to 'reason' in disputes about the meaning and validity of laws.

In their various ways, then, current notions of natural law, Equity and 'the reason of the common law' lent credibility to Integrated Contract arguments. The crucial idea that these notions 'supported' was that natural law was an integral part of the English Constitution. The historical ideas expressed in Integrated Contractarianism made this crucial idea even more plausible. What were these historical ideas? Integrated Contract arguments borrowed the concepts of 'state of nature', 'social contract' and 'governmental contract' from Social Contract Theory and turned them into historical events. This was done by both turning certain historical events (like the Norman Conquest, Magna Carta and Coronation Oaths) into 'original contracts' as we have seen Constitutional Contract Theorists doing, and by linking English constitutional history with Biblical history. There was a period in the world's history when political society had not yet been invented. That period lasted from the Creation until soon after the Flood.²¹ Indeed, there were still some areas in the world, as contemporary travellers seem to be reporting, that had not yet adopted civil life.²² During this time and in these places, people actually lived in the 'state of nature'. In Europe this

period lasted until the sons of Japhet spread across the continent settling down into small communities as they went and establishing governments.²³ These first civil societies were set up by contract between the heads of the separate households that were to be incorporated. Each family or household head sacrificed some of his natural right in order to overcome the disadvantages of the 'state of nature' and to ensure that natural law was made effective. This was the origin of the 'Gothic Constitution' - the purest and most just form of government that had once existed all over Europe but which, by the late seventeenth century according to many writers, only remained in England and a few other countries.²⁴ English constitutional history comprised essentially (as it did in Constitutional Contract Theory and the Common Law interpretation of the Ancient Constitution) the so far victorious struggle of the defenders of the pure and free Gothic 'balance' against encroachments by would-be tyrants. With this view of the historical development of the English Constitution, notions of 'state of nature', 'social contract', 'natural right' and 'natural law' became essential for understanding constitutional law: a law that most accurately followed natural law, it could be claimed, because it was framed by our ancestors whose sole consideration was to overcome the defects of the state of nature and ensure that natural law was made effective.

So far we have considered the 'coherence' of Integrated Contractarianism. But why was it 'attractive' to men in

the late seventeenth century? In part the 'attractiveness' arose from a general characteristic of much polemical argument, in part from the peculiarities of political debate during our period. The first of these I have already mentioned: there is a tendency for political argument to be coercive and all-embracing in terms of its audience. Social Contract Theory presented a theory of political right, Constitutional Contract Theory presented an interpretation of the facts of constitutional history and law. Both were familiar to audiences in the late seventeenth century and it is hardly surprising that several writers should have endeavoured to promote their views with arguments from both right and fact. Integrated Contract arguments, however, seem to have confused arguments from right with arguments from fact. But the confusion was a far from simplistic one. It was recognized that civil right and natural right were notions of different kinds,²⁵ and writers like Tyrrell and Sidney did consider appeal to moral law to be different from appeal to civil law or history. In discussions about right, Sidney observed, "that which ought not to be is no more to be received, than if it could not be."²⁶ And when discussing whether there was a right of resistance, Tyrrell asserted "that the Question being only Moral, or Political, and not about any point of Faith, or Law, it may be safely maintained by either party, without any guilt, either of Heresie, or Treason."²⁷ Yet all the same these writers endeavoured to prove that Englishmen's rights were simple

derivations from the natural rights of man and that English law embodied the law of nature.

A more complete explanation of the 'attractiveness' of this rather peculiar attempt to marry moral right with legal fact, requires a consideration of some specific characteristics of late seventeenth century political argument. The attempted marriage was made by writers endeavouring to prove that it was perfectly 'lawful' to exclude James from the Succession and, eventually, to rebel against him. Their principal opposition came from Filmerian Divine Righters. On the question of Succession, the Divine Righters argued that "proximity of blood does give a title unchangeable by any human laws."²⁸ On the right of resistance, the Divine right argument was essentially that monarchy was ordained by God; that Adam was the first monarch; that paternity gave rise to political rule; that the bond between father and children was analagous to that between ruler and ruled; and that therefore citizens could no more change their rulers than children could their parents. In the debates of the 1680s most Divine Righters were concerned to go further than this, however. They attempted to show what the necessary attributes of monarchical authority were in order to argue that the English king was properly a sovereign and thus possessed those attributes by English as well as divine law. Faced by these arguments, Exclusionists were forced back from English law to a consideration of 'first principles'.

Their arguments took the same form as the Divine Righters' and were dominated by the same fundamental conception: all phenomena were either natural or artificial. The form of argument was first to elicit 'origins'. Divine Righters insisted that political society was natural, originated by God with his creation of Adam. Contractarians responded that it was artificial, created by human design. But the notion of 'origin' was ambiguous: it might refer to rational origins or historical ones. Divine Right arguments appeared to merge the two. The Bible contained a true historical account of the first ages of the world. It portrayed political power originating in Adam's family. Reason taught that royal authority could be deduced from fatherhood.²⁹ The first monarchs in the world were not only like fathers of their people, they were also the actual fathers of them. The complete contractarian response was to show that political authority could only be understood if government was viewed as if it were the product of the conscious design of its citizens and that as a matter of historical fact government was set up that way. Having established these points, contractarian arguments about the particular constitutional provisions of the late seventeenth century English constitution proceeded after the same manner as Divine Right arguments. What was and what must have been in the distant past was made a basis for insisting upon what was the present constitutional position.

In one significant respect the difference between the three theories that were associated with appeals to contract in the late seventeenth century can be seen in terms of different responses to Filmerian Divine Right Theory. Thus the Lockean Social Contract Theory was a response to Filmer's theory of the nature of political power outlined in the first part of Patriarcha. Constitutional Contract Theory was a response to the sort of argument about the English Constitution presented, for example, in the last part of Patriarcha and in The Freeholders Grand Inquest. And only the theory of Integrated Contractarianism was a response to the whole body of Filmer's writings. But we may gain a clearer appreciation of the peculiarities of Integrated Contractarianism if we look in some detail at the writings of Algernon Sidney and James Tyrrell. Sidney's theory of law and Tyrrell's view of English constitutional history will be of particular importance here.

CHAPTER IXALGERNON SIDNEY AND THE THEORY OF INTEGRATED CONTRACT

Algernon Sidney's name has been linked to the tradition of European liberal thought ever since his 'martyrdom' for the "Old Cause"¹ in 1683. Various historians have described him as a democrat,² a republican,³ a Commonwealthsman,⁴ the philosopher of 1688,⁵ a tacit proponent of constitutional monarchy,⁶ and even as the upholder of the two 'ideal' constitutions that achieved their respective realisations in America in 1776,⁷ and in England in the mid-nineteenth century.⁸ But, somewhat curiously, of all the historians who have mentioned his writings, none have presented a critical examination of his ideas, the purposes for which he wrote, or the coherence of his theories of society, government and law. Yet Sidney's reputation was considerable in the late seventeenth century.⁹ He was the author whom Locke ranked with Hooker, Pufendorf, Paxton and himself as recommended reading for the student of "the Original of Societies, and the rise and extent of political power."¹⁰ The surprising lack of critical work is even further underlined by the fact that it was partly on the evidence of his ideas that Sidney was convicted and executed for high treason. The opinion of Lord Chief Justice Jeffreys is sufficiently dramatic to warrant a close enquiry into the ideas of that book which, he said in his summing up:

If you believe that that was Colonel Sidney's book, writ by him, no man can doubt but it is a sufficient evidence that he is guilty of compassing and imagining the death of the King ... this book contains all the malice, and revenge and treason, that mankind can be guilty of: it fixes the sole power in the parliament and the people. 11.

Sidney wrote his manuscript, the Discourses Concerning Government, principally to refute Filmer's doctrines and to re-assert the idea of man's natural liberty to set up the civil society of his choice and control it throughout all its constitutional development. Many of Filmer's basic assumptions about the relationship of man to God, the importance of Scripture as history, and the necessity of inquiring into 'origins' to settle questions of right, were shared by Sidney. But Sidney totally disagreed with the principles that Filmer had deduced from these premises. "Patriarcha", he declared, was "grounded upon wicked principles, equally pernicious to magistrates and people". For, as far as his reading of the work was concerned, it declared the opinion

That all men are born under a necessity derived from the laws of God and nature, to submit to an absolute Kingly government, which could be restrained by no law, or oath; and that he that has the power, whether he came to it by creation, election, inheritance, usurpation, or any other way, had the right; and none must oppose his will, but the persons and estates of his subjects must be indispensably subject unto it. 12

The opposing view which Sidney claimed to stand for, and which he claimed to have defended in his writings, were set out by him in a series of propositions in his last Paper:

I am persuaded to believe, that God had left nations to the liberty of setting up such governments as best pleased themselves.

That magistrates were set up for the good of nations, not nations for the honour or glory of magistrates.

That the right and power of magistrates in every country was that which the laws of that country made it to be.

That those laws were to be observed, and the oaths taken by them, having the force of a contract between magistrate and people, could not be violated without danger of dissolving the whole fabric.

That usurpation could give no right; and the most dangerous of all enemies to Kings were they, who raising their power to an exorbitant height allowed to usurpers all the rights belonging unto it. 13

All these propositions are familiar as the stock-in-trade of late seventeenth century contractarians. In order to uphold them against Filmerian attack, Sidney felt obliged to contradict him point by point. This common seventeenth century style of criticism tends to obscure the passion, determination and depth of feeling that clearly lay behind the views that Sidney was prepared to die for. The Discourses are too rambling and repetitive to present a single developing line of argument. They seem overburdened with an excessive scholarship. Yet a passionate belief is often close to the surface and Sidney was prepared to follow through the consequences of his ideas in a much more rigid way than most other contractarians.

Sidney's critique of Filmer began with an assertion of the far-reaching practical importance of such a task. "Such as have reason, understanding, or common sense, will, and ought to make use of it in those things that concern

themselves and their posterity", he declared. "This rule obliges us so far to search into matters of state, as to examine the original principles of government in general, and of our own in particular."¹⁴ The authorities which he claimed were necessary for this examination, and by which he was prepared to be refuted, were those of Reason, Law, History and Scripture.¹⁵ It is in terms of the interdependence of the evidence from these diverse sources that the main characteristics of Sidney's writings as a form of Integrated Contractarianism can be seen.

His examination of the "original principles of government in general" brought Sidney into conflict with Filmer's notion of 'natural subjection'. Against this view that man was born under the dominion of a religiously sanctified absolute monarch, Sidney asserted "that man is naturally free".¹⁶ But this natural freedom was far from unlimited. Sidney disputed only that man's natural obligations involved a political obligation. He accepted much else of Filmer's argument. Thus man, he believed, was born under a complete obligation to God, his Creator. But this simply confirmed his own point about natural freedom. For God had created free men!¹⁷ Certainly, too, man was born under an obligation to parents, but this was not a political obligation.¹⁸ Yet this did mean that ultimately only "every father of a family is free, and exempt from the domination of any other".¹⁹

Basing himself on this principle of man's natural

right to liberty, Sidney proceeded to enquire into the origin of government in the spirit of Rationalist Constructivism. Men were all equal in respect of natural rights, how then did the patent inequality in existing civil societies arise? The argument from 'design', a crucial aspect of Rationalist Constructivism, provided Sidney with the answer. Inequality must have arisen in one or other of the only two types of consciously directed human actions that Sidney could imagine:

It is hard to comprehend how one man can come to be master of many, equal to himself in right, unless it be by consent, or by force ... If by force ... it could not be justifiable: and whilst our dispute is concerning right, that which ought not to be is no more to be received, than if it could not be. No right can come by conquest ... [and] That which was unjust in its beginning, can of itself never change its nature. 20

Thus of the two possible origins of inequality, only conscious consent could provide a viable and legitimate explanation of inequality. To the questions why, how and to what extent natural equality should be relinquished, Sidney replied through a reference to 'state of nature' and 'civil contract'. It is clear that he understood this explanation of the origin of civil society as something that had actually occurred in the history of mankind and not simply as a hypothetical construction useful for portraying the relationships inevitably presupposed in social existence. "The first fathers of mankind", he argued, "left their children independent on each other, and in an equal liberty of providing for themselves":

every man continued in this liberty, till the number so increased, that they became troublesome and dangerous to each other; and finding no other remedy to the disorders growing, or like to grow among them, joined many families into one civil body, that they might the better provide for the conveniency, safety, and the defence of themselves and their children. This was a collation of every man's private right into a publick stock. And no one having any other right than what was common to all, except it were that of fathers over their children, they were all equally free when their fathers were dead; and nothing could induce them to join, and lessen that natural liberty by joining in societies, but the hopes of a public advantage. 21

The origin of society, then, lay in the rational act of previously free and independent family heads. Natural liberty involved disadvantages, and the intention of overcoming these was the only motive for the formation of that association which is called 'civil society'. "Societies cannot be instituted, unless the heads of families, that are to compose them, resign so much of their right, as seems convenient, into a public stock, to which every one becomes subject."²² The public realm was created by a contract imposing restrictions on private right. But the extent of the restriction on natural liberty was left entirely to the subjective judgement of the participants. It was they who had to decide on the gravity of the disadvantages of the state of nature - the insecurity, absence of a judge in disputes and each man's liberty being "thwarted by that of another"²³ - and it was they who had to decide on the size of their association, for they alone would suffer if a mistake were made.²⁴

Thus the first governments were those set up by the consent of the governed. From this proposition Sidney drew certain conclusions which follow, in fact, only when related to his fundamental assumption of the rational design of human institutions.

If the power be originally with the multitude, and one or more men, to whom the exercise of it, or a part of it was committed, had no more than their brethren, till it was conferred on him or them, it cannot be believed, that rational creatures would advance one, or a few of their equals above themselves, unless in consideration of their own good; and then I find no inconvenience in leaving to them a right of judging, whether this be duly performed or not. We say in general, "he that institutes may also abrogate;" more especially when the institution is not only by but for himself. If the multitude therefore do institute, the multitude may abrogate; and they themselves, or those who succeed in the same right, can only be fit judges of the performance of the ends of the institution. 25

Government, then, was entrusted to the care of magistrates on condition that its 'design' be fulfilled. Only part of men's natural liberty was given up on entering civil society, and that only conditionally. The reasons for establishing society in the first place were the continuing ends for which government existed. These ends, according to Sidney, must have consisted in "the public safety [being] ... provided for, liberty and propriety secured; justice administered, virtue encouraged, vice suppressed, and the true interest of the nation advanced."²⁶

This 'trust' of government was not without sanctions. Laws originated from attempts to direct and restrain magistrates in the performance of their duties. And, according to Sidney, "nations, in variously framing [constitutions] ...

[preserve] the possession of their natural right, to be governed by none, and in no other way than they should appoint".²⁷ A natural right to rebel thus appeared as the inevitable consequence of the 'correct' view of the origin of government. When Locke and Tyrrell argued for a natural right to rebel they hedged that right around so as not to seem to render government too unstable. Sidney's argument, however, contained no such qualifications. In the opening pages of his Discourses he simply declared that the dangers of asserting a right to resist and correct magistrates were exaggerated. What was essential was that government be exercised with justice. "There can be no peace, where there is no justice", he insisted, "nor any justice, if the government instituted for the good of the nation be turned to its ruin".²⁸ In this statement Sidney summed up an enduring theme of his life in politics. By far the gravest threat to the public well-being came, as he saw it, from established magistrates. No effort should be spared in opposing their abuses of power. But the citizen body, for its part, almost as an analytic truth would hardly ever act contrary to its own interest. It needed no harsh controls. Sidney does not seem to have had any particular communities in mind here. He was simply juggling propositions about the causes of civil disorder.

Here, then, we have Sidney's theory of the origin of government in general. All its ideas were quite familiar

in the late seventeenth century but it is remarkable for its unqualified insistence on a popular right of rebellion. The idea of 'contract' was clearly crucial to Sidney's notions of society, law and government. Society could only legitimately be set up, and historically the first societies actually were set up, by a contract between the heads of independent families. Government was designed to perform the ends adumbrated in the original contract. Laws were designed to ensure that government fulfilled its only legitimate role and punished actions contrary to the terms of the contract:

"Human societies are maintained by mutual contracts," he asserted, "which are of no value if they are not observed. Laws are made, and magistrates created, to cause them to be performed in public and private matters, and to punish those who violate them". 29

Sidney understood these contracts as much more than simply hypothetical devices for explaining and reconciling individual freedom with the restrictions imposed by an increasingly powerful secular and sovereign state. They were a constitutional reality. "I will prove", he claimed, and intended to devote a chapter to that proof:

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; and where they are not, or the party offending is of such force or pride, that he will not submit, nations have been obliged to take the extremest courses. 30

Unfortunately, the rest of the chapter was lost, but sufficient

evidence exists, scattered throughout his vast Discourses, for us to present a fairly reliable account of what would have been the lines of his 'proof'. His main concern was to establish the existence of constitutional rather than social contracts. The latter were only necessary for him as a weapon against the Filmerian assertion that government 'had always been'. But the ultimate justification for both kinds of contract was the reasonableness of asserting their existence and the unreasonableness of their Filmerian alternatives.

Sidney agreed with Filmer that the "Creation is exactly described in the Scripture; but", he continued, "we know so little of what passed between the finishing of it and the flood, that [Filmer] may say what he pleases, and I may leave him to seek his proofs where he can find them. In the mean time, I utterly deny, that any power did remain in the heads of families after the flood, that does in the least degree resemble the regal in principle or practice."³¹ Filmer's theory was thoroughly unreasonable because "though there had been such a [political] right in the first fathers of mankind ... it must necessarily perish, since the generations of men are so confused, that no man knows his own original; and consequently this heir is no where to be found".³²

Sidney next presented his own principles of natural liberty, natural equality, and the contractual origins of society and government as based on little more than common

sense! "Common sense teaches", he asserted, "and all good men acknowledge, that governments are not set up for the advantage, profit, pleasure, or glory of one or a few men, but for the good of society".³³ And this was the ultimate 'proof' of his general theory that men voluntarily contracted together to set up civil societies.³⁴

Yet although nothing more might be required to prove his theory than its reasonableness, Sidney laboriously produced 'proofs' from history, law, and scripture as well. But since all his evidence from these sources was interpreted in the light of what appeared reasonable to Sidney, there could hardly arise any conflict. Sidney seems to have believed in a kind of 'Scholastic harmony': the universe was so ordered and guided by a reasonable God that everything in it contributed towards the divine (reasonable) plan. Any evidence to the contrary was either wrong or had been misunderstood. Thus, for example, in the face of Filmer's demand for historical evidence of 'original contracts', Sidney simply replied, "if there never were any general meetings of whole nations, or of such as they did delegate and intrust with the power of the whole, how did any man that was elected come to have a power over the whole?"³⁵ He then proceeded to give several specific examples including the Romans, Goths, Franks, Vandals and the Saxons.³⁶ Indeed, he claimed that the "histories of all nations ... are so full of examples of this kind, that no man can question them, unless he be brutally ignorant, or maliciously

contentious."³⁷

As for evidence from constitutional law, Sidney claimed that this too 'proved' the contractual nature of government. But his argument was as circular here as it was with historical evidence. There was a great variety of constitutions in the world, he asserted, and "no other reason can be given for this almost infinite variety of constitutions, than that they who made them would have it so; which could not be, if God and nature had appointed one general rule for all nations".³⁸

The evidence from religion and scripture was dealt with in a similar fashion. The reasonableness and necessity of civil society for the life of man, Sidney argued, must be presumed to prove that the contract of civil society was the will of God. God had made man and had ordained that he live in society with others. But He had left man free to choose his own form of government.³⁹

The proofs that Sidney might have produced in the missing chapter of his Discourses - proofs, that is, for the 'reality' of contracts - are thus ultimately circular and not proofs at all. What accorded with common sense and reason provided the constant reference point for all his enquiries into political affairs. For all his assertions about "the political science, which of all others is the most abstruse and variable according to accidents and circumstances",⁴⁰ Sidney's contract theory can only be understood in terms of his rationalism. This

can be seen most clearly in his reflections about law and justice in his theory of government.

Sidney declared that his "purpose" for enquiring into the relative merits of the various forms of government was to "seek only that which is legal and just."⁴¹ We have already seen that the attempt to marry law with morality was a central theme in Integrated Contractarianism.⁴²

It involved far more than the common sense idea that there ought to be some correspondence between legal rules and moral precepts. In fact, it seemed to involve a theory of law that bore closer resemblance to mediaeval than modern ideas.⁴³ But it is a legal theory of crucial importance for understanding the coherence of the Whig theory of legal rebellion. Sidney's writings contain one of the clearest statements of this Whig theory. The characteristics of the theory emerged from Sidney's search for the lawful and just constitution.

His enquiry proceeded along both historical and rationalist lines. The outcome of the enquiry was that the lawful and just constitution was that which began in contract and persisted through the continuous consent of the citizens to laws which enshrined their purpose for originally setting up government in the first place. In this constitution "the laws of every people" were indicative of "the reasons for which, or the conditions upon which ... [their] consent was obtained" to be governed.⁴⁴ Justice was possible only if the constitutional arrangements guaranteed the continuous

right of the citizenry to alter their laws as they saw fit.⁴⁵ Such a constitution, Sidney argued, was no utopian dream. It was a practical possibility which had been evidenced already in human history.⁴⁶

The best form of government that the world had yet witnessed was that of Republican Rome. It had not been 'perfect' for, after all, it had collapsed. But Sidney's concern was "not after that which is perfect, well knowing that no such thing is found among men; but we seek that human constitution, which is attended with the least, or the most pardonable inconveniences."⁴⁷ The consideration of history led him, as it had led many before him, to that Classical Republicanism for which he is most famous.⁴⁸

Ancient Sparta, Republican Rome, and contemporary Venice had portrayed most effectively the characteristics of liberty, justice and durability that qualified them as the best models to be followed.⁴⁹ Yet Sidney's Republicanism was neither populist nor anti-monarchical. Indeed, he expressed himself opposed to "pure democracy".⁵⁰

The crucial common attribute of all these constitutions Sidney admired was that they recognized a perpetual right in the citizen body to change their legal arrangements. This was the very "essence" of the "just constitution".⁵¹ The excellence of this type of constitution consisted in its securing the ideals of Justice, Liberty and Property. By definition the "just constitution" was a constitution

based on "consent". The sort of 'consent' that Sidney had in mind here seems to have been of a very explicit kind:

It is not ... the bare suffrage of a government when a disgust is declared, nor a silent submission when the power of opposing is wanting, that can imply a consent or election, and create a right; but an explicit act of approbation, when men have ability and courage to resist or deny. 52

The liberty guaranteed by this constitution did not involve relinquishing all man's natural liberty. Sidney distinguished liberty from licence very clearly. The "liberty asserted is not a licentiousness of doing what is pleasing to everyone against the Command of God", he claimed, "but an exemption from all human laws, to which men ... have not given their assent."⁵³ Liberty consisted solely "in an independency upon the will of another"⁵⁴ and thus, Sidney concluded, he "is a free man who lives as best pleases himself, under laws made by his own consent".⁵⁵

The contractual origin of civil society, however, did involve the sacrifice of some 'natural liberty'. This Sidney recognized as legitimate provided both that the sacrifice was made willingly and equally by all and also that a sphere of individual liberty still remained.⁵⁶ He also acknowledged that society might have considerable, legitimate, interests in the private affairs of individuals. Although the boundary between the public and the private should be very clear, society might legitimately concern itself with an individual's property if the public good so required.⁵⁷

But the sacrifice of natural liberty and the acceptance of possibly considerable interference by society in an individual's affairs, were only conditional. The required 'continuous consent' in the just constitution meant, as far as Sidney was concerned, the retention of a natural right to reject the laws of that constitution both by individuals and by the general body of the citizenry. Without these rights, the just constitution would appear a mere chimera:

all laws must fall, human societies that subsist by them be dissolved, and all innocent persons exposed to the violence of the most wicked, if men might not justly defend themselves against injustice by their own natural right, when the ways prescribed by public authority cannot be taken. 58

Yet this right of resistance was neither merely a right held in reserve for rectifying intolerable conditions nor was it grounded on natural law alone. It was the logical outcome of Sidney's complex theories of the origin, design and nature of government. Through the constant operation, or threat of operation, of this right, the just constitution could be retained and corruption avoided:

Laws and constitutions ought to be weighed; and whilst all due reverence is paid to such as are good, every nation may not only retain in itself a power of changing or abolishing all such as are not so, but ought to exercise that power according to the best of their understanding, and in place of what was either at first mistaken or afterwards corrupted, to constitute that which is most conducing to the establishment of justice and liberty. 59

And resistance was lawful not only according to natural or divine law, but also according to human, positive law. Sidney's argument (which might almost be taken as the fundamental principle of liberalism) was the following:

If the laws of God and men are ... of no effect, when the magistracy is left at liberty to break them, and if the lusts of those, who are too strong for the tribunals of justice, cannot be otherwise restrained, than by sedition, tumults, and wars, those seditions, tumults, and wars, are justified by the laws of God and man. 60

Sidney acknowledged that "human laws do not, in all cases, make men judges and avengers of the injuries offered to them",⁶¹ but on his theory this presented no obstacle to maintaining the legality of rebellion. His understanding of 'law' is of critical importance here.

Law, for Sidney, consisted of rules exhibiting certain distinct and related characteristics. Its origin lay in the attempts by the founders of governments to secure the advantages of social intercourse. Law was thus distinctive in terms of being designed to secure not merely order but "good order" in society. This design was itself the highest of all human laws - the first law in the light of which all other laws must be interpreted. The "general law to provide for the safety of the people" was the highest law, the "municipal laws do only show how [this] ... should be performed."⁶² The variety of each country's laws indicated not only the freedom of each nation to frame laws, but also the judgement of each people of what rules best guaranteed their well-being.

Law, then, was the result of the design of rational beings pursuing their own interest. It could be judged either according to the letter or according to the design behind it, because both should point in the same direction.⁶³

The "true intentional meaning" of every law was to advance the public good. Law was nothing less than "written reason".⁶⁴

Since law was "written reason", the interpretation of it did not involve an enquiry into law books, statutes and cases. It involved simply the application of rational axioms to the letter of the law. It was not the study of past case law that produced legal axioms; instead, the axioms of the law were self-evident in exactly the same way as mathematical axioms were:

Axioms [in law] are not rightly grounded upon judged cases; but cases are to be judged according to axioms: the certain is not proved by the uncertain, but the uncertain by the certain; and every thing is to be esteemed uncertain, till it be proved to be certain. Axioms in law are, as in mathematics, evident to common sense; and nothing is to be taken for an axiom, that is not so ... 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.⁶⁵

Many different rules, decrees and sanctions existed in the world. A rational examination of them not only determined the wisdom or justice of their authors, but also determined which of them were truly laws. It was not the antiquity of a rule or the reputation of its framers that provided it with the authority of law; it was simply its "intrinsic equity and justice".⁶⁶ Thus 'law' and 'justice' were made virtually synonymous, or rather, the name 'law' was reserved exclusively for 'just human rules'. "That Which is not Just", Sidney declared in a chapter heading, "is not Law; and that which is Not Law ought Not to be Obeyed".⁶⁷ But just as 'justice' was indispensable for

the notion of 'law', so 'law' was indispensable for understanding 'justice'. "If any man ask", he asserted, "what I mean by justice, I answer, that the law of the land, as far as it is 'sanctio recta, jubens honesta, prohibens contraria', declares what it is."⁶⁸ And this question-begging answer was all that Sidney was prepared to give.

He did, however, anticipate a number of questions and objections that might be levelled against his legal theory. His answers were characteristically forthright and somewhat astonishing. He dismissed the suggestion that it might be difficult to determine which rules in practice should be considered just or unjust by asserting "that as this consists not in formalities and niceties, but in evident and substantial truths, there is no need of any other tribunal than that of common sense, and the light of nature, to determine the matter".⁶⁹ To the question "who should judge?", he replied "the people", in the sense of the whole citizen body. "As kings, and all other magistrates ... are constituted for the good of the people, the people only can be fit to judge whether the end be accomplished."⁷⁰ Astonishingly, he had no reservations to make about the correctness of their estimation. The issues would be straightforward and, anyway, as "long as men retain anything of that reason which is truly their nature they never fail of judging rightly of virtue and vice."⁷¹ This very simple theory of human nature rests uneasily in Sidney's otherwise thoughtful work. It perhaps serves to emphasise once again

his passionately held belief that magistrates, not the people, represented by far the greatest threat to the public well being.

Sidney was aware that exception might be taken to his legal theory on the grounds that it effectively dissolved all obligation to obey civil law. He denied that this was so by distinguishing between the obligation owed to magistrates by individuals on the one hand and by the 'people' on the other. But his overriding concern to establish rights of resistance against magistrates was equally visible even here:

Allegiance signifies no more (as the words "ad legem" declare) than such an obedience as the law requires. But as the law can require nothing from the whole people, who are masters of it, allegiance can only relate to particulars, and not the whole nation. No oath can bind any other than those who take it, and that only in the true sense and meaning of it: but single men only take this oath, and therefore single men only are obliged to keep it. The body of a people neither does, nor can perform any such act. Agreements and contracts have been made: ... but no wise man can think, that the nation did thereby make themselves the creature of their own creature. 72

Thus the whole citizen body, whose continuous consent to the law was a prerequisite for the just (and therefore legal) constitution, could not be subordinate to their own creation. The idea of a rebellion by them was, then, a contradiction in terms. Their consent was a prerequisite of law: the withdrawal of that consent simply involved the illegality of the rules which had previously governed them. "Those who seek after truth", Sidney concluded, "will easily find,

that there can be no such thing in the world as the rebellion of a nation against its own magistrates".⁷³ Civil war was certainly an evil, but it was necessary when the alternative was tyranny. For, although civil war was "a disease ... tyranny is the death of a state."⁷⁴ Sidney recognized that civil war would involve extra-constitutional or extra-judicial action. But since law and justice were virtually synonymous, civil war could not involve illegality on the people's side.⁷⁵ If the cause were just, then the neglect of the old law could not be stigmatized as illegal.

It is hardly surprising that such doctrines as these should have encountered the censure of late seventeenth century royalists. The right of resistance was made the corner-stone of all legal arrangements. The citizen body was exhorted to constant vigilance over its rights and the activities of its rulers. The right to resist gave this vigilance effectiveness and meaning. The activity of resisting ensured the continuance of just laws. From these notions Sidney derived a most astounding conclusion: resistance was the foundation of all law. "Whoever disapproves tumults, seditions, or war", he argued, "by which [an evil magistrate] ... may be removed from it, if gentler means are ineffectual, subverts the foundation of all law!"⁷⁶ Sidney's notion of the 'foundation' of law, is in fact the negation of law. The paradox, once again, seems only comprehensible in terms of a one-sided concern that kings were the only source of political evil to be guarded against.

Since Sidney proceeded to integrate these doctrines of legitimate resistance and deposition of kings into a specific interpretation of the English Constitution, it becomes easier to understand the violence of the royalist reaction against him. His theory of the English Constitution shared many of the characteristics of Constitutional Contractarianism. The present constitution was essentially the same as the ancient English Constitution. English Constitutional development had been unbroken since Saxon times. There had been neither a Saxon nor a Norman Conquest.⁷⁷ The laws of the constitution were initially 'customary laws', and custom was 'immemorial' though not necessarily 'unchanging'.⁷⁸ Not all the laws of the Ancient Constitution were still in force in late seventeenth century England, but the constitution was 'in essence' the same. Parliament was "as antient as our nation".⁷⁹ In brief, the Ancient Constitution was an elective, limited monarchy preserved by resisting and deposing wicked monarchs.⁸⁰

The historical and legal issues of the Ancient Constitution debate,⁸¹ were clearly very important for Sidney. But they did not constitute the dominant elements in his theory of the English Constitution. Sidney's writing exhibits the conflict between arguments from history and from reason that we have seen as characterizing Constitutional Contract Theory. But Sidney was much more explicit than the Constitutional Contractarians in his ultimate reliance upon "reason" in constitutional debate. For example, when replying to Filmer's assertion that

parliaments did not exist until after the Norman Conquest, Sidney argued:

I do not think myself obliged to insist upon the name or form of the parliament in pre-Norman times; for the authority of a magistracy proceeds not from the number of years that it has continued, but the rectitude of those that instituted it ... For as time can make nothing lawful or just, that is not so of itself (though men are unwilling to change that which pleased their ancestors, unless they discover great inconveniences in it) that which a people does rightly establish for their own good is of as much force the first day, as continuance can ever give it: and therefore in matters of the greatest importance, wise and good men do not so much inquire what has been, as what is good, and ought to be; for that which of itself is evil, by continuance is made worse, and, upon the first opportunity, is justly to be abolished. But if that liberty, in which God created man, can receive any strength from continuance, and the rights of Englishmen can be rendered more unquestionable by prescription, I say, that the nations, whose rights we inherit, have ever enjoyed the liberties we claim, and always exercised them in governing themselves popularly, or by such representatives as have been instituted by themselves, from the time they were first known in the world. 82

There are, in fact, only two apparently significant differences between Sidney's theory of the English Constitution and the general outline of Integrated Contractarianism that I presented in the previous chapter. The first is terminological. Whereas Integrated Contractarianism paralleled a theory of Social Contract with one of fundamental contract, fundamental law and fundamental rights, the distinction between concepts of "the fundamental" and "the natural" play little explicit part in Sidney's theories. I call this difference merely 'terminological' because, as we have seen, both Constitutional and Social Contract Theories contained conceptions of law which at the same

time maintained a distinction and a necessary connection between positive and natural law. As far as the coherence of these contract theories is concerned (and therefore their 'usefulness' and apparent relevance for justifying particular actions), it was the supposed 'connection' between positive and natural law that was important. Sidney's theory defined law in terms of this connection. As we have just seen, unjust rules were simply not to be considered as laws. Thus the key for determining whether a particular set of constitutional arrangements was just, and for determining whether a particular law was authoritative, was the same in Sidney's theory as in the general theory of Integrated Contractarianism. If a constitution could be seen to embody the consent of the governed, then it was just. If a law did not vitiate the requirements of salus populi, then (provided it had been promulgated in the proper constitutional way) it was authoritative. Irrespective of whether these requirements of consent and salus populi were accorded the nominal status of fundamental laws or fundamental rights, the argument was the same.

The second difference between Sidney's theory of the English Constitution and that of Integrated Contractarianism concerns the role of historical evidence. Both Constitutional Contract and Integrated Contract arguments appealed to history. But Sidney, as we have just seen, was prepared to argue from reason alone should history conflict with his notion of right. Nonetheless, his view of English constitutional history was substantially the same as that of his contemporary

contractarians. Whereas contemporary contractarians took great pains to equate the Saxon Constitution with the late seventeenth century constitution (and rewrote history so that it accorded with their understanding of what was 'rational'), Sidney acknowledged that many changes had occurred since Saxon times but insisted that the constitution had remained the same 'in essence'. His history was certainly as 'rationalistic' as theirs, but it allowed for a theory of 'development' which could not be contemplated within the frameworks of either Whig Ancient Constitution Theory or Constitutional Contractarianism.

In company with the Constitutional Contractarians, Sidney argued for the Germanic or Gothic origin of the pre-Norman English Constitution.⁸³ That earliest English Constitution was a limited monarchy, he claimed, and he cited Caesar and Tacitus as authorities for this.⁸⁴ After the departure of the Romans the Saxon Constitution could only have been established by a contract. His arguments to prove this were the familiar 'rationalist' ones that I have examined in detail in Atwood's writings. Since the Saxons "were free in their own country, they must be so when they came hither",⁸⁵ he argued. Furthermore:

when the Romans abandoned this island, the inhabitants were left to a full liberty of providing for themselves: and whether we deduce our original from them, or the Saxons, or from both, our ancestors were perfectly free ... whatever they did was by a power inherent in themselves to defend that liberty in which they were born. All their Kings were created upon the same condition, and for the same ends. 86

The dependence of this piece of constitutional history

upon Sidney's general theory of the origin of government is quite clear. Where historical evidence was lacking, the gap was filled by evidence from what appeared reasonable. The name of any nation that had a "legitimate constitution" could have been substituted for "Saxon" or "our ancestors" in the above passage.

According to Sidney, English constitutional history consisted essentially of the preservation of an association of "naturally free" citizens.⁸⁷ The Normans "inherited the same right" as the Saxons "when they came to be one nation" with them.⁸⁸ And having thus assimilated the Norman Conquest into the unbroken development of the constitution, he concluded: "we cannot but continue [perfectly free] ... unless we have enslaved ourselves. [And] Nothing is more contrary to reason, than to imagine this."⁸⁹

The rights and liberties of Englishmen were "innate, inherent, and enjoyed time out of mind, before we had Kings."⁹⁰ The constitutional rights of English citizens were nothing less than the natural rights of man, guaranteed not so much by natural law as by Magna Carta:

Magna Carta was made ... to assert the native and original liberties of our nation by the confession of the King then being, that neither he nor his successors should any way encroach upon them. 91

English constitutional history showed that the nation, far from having enslaved itself, had been the best defender of its liberty in the world. Neither the Romans "nor any people of the world, have better defended their liberties

than the English nation".⁹² The "Saxon Laws", Sidney asserted, "continue to be of force among us".⁹³ The particular Saxon laws which he had in mind here were those which concerned the main outline of his idealized Saxon Constitution.⁹⁴ These ancient laws insisted that the king was below the law. He must "take the laws and customs as he finds them, and can neither detract from, nor add any thing to them."⁹⁵ The particular laws relating to the succession had changed since Saxon times. The monarchy was no longer purely elective, but "hereditary under condition."⁹⁶ But this, he argued, had been brought about by the will of the people - the only legitimate means whereby laws could be changed.⁹⁷

The right of altering law in the English Constitution lay in the people, or, more specifically, in parliament as their representative.⁹⁸ Even the laws relating to the monarchy (or perhaps especially those laws) could be changed or abrogated only by parliament.⁹⁹ The laws in being at any given time, then, received their authority from the consent of the nation. Those laws were of two kinds - "immemorial customs" and "statutes". Custom received its authority from the nation's consent expressed through parliament.¹⁰⁰ Both kinds of law, he argued, "may be, and often are, changed by us"¹⁰¹ (a rather strange view of supposedly immemorial custom!). Law was by no means sacrosanct. It could and should be changed if the people so decided. The only consideration that should guide the citizen body was "the welfare of the people". It was, in

fact, the embodiment of salus populi est suprema lex as the supreme constitutional law that constituted the unchanging "essence" of the English Constitution since Saxon times:

Our laws were not sent from heaven, but made by our ancestors according to the light they had, and their present occasions. We inherit the same right from them, and, as we may without vanity say, that we know a little more than they did, if we find ourselves prejudiced by any law that they made, we may repeal it. The safety of the people was their supreme law, and is so to us: neither can we be thought less fit to judge what conduces to that end, than they were. 102

With this statement we see how exactly the English Constitution seemed to Sidney to portray the essential characteristics of the legitimate contract constitution. But all was not well in the constitution of Restoration England. The monarchy had risen to an overbearing position in the state. Sidney blamed the decline of the traditional English nobility for the contemporary constitutional malaise. His argument was reminiscent of Harrington. The designers of the original English Constitution had done well, he argued, because they had counterbalanced the power of the king with "the virtue and power of a great and brave nobility". This ancient nobility consisted of "those with the greatest interest in [the] ... nations, and who by birth and estate enjoyed greater advantage than Kings could confer upon them for rewards of betraying their country."¹⁰³ But in the intervening years "through the weakness of some and malice of others", this balance had been upset and the virtuous nobility had been reduced to the level of commoners and replaced by purely mercenary and self-seeking men. The

result was that the monarch had risen in power because the corruption of the supposed countervailing pressure prevented it from operating as designed. The modern nobility had "neither the interest nor the estates required for so great a work" as to restore the constitution to its original design.¹⁰⁴

Yet the situation was not irreparable. We still had the evidence of our ancestors' intentions before us. And thus:

If we will be just to our ancestors, it will become us in our time rather to pursue what we know they intended, and by new constitutions to repair the breaches made upon the old, than to accuse them of the defects that will for ever attend the actions of men. Taking our affairs at the worst, we shall soon find, that if we have the same spirit they had, we may easily restore our nation to its antient liberty, dignity, and happiness; and if we do not, the fault is owing to ourselves, and not to any want of virtue and wisdom in them. 105

We have now examined the principal characteristics of Sidney's theories of both the origin and nature of government in general and the English Constitution in particular. His general theory seems to share many of the essential features of Philosophical Contractarianism. At least its vocabulary and the broad outline of how civil society was composed appear the same. But several fundamental differences emerge on closer examination. Sidney's theory was much looser, much less rigorous, than, say, Pufendorf's Social Contract Theory. Sidney was not concerned with the question why civil society was 'necessary' for human life. Many of the central concepts of his theories were presented with little or no critical analysis and clarification. The

notion of 'consent', for example, was hardly examined at all by Sidney. Similarly, the problem of whether civil society was 'natural' or 'artificial' did not trouble him. His arguments simply presupposed its artificiality and the little that he had to say explicitly on the subject was presented uncritically and contained contradictions. For example, in the only passage where he addressed himself to the question of the 'naturalness' of civil society for man, he asserted:

man being a rational creature, nothing can be universally natural to him, that is not rational. But ... liberty without restraint being inconsistent with any government, and the good which man naturally desires for himself, children, and friends, we find no place in the world where the inhabitants do not enter into some kind of society or government to restrain it ... The truth is, man is hereunto led by reason, which is his nature. Every one sees they cannot well live asunder, nor many together, without some rule to which all must submit. This submission is a restraint of liberty, but could be of no effect as to the good intended, unless it were general; nor general, unless it were natural. When all are born to the same freedom, some will not resign that which is their own, unless others do the like. This general consent of all to resign such a part of their liberty, as seems to be for the good of all, is the voice of nature, and the act of men, according to natural reason seeking their own good ... But as a few or many may join together, and frame smaller or greater societies, so those societies may institute such an order or form of government as best pleases themselves; and if the ends of government are obtained, they all equally follow the voice of nature in constituting them. 106

Thus Sidney argued that forming civil society was 'natural' for man. But he still insisted that "the establishment of government ... The particular forms and constitutions, the whole series of the magistracy, together with the measure

of power given to every one, and the rules by which they are to exercise their charge", were the result of "an arbitrary act, wholly depending upon the will of man."¹⁰⁷ Civil government was apparently both an artifact, and also natural. It was the product both of man's arbitrary will and reason. The only plausible way of reconciling these beliefs was by defining both nature and man's will in terms of their rationality. This, as we have seen, is what Sidney did, but then man's will could only be considered "arbitrary" by a somewhat confused use of the term!

Sidney's general theory, then, was either a very bad example of Philosophical Contractarianism or it was a theory of a different kind. The latter seems more plausible in that the essential questions that Philosophical Contractarianism set out to consider hardly troubled Sidney at all. In fact, Sidney's general theory appears to underpin his account of the English Constitution and to provide further justification for the practical political proposals that he was concerned to recommend. His general theory presented a rational account of civil society which served to organize his researches into constitutional history and enabled him to argue that what appeared reasonable to him was in fact in accordance with constitutional law. His enquiries throughout the Discourses can only be understood in terms of his rationalism. The sort of enterprise in which Sidney believed himself to be engaged, the method of his enquiry, the evidence which he considered relevant to

justify a particular proposition and the nature of the 'materials' with which he considered himself to be working, were all interpreted according to "the Light of Reason".

This interpretation of Sidney's writings, however, directly contradicts some generally accepted interpretations. G.P. Gooch and W.H. Greenleaf express these widely held beliefs. In his study of English Democratic Ideas in the Seventeenth Century, for example, Gooch argues that the "chief merit" of Sidney's theories was their concern with "the historical sanction [rather] than of the law of nature."¹⁰⁸ And W.H. Greenleaf has more recently argued that "unlike Locke, Sidney did not produce a document the essence of which was rationalistic. His book was much more in the normal empirical style, depending for its arguments on the evidence of experience and of history, ancient and modern, sacred and profane."¹⁰⁹ We may conclude our examination of Sidney's theories by reviewing these interpretations and the light that Sidney's own understanding of history casts upon them.

It has not been my intention to deny that historical evidence played a very important role as 'justification' for the propositions which Sidney wished to uphold, and the preferences that he wished to recommend. My point is rather, first, that these principles and preferences were justified by Sidney principally on the grounds of their 'reasonableness'; second, that history was seen by him

as a moral frame in which reasonable actions were rewarded and unreasonabale ones punished; and third, that even if history were to contradict his rational propositions, he recognised that this would not destroy their validity.

We have seen that Sidney considered his dispute with Filmer to be one concerning 'right', and that in this dispute any evidence of what "ought not to be is no more to be received, than if it could not be."¹¹⁰ This proposition Sidney repeats several times in the Discourses. One of these repetitions clearly indicates how he was prepared to overrule historical evidence if it conflicted with what rational men ought to consider right:

Though it should be granted that all nations had at first been governed by Kings, it were nothing to the question [of what now ought to be]; for no man, or number of men, was ever obliged to continue in the errors of his predecessors. The authority of custom, as well as of law ... consists only in its rectitude. 111

The whole of Sidney's theory of law, his belief that government could be understood as the design of rational men, his fundamental belief in man's natural freedom, equality and rationality are all rationalist premises, independant of any historical or empirical evidence. Even in his theory of the English Constitution, historical evidence was regarded as of questionable relsvance. Much more important was the idea that "in matters of the greatest importance, wise and good men do not so much inquire what has been, as what is good, and ought to be".¹¹²

It is not even true to say that empirical evidence

alone determined the outcome of Sidney's search for those constitutional arrangements that would best secure the ideals of liberty, justice, property and virtue. For the general outlines of that constitution were elicited on rationalist lines. He certainly did argue against each of the Aristotelian 'pure forms' of government on the basis of "what history, and daily experience teach us".¹¹³ And he did also argue that historical evidence would justify his preference for a mixed form of government.¹¹⁴ But Sidney's understanding of historical change exhibited beliefs in both the progress and refinement of the human intellect and in the more common seventeenth century view that history was a moral story. The first of these beliefs led Sidney to argue that past actions should only be interpreted in their historical contexts. The second belief appears to have persuaded him that there were 'universal' rules in politics as in other 'sciences', that changes in the form of government led inevitably to either virtue and persistence or vice and destruction.

The second of these beliefs predominated in Sidney's historical thought. It restricted how far arguments about historical relativity could be taken and maintained a firm connection of relevance between actions in the past and those in the present. In short, there was a tension in Sidney's understanding of history between ideas which emphasised particularity and change and ideas which emphasised universality and constancy. His very wide

reading of history led him to the view that "political matters are subject to ... mutations" and that "no right judgment can be given of human things, without a particular regard to the time in which they passed."¹¹⁵ Political change was inevitable because "the wisdom of man is imperfect, and unable to foresee the effects that may proceed from an infinite variety of accidents".¹¹⁶ But it must be emphasised that government was still being viewed on the rationalist premise that it was the result of the conscious design of men. Every effort ought to be made "to constitute a government that should last for ever".¹¹⁷ But since men were imperfect, the best that could be hoped for was "such as in relation to the forces, manners, nature, religion or interests of a people, and their neighbours, are suitable and adequate to what is seen, or apprehended to be seen."¹¹⁸ The study of history, then, certainly did teach that government and law should be tailored to prevailing customs and manners. It taught, too, that "the laws that may be good for one people are not for all, and that which agrees with the manners of one age is utterly abhorrent from those of another."¹¹⁹

But, as well as containing these notions of change and historical relativity, Sidney's writings occasionally refer to a doctrine of progress. Had this doctrine been developed to the point where Sidney might assert that whatever had happened to previous generations was irrelevant to the question of what the present, superior

generation ought to do, his historical enquiries would have lost much of their practical importance. History would have become a mere catalogue of falsity and error. Arguments from the Ancient Constitution or the 'intentions' of the Saxon contractees would have lost all force. Sidney did not pursue the notion of 'progress' this far. He introduced the idea in order to justify an assertion that Englishmen in the present were not bound to adhere to the laws of their predecessors, but they were bound by the rational 'intentions' of their ancestors. His doctrine ran as follows:

The bestial barbarity in which many nations, especially of Africa, America, and Asia, now live, shews what human nature is, if it be not improved by art and discipline; and if the first errors, committed through ignorance, might not be corrected, all would be obliged to continue in them; and for any thing I know, we must return to the religion, manners, and policy, that were found in our country at Caesar's landing. To affirm this is no less than to destroy all that is commendable in the world, and to render the understanding given to men utterly useless. But if it be lawful for us, by the use of that understanding, to build houses, ships, and forts, better than our ancestors, to make such arms as are most fit for our defence, and to invent printing, with an infinite number of other arts beneficial to mankind, why have we not the same right in matters of government, upon which all others do almost absolutely depend? 120

In the light of these notions of change, relativity and progress, the 'past' could only remain relevant to the present through a rationalist understanding of that 'past'. Sidney did, in fact, understand the past in this way.

His interpretation of the past rested on two main

principles. The first was that "as there may be some universal rules in physic, architecture, and military discipline, from which men ought never to depart, so there are some in politics also".¹²¹ The second principle was that changes in the fortunes of a nation were produced only by changes in its government, and not vice versa.¹²²

These two principles emphasised the reason in the past. The tension between the rationalist and empiricist threads in Sidney's historical thought remained concealed within the general view of history as 'moral philosophy teaching by example':

The nations which have been governed arbitrarily, have always suffered the same plagues, and been infected with the same vices, which is as natural, as for animals ever to generate according to their kinds, and fruits to be of the same nature with the roots and seeds from which they come. The same order that made men valiant and industrious in the service of their country during the first ages, would have the same effect, if it were now in being. 123

Sidney's enquiries, then, despite the widely held views expressed by Gooch and Greenleaf, can only be understood in terms of his rationalism. His general theory served as a basis on which to build a view of the English Constitution. A practical political concern ran through all his work. This, as we have seen, is most clearly visible in his theory of law. Sidney's historical ideas are a little more problematic. They reveal a barely concealed conflict between a past that was 'useful' to the present and one that was not. Tyrrell's historical thought

contained no such conflict. It was much more conventionally 'seventeenth century' in this respect. Tyrrell's writings expressed very clearly how common seventeenth century notions of history could serve the purposes of Integrated Contractarianism. It is to a consideration of these writings that I now wish to turn.

CHAPTER X

JAMES TYRRELL AND THE THEORY OF INTEGRATED CONTRACT

James Tyrrell (1642-1718), unlike Sidney, did not engage himself actively in politics. It seems that local administration was the extent of his ambition in public life. As the eldest son of Sir Timothy Tyrrell, the heir to an estate in Buckinghamshire, and the grandson of Archbishop Ussher, he seemed to prefer a more secluded and a more academic life. His education was typical for a man of his social position: Oxford and then the Inner Temple. But the legal profession proved unattractive. He retired to his estate and became a deputy lieutenant and J.P. In 1687 he was deprived of these offices by James II for refusing to support the Declaration of Indulgence and he devoted the rest of his life to writing.

The Exclusion Crisis occasioned his first major political work. The Patriarcha Non Monarcha appeared in 1681 and was concerned to attack Filmer's recently published defence of absolute monarchy. Tyrrell's book caused some controversy, and practically the whole of Bohun's lengthy introduction to the next edition of Patriarcha was written as a reply.¹ Thomas Hunt, the radical Exclusionist recommended Tyrrell's work as "a very candid and judicious Book",² and Locke referred to "the Ingenious and Learned Author of Patriarcha Non Monarcha."³ It was not until the 1688 Revolution that Tyrrell was once more stirred to

bring his views before the reading public. This time he did so in great style, showing, if not the depth, then at least the considerable breadth of his reading. The Bibliotheca Politica appeared in the form of thirteen dialogues between the years 1692 and 1694, a separate fourteenth dialogue was added in 1702, and two complete collected editions appeared in 1718 and 1727. The dialogues take place between Freeman, "a Gentleman", and Meanwell "a Civil Lawyer".⁴ Freeman in fact represents a Whig, Meanwell a Tory, and their discussion covers practically all aspects of the current debate about the 'lawfulness' of the Revolution.

The Bibliotheca Politica was very favourably received by Peter Motteux's The Gentleman's Journal. In the December 1693 issue, for example, the work was recommended as "in effect a whole Library of Politics, and the Sentiments of the greatest Politicians of all Parties are so fairly laid down ... that our Nobility and Gentry will hardly have occasion to read any other [work] to be fully inform'd of the Constitution of our Government".⁵ Even in the middle of the nineteenth century, a legal text book continued to recommend Tyrrell's work to students as a "perfect mine of constitutional learning, which the student will be very fortunate if he can succeed in obtaining".⁶

Whilst writing the Bibliotheca Politica, Tyrrell published a translation and abridgement of Cumberland's De Legibus Naturae (1672). A Brief Disquisition of the Law of Nature appeared in 1692 and ran to one further

edition in 1701. Cumberland's work was widely read and was frequently reprinted and translated into English, German and French throughout the eighteenth century. He was associated with the Cambridge Platonists, propounded an optimistic theory of human nature, and deduced a law of nature that had much influence on later Utilitarians.⁷ Tyrrell followed Cumberland quite strictly in the first part of his abridgement, but he did add lengthy 'supports' from Locke's psychology. In the second part he extracted all the arguments Cumberland had used against Hobbes and put them into a consistent form. Again, he added some knowledge of his own, principally from history and anthropology. The Brief Disquisition was reviewed very favourably in both Wooley's Compleat Library⁸ and Motteux's Gentleman's Journal.⁹ And Dr. Manningham recommended it to the House of Commons in a sermon preached in 1692.¹⁰

In 1696 Tyrrell published the first volume of The General History of England, as well Ecclesiastical as Civil, From the Earliest Accounts of Time, To the Reign of His Present Majesty King WILLIAM. Two further volumes appeared in 1700 and 1704, but the history only extended to the end of Richard II's reign. His interest seemed to have waned considerably and the projected abridgement of the first three volumes never materialised. The history, however, was written from the point of view of a Whig constitutional theorist. And from that point of view, a history which covered in detail the period from the exit of the Romans

to the reigns immediately following the Norman Conquest, had completed the bulk of its 'task'.¹¹ As D.C. Douglas has remarked, Tyrrell's history "never subordinated propaganda to inquiry".¹² The work pleased supporters of the Revolution like Locke,¹³ Atwood,¹⁴ and Toland,¹⁵ and displeased opponents like Thomas Hearne.¹⁶ Yet all the same, Hearne was moved to remark that Tyrrell was "a learned man, although he runs counter now and again to usually-received opinions".¹⁷

Tyrrell's work was not that of a first-rate mind. He has none of the stature of Locke or Cumberland. But his writings, nonetheless, represent the single most comprehensive indication of the character of late seventeenth century political argument. He devoted considerable time to reading the then 'standard' works on politics and history. He was a friend of two influential contemporary writers on these subjects: John Locke and William Petyt. His Bibliotheca Politica was designed to give the general reader the 'best arguments out of the best authors' on the major problems of political theory and constitutional history. All his work was of this eclectic nature. Thus it is difficult to discern any more than the general pattern of Tyrrell's own ideas. Petyt and Locke influenced him greatly and the best way of characterizing his thought is, as Pocock suggests, in terms of the "mingling" of them both.¹⁸

Tyrrell began his polemical career, then, with a book

against Filmer. But, even more than Locke, Tyrrell was so much in agreement with his adversary on fundamentals (especially in the view of man as a creature made by and for God, and in the acceptance of biblical 'history' as valid) that he constructed a variant of Social Contract Theory characterized by rather tortuous distinctions. Filmer's Patriarcha was written "against an Opinion maintained by some Divines, and several learned men, That Mankind is naturally endowed and born with Freedom from Subjection, and at liberty to chuse what form of Government it please; and that the Power which any one man, hath over others, was at first bestowed according to the discretion of the Multitude".¹⁹ Tyrrell was determined to rescue and re-establish these ideas. He adopted current notions of a 'state of nature' as the means to uphold those natural rights that Filmer's disciples were denying. But he believed that the 'state of nature' should stand the tests of historical and empirical analysis. His interpretation of Filmer in part necessitated this.

Filmer's arguments from biblical history were formidable. If government originated with Adam, there could be no doubt that not only government but also absolute monarchy was ordained by God. Tyrrell did not dispute the validity of Genesis, but he felt obliged to dispute Filmer's interpretation of it. His argument depended on a distinction between 'paternal' and 'political' power. If this distinction could be upheld, Genesis could be accepted whilst Filmer's

arguments were refuted. It could be argued that there had been a period in the world's history before civil society existed. This 'state of nature' would cast doubt on the historical foundation of Patriarchalism. If man's condition in the 'state of nature' were then portrayed in natural law and natural right terms, the proposition that "Mankind is naturally endowed and born with Freedom from Subjection, and at liberty to chuse what form of Government it please" could be defended. The 'state of nature' thus performed a dual role in Tyrrell's writings. It portrayed the historically and empirically verifiable condition of man outside civil society. And it also portrayed man outside civil society so as to establish his essentially 'natural' attributes (particularly his natural rights) and then determine the 'necessity' for civil government. This second role was not dependent upon historical evidence.

In the first dialogue of the Eibliotheca Politica Tyrrell affirmed that his idea of the 'state of nature' accorded with prevailing Christian belief:

"Pray Sir," says Meanwell, "begin first with the Natural state of Mankind, but remember to do it like a Christian, and one that believes that we are all deriv'd from one first Parent, and that we did not at first spring up out of the Earth like Mushrooms, or as the Men whom Ovid feigns to have been produc'd of the Dragons Teeth Cadmus is feigned to have sown, who as soon as they sprung out of the Earth, immediately fell a Fighting and Killing each other". 20

By accepting this "honest and kind advice", Freeman has guaranteed that his state of nature will not be Hobbesian.

But exactly what Tyrrell meant by 'the state of nature' is confusing.

At times Tyrrell refers to the state of nature as the state of innocence before the Fall,²¹ at times it appears as the depraved state of post-Lapsarian man.²² On one occasion he even refers to a monarch existing in the state of nature.²³ But most often he refers to the notion in its generally accepted sense as the natural condition of mankind before or outside civil society, into which man would again fall if civil government were dissolved. Like Pufendorf and Locke, he believed this state to be 'social'. When attacking Hobbes in the Brief Disquisition, for example, Tyrrell accused him of confusing "that first, and most natural amity, and sociableness of Persons of one and the same Family, as of Husband and Wife, Parents and Children, Etc. towards each other [with] that artificial Society, which proceeding wholly from Compacts, we call a Commonwealth."²⁴ The state of nature was characterized by family life on a grand scale. The institution of marriage was one of its cornerstones: a contractual relationship sanctioned and limited by the law of nature.²⁵ The relationship between parents and children was also of a contractual kind,²⁶ and so too was the relationship of "Masters of Families" to their servants and even their slaves.²⁷ These observations on mankind's natural state clearly evoke Pufendorf's "mixed state of nature".²⁸ And like Pufendorf's notions, Tyrrell's remarks depend upon a prior conception

of natural law and natural rights. Tyrrell, of course, recognized this and the first part of the Brief Disquisition was devoted to establishing the status of that law.

In a lengthy and difficult passage, based on the scientific ideas of his day, Tyrrell determined the first law of nature. God was the author of all "natural and necessary" processes, he asserted. Human ideas of natural and moral affairs arose naturally from sense experience. Thus God was the author of these ideas. Knowledge developed through the comparison and combination of these first ideas and God 'encouraged' men to 'compare and combine'. One of the most general ideas resulting from this activity of the human mind was that "a whole signifies the same with that of all the several Ideas of the particular parts put together". From this idea, Tyrrell continues, the mind:

is thence carried on to make a Proposition of the Identity of the whole, with all its parts; and can truly affirm, that the same Causes which preserve the whole, must also conserve all its constituent parts; and then from a diligent Contemplation of all these Propositions (which justly challenge the title of the more general Laws of Nature) we may observe, that they are all reducible to one Proposition, from whose fit and just Explication, all the Limits or Exceptions, under which the particular Propositions are proposed, may be sought for, and discovered, as from the Evidence of this one Proposition ... viz. The Endeavour, as much as we are able, of the common Good of the whole System of Rational Beings conduces, as far as lies in our Power, to the Good of all its several Parts or Members, in which our own Felicity is also contained, as part thereof; whereas the Acts opposite to this Endeavour, do bring along with them Effects quite opposite thereunto, and will certainly procure our own Ruin or Misery at last. 29

All other laws may be deduced from this, Tyrrell continued, "as their Foundation and Original, according to that respect or proportion they bear to the common Good, or happiest state of the whole aggregate Body of rational Beings."³⁰

These natural laws could justifiably be considered as laws when once we had a knowledge of God. Since then the two conditions that Tyrrell believed necessary for some rule to be properly law would be satisfied: the rules would have a known and authoritative source, and there would be known rewards and punishments attached to them. The Brief Disquisition was concerned to establish precisely these points about natural law and to draw out certain implications from them.

Natural law defined and guaranteed man's natural rights. In the state of nature men had a natural right to self-preservation, to private property and to self-government (although this last was restricted to the heads of families). In the transition to civil society, some of these natural rights were limited in order to secure the remainder. But before examining Tyrrell's views on the formation of civil society, we should note one significant aspect of his understanding of the state of nature.

A valid portrait of life in the state of nature, Tyrrell believed, must be evidenced by empirical observation and divine history. Since he believed the state of nature to have been an historical condition, as we have seen, his appeal to historical evidence is quite understandable. But

analysis of a state of nature was also an enterprise in moral philosophy. As such an enterprise it is by no means obvious what relevance historical and empirical evidence might have for the validity of the speculations. Yet Tyrrell believed they were essential, for as far as he was concerned:

tho I grant it is both lawful and usual for natural Philosophers, who not being able through the imbecility of our humane Faculties, to discover the true nature and essencies of Bodies, or other Substances, do therefore take a liberty to feign or suppose such an Hypothesis, as they think will best suit with the nature of the things themselves, of which they intend to treat; and from thence to frame a body of natural Philosophy, or Physicks, as Aristotle of old, and Monsieur Des Cartes, in our age have performed: Yet can we not allow the same liberty in moral or practical Philosophy, as in speculative. 31

One of the most important things that divine history and empirical evidence 'proved' was that Hobbes' state of nature as a war of all against all was wrong. Divine history 'proved' this because it showed that human life had from the start been organized in families, and there had been an effective law governing human relations (as God's punishment of Cain indicated).³² The evidence of contemporary travellers served to reinforce the conclusion that Hobbes' account of the state of nature had been mistaken. For this evidence referred to peoples living peacefully together without government.³³

Thus the evidence in history and contemporary travel literature about life in the state of nature served to disprove Hobbes' theory. But if life were genuinely

'social' in the state of nature, from whence arose the necessity for constructing civil societies? And what was the difference between the state of nature and civil society? There was one fundamental difference between natural society and civil society: in the former there was no political authority although there was "Domestick Government".³⁴ We must return to this distinction in a moment. But given that civil and natural society were significantly different, why did men leave the state of nature?

One reason might well have been that separate families were forced to 'combine' in defence against a common enemy, as Aristotle had suggested. Very occasionally Tyrrell did argue this, but more typically he asserted:

it is absolutely impossible to suppose, that any great number of people not pressed by the Invasion of a powerful Enemy from abroad (which could not be supposed in this early Age of the World [when governments were first established]) would ever be brought to consent to put themselves under the absolute power of others, but for their own greater Good and Preservation, or to part with, their Natural Liberty without advantaging themselves at all by the Change. 35

This 'rationality postulate' was common to all the contractarian writers that we have considered. It served them in their quest to explain why the dangerously powerful sovereign state 'needed' to exist and it helped them in their attempts to harness that power in the 'interests' of the governed. In Tyrrell's argument the postulate provided the most general reason why civil society was formed. The Aristotelian explanation was rejected because it was too

narrow and could not account for government arising in the circumstances described in Genesis, "this early Age of the World".

In explaining why the state of nature should have been so unattractive as to lead men to sacrifice their natural liberty and enter civil society, Tyrrell dropped some of his 'sociability' assumptions. His discussion continued in an historical vein:

the necessity as well as being of all Civil Government, proceeded from the Fall of Adam, since if that had not been, we had still liv'd as the Poets fancy Men did under the Golden Age, without any need of Kings or Common-wealths ... But after the Fall, the state of Mankind was altered, and Self-love, and the desire of Self-preservation grew so strong and exorbitant above all Natural Equity, that the inordinate passions of Men blinding their Reasons, they began to think they had a Right not only to the Necessaries of Life, but to whatever their unruly Appetites desired, or that they thought they could make themselves Masters of. To remedy which Inconveniencies, I suppose the Fathers and Masters of Families, and other Freemen (in whom alone then resided that little Government that then was in the World) were forced after some time to agree upon one or more Men into whose hands they might resign all their particular powers, and to make Laws for the due Governing and Restraining those disorderly Appetites and Passions, and also endowing them with a sufficient Authority to put them in Execution. 36

It was because of the Fall, then, that civil government both had to be, and in fact was, instituted. Right reason, or the law of nature, taught men that it was best to establish a civil society. In particular, it was the abuse of men's natural right to "the Necessaries of Life" that led to the state of nature being superseded. And Tyrrell made the definition and protection of property rights "one main end"

of government.³⁷ The "Fathers and Masters of Families and Freemen" were the sole parties to the contract. Indeed, as with Pufendorf, they were the only ones who could be parties because they alone had a natural right to self-government in the state of nature.³⁸ Here, perhaps more obviously than anywhere else in Tyrrell's writings, the social assumptions of his time led him to a contradictory position. In arguing against Filmer he was at pains to prove a natural right of resistance for women against their husbands. This he did by reference to the natural rights of freedom and self-government, deducing from them the notion that marriage was contractual. But when he came to consider the formation of civil society, it appeared that husbands were naturally superior to their wives and children. The "Power of Fathers and Masters is Natural," he asserted, "whereas that of Kings and Republicks is Political and Artificial, as proceeding from compacts or the consents of diverse Heads of Families and other Free-men".³⁹

The origin of civil society, then, lay in the consent of the prospective members. I have argued that Tyrrell believed the state of nature had been evidenced in history. It should follow that he saw the social contract as an historically verifiable event also. Indeed, it appears that he did but to establish this Tyrrell could not use sacred history directly since it contained no explicit references to such contracts. He turned this potentially embarrassing absence into an irrelevancy. His general

claim was that "the Scriptures" were not "written to show us the original either of Government, or Propriety".⁴⁰

But even given this, he felt moved to 'prove' at length that biblical history must be presumed to be on his side.⁴¹

The care he took indicates how important such 'historical' evidence was for him.⁴²

Like sacred history, profane history was far from unequivocal about the contractual origin of commonwealths. Whilst acknowledging this, Tyrrell argued as before: where history is not explicit it still must be presumed to be on his side. Thus, for example, he asserted:

the beginnings of most Kingdoms ..., like the head of Nilus, are hard to be traced up to their Heads or Fountains, and no man can positively tell the manner of their beginning ... But since [Filmer] puts me to name any Commonwealth out of History where the Multitude, or so much as the greatest part of it ever consented, either by Voice or Proxies, to the election of a Prince; I will name him two Commonwealths: the first was Rome, where all the People or Freemen consented to the election of Romulus ... and the second shall be that of Venice ... which plainly proves some Governments to have had their beginning by the consent of the People. ⁴³

The point Tyrrell was arguing here was that Rome and Venice had no governments, no political authorities, until the compact or consent of the "Multitude" established them. They were in the 'state of nature', although he did not expressly state that here.

Tyrrell then proceeded to distinguish between governments begun by conquest from those begun by consent. His conclusion was extremely important for his analysis of the English Constitution.

And though some Governments have begun by Conquests, yet since those Conquerors could never perform this without men over which they were not always born Monarchs, it must necessarily follow, that those Souldiers or Volunteers had no obligation to serve them, but for their own agreements with their General, and for those advantages he proposed to them in the share of those Conquests they should make. Thus were the Goths, Vandals, and our Saxon Kingdoms erected by Generals ... [who when victorious] could have no farther Right over the men they brought with them than what sprung from their mutual Compacts and Consents. 44

Tyrrell's examples of contracts from profane history clearly concern more the 'contract of government' than the specific 'contract of society'. It is not difficult to explain this, and the explanation will shed light on the character of his Contract Theory. In the first place, on his own assumptions of the sociable state of nature, a 'contract of society' is almost unnecessary. His problem was all the greater here because he also wished to deny that society was at all 'artificial'. Second, his idea of a 'social contract' was almost completely merged with 'the contract of government' - the latter gave substance to the former. And finally, Tyrrell's concern throughout his general theory was to establish a governmental contract so that he could then 'locate' it in English history (and thus provide 'ammunition' for defending first, resisting Charles II and ultimately, the 1688 Revolution). I shall examine each of these points in a little more detail.

Tyrrell adopted social contract ideas in opposition to Filmerian Patriarchalism. But his insistence that the world must have been peopled as recounted in Old Testament

history, led him to portray the state of nature as a very social state. The pre-civil state differed from civil society in respect of the size of communities and their kind of government. 'Natural government' existed in the family, but was very different from 'political government'. It was different because 'political power' was "Artificial, as proceeding from compacts or ... consents".⁴⁵ But the distinction was rather forced. There was a right of resistance under both sorts of government, guaranteed by the law of nature. A contract, then, did not establish any difference here. But what it did seem necessary for was to explain the bond that tied so many people together in civil societies. That bond could not be 'natural', according to Tyrrell, because civil societies were manifest not single families. The only alternative, given the universality of the Nature/Art dichotomy,⁴⁶ was that it must be 'artificial' - the product of human design. The idea of an 'historical' bond had yet to enter the mainstream of European consciousness.

But Tyrrell was not content with the rigid distinction between natural and artificial societies. His 'sociable' state of nature was sufficient to arouse some misgivings about it and, indeed, occasionally he pursued the logic of its sociability. The difference between pre- and post-contractual society was not so great, he argued at one point, "that there can be no passing from one to the other" almost imperceptibly.⁴⁷ The same notion appears in Locke's Two

Treatises and like Locke, Tyrrell insisted that although such a change might be imperceptible still a 'contract' must be supposed to have been made. Without it, there appeared no other way of explaining the bond holding civil society together, or of justifying the supposed limitations of political power.

His concern to define political power in terms of its 'origins' (i.e. consent and contract) whilst distinguishing it from paternal power, 'necessitated' the view that civil society was artificial. Hobbes had quite happily maintained this, but Tyrrell would not. In the Brief Disquisition he attacked Hobbes and attempted to restore civil society to a place amongst natural phenomena. Civil society, he argued, proceeded "wholly ... from the Rational Nature of Mankind"; 'reason' was a "natural Faculty", therefore civil society was natural.⁴⁸ Tyrrell was clearly more avoiding the problem than solving it, but he did go on to explain why he could not be satisfied with accepting civil society as artificial. All political obligation proceeded from consent. If that consent were viewed as something artificial, as something "quite opposed to what is natural", then "it may become thereby less firm and durable". Hobbes had committed this error for he had failed to see that although "those words by which Compacts are expressed" arose "from the Arbitrary agreements of men", still the consent itself arose from natural reason - it was a "natural Consent, constituted by words, with some kind of Art" but this

"doth not at all diminish its firmness or duration."⁴⁹

Thus Tyrrell attacked Hobbes and insisted that civil society was a natural phenomenon because otherwise political obligation would be too insecurely founded. Yet he still maintained that 'consent' was the only legitimate basis of civil order. It had to be if resistance were to be 'proven' legitimate. Thus Tyrrell's own foundation for political obligation turned out to be as 'precarious' as the one he was rejecting. His final statement on the problem concluded by locating that foundation in "gratitude" alone!⁵⁰ But this, Tyrrell insisted, would not endanger a Commonwealth. His insistence appeared completely unequivocal. But, as his justification of the 1688 Revolution will show, the appearance masked a revolutionary doctrine. Nonetheless, he asserted:

I utterly deny that these Principles I have here laid down, do at all countenance Rebellion, ... since I grant no particular Subject can contradict or resist the Supream Power of the Lawful Magistrate (however unjustly exercised) by force, without disturbing or at least endangering the quiet and happiness of the whole Community, and perhaps the dissolution of the Government it self, which is against the duty, not only of a good Subject, but also of an honest Moral Man, who will not disturb the public tranquillity for his own private security or revenge. 50

As a second explanation of the historical examples Tyrrell gives of the social contract, I have suggested his 'merging' of the social and the governmental contracts. That he should have done so would certainly follow from the kind of state of nature he envisaged. Society was

natural and had always existed, it needed no contract to invent it. Yet both Pufendorf and Locke had portrayed life in the state of nature as 'social'. Tyrrell, as we have seen, had certainly read both these writers and his own views seem often to have been borrowed from them. Pufendorf, however, had rigidly distinguished between the social contract and the governmental contract, whilst Locke maintained a distinction between the social contract and the 'trust' of government. At times Tyrrell approached Pufendorf's view, but he never sustained it. For example, in the Patriarcha Non Monarcha, he suggested that there were two contracts:

at the first institution of the Government, the first Compact was, That the agreement of the major part should conclude the whole Assembly; and whoever either then would not, or now refuses to be so concluded, is still in the state of Nature, in respect of all the rest, and is not to be lookt upon as a member of that Commonwealth, but as an Enemy, and a Covenant-breaker. 52

Occasionally, too, Tyrrell employed Locke's notion of the 'trust' of government. But this was rare and only when explicitly quoting from Two Treatises.⁵³ Much more frequently there was just one contract and that determined the form of the government.⁵⁴

Tyrrell was clearly not too concerned that he merged the social and governmental contracts. This lack of concern, and the looseness in his thinking about the vital transition to civil society, can be further explained by looking at his focus of interest. Contract seems less important to him as an event, although it was crucial to

his argument that some contracts had occurred in history, than as a continuing process. In all his major works, except the Brief Disquisition, Tyrrell was ultimately concerned to provide an interpretation of the English Constitution. His general theory of "the Original of Societies, and the rise and extent of political power"⁵⁵ was included as a foundation for erecting a 'true view' of the seventeenth century constitution. Within that constitution, he needed to locate an undeniable right of resistance. The Bibliotheca Politica provides the clearest evidence of this. Tyrrell explained his purpose as follows:

I think I can make it as clear as the Day, that [the Nobility, Gentry, Clergy, and People] have done nothing in joining in Arms with the Prince of Orange, but what is justifiable by the Principles of Self-preservation, the Fundamental Constitutions of the Government, and a just Zeal for their Religion and Civil Liberties, as they stand secured by our Laws. 56

Later, he informed the reader that the "best method" for examining this "Noble Controversie" was:

first to look into the Natural state of Mankind, after the Fall of Adam, and enquire First, If God has appointed any kind of Government by Divine Institution before another. Secondly, If he has not; how far Civil power may be lookt upon as from God, and in what sense, as deriv'd from the people. Thirdly, Whether Resistance by the Subjects, in some cases be incompatible and absolutely destructive to all Civil Government whatsoever. Fourthly, whether such resistance be absolutely contrary to the doctrine of Christ contain'd in the Scriptures and that of the Primitive Church pursuant thereunto. Fifthly, Whether such Resistance be contrary to the Constitution of this Government, and the express Laws of the Land, Sixthly, Whether what has been done by the Prince of Orange, and those of the Nobility, Gentry, Etc. in pursuance of these Principles, has been done according to the Law of Nature, the Scriptures, and the Ancient Constitutions of this Kingdom. 57

As we shall see, these three 'principles' were related directly to one another in Tyrrell's thought. Thus they did not form three separate sources for justifying actions. Instead, they were so inter-woven that each conjured up the suggestion of the others.

Tyrrell's constitutional enquiries seem at first glance to have been conducted within the frame of reference of the fairly longstanding Ancient Constitution debate.⁵⁸ His works, especially the Bibliotheca Politica and The General History of England, retain the key concepts of that debate but they are given different connotations.

'Fundamental law', 'fundamental rights', 'fundamental liberties', 'ancient constitution', 'common law', 'custom', all appear with monotonous regularity, but they are woven into a tapestry of moral theory. The justification for each is no longer that they have 'always been', but that they are right, intrinsically good. 'Constitutionality' is no longer solely determined by precedent, rather by natural law.

His constitutional theory, however, still purported to be historical: it was an interpretation of the English Constitution. But the method he pursued and the conclusions he reached bear the unmistakable traces of social contract analysis. In The General History of England he presented an account of the origins of our ancestors based on the book of Genesis:

I shall ... now proceed to somewhat more Solid and Useful, and try if we can discover who were the first Inhabitants of this Island; but since the Scriptures, as well as Prophane Histories, are silent in this Point, it is impossible to tell the Name of the Man who brought the first Colony hither: Only this much seems probable, that Europe was Peopled by the Posterity of Japhet ... and ... this Island was first Inhabited (at least as to its Southern Parts) from the Continent of Gaul, as is delivered by Bede in his first Chapter as a current Tradition in his Time. 59

The records of this time were extremely sparse. There were "no Authentick accounts left us of the British Kings that reigned in this Island till Julius Caesar's first Expedition hither".⁶⁰ But this was really immaterial since Tyrrell's aim was to give the origin of the present constitution. That origin occurred at a specific time in history when, after the Romans had left, the country was conquered by the Saxons. But, because of the problem of 'conquest' in constitutional thought,⁶¹ Tyrrell hastily added that the Saxon Kings were not kings "by Right of Conquest" since their own soldiers "set them up for what they were" and the Britains were either driven out of England or were "by Degrees Incorporated with the Saxons".⁶² Thus none of those who became subjects of the Saxon kings had been conquered.

The ultimate biblical basis of history appeared once again when Tyrrell turned to enquire into who these Saxons were. They too were the posterity of Japhet, the son of Noah. There was definitely the implication here of the repopulating of the world under the heads of households who eventually contracted amongst themselves to establish

civil societies. Tyrrell had argued as much in his general theory.

The Saxons appeared as a branch of the "Getae or Goths", and these in turn were the descendants of Japhet and populators of Scandinavia and Europe.⁶³ Wherever they settled the Goths contracted together and set up limited monarchies. Thus when pressed to state what the earliest Saxon constitutions were like, Tyrrell could argue that as records again were scarce, one could look to other Gothic constitutions described by Roman writers, and then draw a parallel. From these Roman accounts it appeared that the "Nations of the Gothic Original, were never Governed by Absolute Monarchs; but by Kings or Princes limited by the Laws and Common-Councils of their own Nations, as were all those that descended from this Gothic Original."⁶⁴

The consequence of all this for England, Tyrrell insisted, was that it too must have been a limited monarchy. The Saxons only came to seek new homes, their armies were composed of volunteers and, as general theory proves, conquest by itself cannot establish governments. The Saxons were free men when they came, thus their government must have been set up by contract after victory had been gained and the army dissolved. This must have been the case, Tyrrell argued, for "I can give no account, how these Princes should become Kings but by the Consent or Election of their Souldiers or Followers".⁶⁵ And this, he assured the reader, "is no Romance but true History."⁶⁶

There were few records of the Saxon Heptarchy, but there was evidence of a contract unifying all England. For this Tyrrell pointed to the Mirror of Justices.⁶⁷ The bargaining with the first prospective king of all England was, according to Tyrrell, the "original contract"; that original contract established "fundamental laws" (or "constitutions"); and the fundamental laws defined and protected certain "fundamental liberties". What made these laws and constitutions 'fundamental' was no longer that they 'had always been', but that they were the content and conclusion of the historically specified original contract.⁶⁸ They owed their being to the express consent of the governed and they could only be modified with that consent. They were 'fundamental' to the form of government decided upon at the contract, and that form of government could be changed only through the consent of the majority of the citizens. These fundamental laws were basic constitutional laws and not natural laws, but through the notions of 'fundamental rights' and 'constitutional law' this distinction practically evaporated. Natural law was brought down to earth in the guise of the English Constitution.

Tyrrell's examination of Englishmen's fundamental rights revealed that they were both 'natural rights' and the further particularisation of those rights. They were natural rights because, as he insisted, "the people in a limited Kingdom remain as to the defence of their Lives, Liberties, Religion, and Properties, always in the state of nature, in respect

of their Prince as well as all the rest of Mankind".⁶⁹
 They were also the particularisation of these natural rights. When 'Freeman' was pressed to state "what these fundamental Rights and Liberties are", he argued:

they are only such as are contained in Magna Carta and the Petition of Right, and are no more than the immemorial Rights and Liberties of this Kingdom, and that first. In respect of the safety of mens lives and the liberties of their persons: 2ly. The security of their Estates and Civil Properties. And 3ly. The enjoyment of their Religion as it is established by the common consent of the whole Nation. 70

Englishmen's fundamental rights, then, were more specific than the natural rights that formed their basis. Since the function of fundamental law was to define and protect fundamental rights, we might expect some close relationship between fundamental and natural law. J.W. Gough has shown that just such a close relationship was implicit in some late seventeenth century ideas of fundamental law.⁷¹ Tyrrell, however, seemed too aware of the differences to bring them into even a partial union. He argued, for example, that the Saxon kingdoms were elective monarchies. This was an essential part of their fundamental law. But he was, of course, aware that the seventeenth century monarchy was not elective. To explain this he had to admit that fundamental law could change. Thus it could not be equivalent to the immutable law of nature.⁷² Yet he still asserted that natural law was part of English constitutional law. This, as we shall see, was because he needed some criterion of 'legality' apart from the

strictly 'constitutional'. Thus he wrote:

It is already granted, that all those Laws in a limited Government, but those of Nature, and right Reason are alterable, because the Government [sic] itself 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. 73

By acknowledging that fundamental law both could be and had been changed, Tyrrell opened to question the practical point of enquiries into the Saxon constitution. What relevance did the Saxon constitution have for men in seventeenth century England? What claim did any real or supposed Saxon law have to the obedience of men in the seventeenth century? Tyrrell suggested two reasons why the Saxon constitution was still binding on the present. The first was that the original contract was renewed each time a new king took the coronation oath. Taking that oath thus became a sort of contract in itself.⁷⁴ But this, Tyrrell felt, was an incomplete explanation both because some kings could not be shown to have taken any such oath and because the coronation oath (whereby a monarch undertook to rule according to established law) could not account for the binding force of changes in constitutional law. His solution was to add a second notion, a restricted idea of popular sovereignty, and make the consent of the governed the basis and binding force of the constitution. To his mind, the limited monarchy he supposed established by the Saxon contract was the only form of government that people ought to consent to. His argument on these points was:

if the first King of the Saxon Race took the Crown upon condition to maintain the Fundamental Laws, and constitution of the Government, and that he was never invested with an absolute despotick power of making Laws, and raising Money at his pleasure, but the people reserved to themselves their share of both, at the first institution of the Monarchy; all those Princes that claim by Vertue of their Right, are tied by this first original contract, whether they ever took any Coronation Oath, or not; nor tho' the Crown now become no more Elective, does it, at all alter the condition or the limitation of his Ancestors, as long as the present King holds by, and under the same Title, and by vertue of the same original contract; since, as it was by the Peoples will, that it was at first Elective, so it was also by their Will, that it became successive; since every entail of the Crown upon heirs, can only proceed from the Peoples agreement or consent to maintain it as a standing Law, or else every King might alter it at his pleasure. 75

The Danish and Norman Conquests were still obvious problems for this interpretation. If either of them had fundamentally altered the constitution established by the Saxon contract, there would have been a little point in discussing that contract as Tyrrell admits to be the case of government before then. Thus Tyrrell resorted to the same unhistorical arguments as a host of previous theorists like Petyt, Atwood and Ferguson,⁷⁶ in order to 'prove' that no conquests had occurred since Saxon times:

As for the Invasions of the Danes, under King Cnute, and by the Normans under King William, commonly called the Conqueror; though it must be granted, that these Princes were victorious by their Arms, yet was not this Nation subdued by either of them so entirely, as that its Submissions could properly be styled Conquests, but rather Acquisitions gained by those Princes upon certain Compacts between them and the People of England; both Parties standing obliged in solemn Oaths, mutually to perform their parts of the Agreement. 77

Cnute and William I, then, were Kings by right of compact

and not conquest. Their part of the 'bargain' was to rule according to established law.⁷⁸ And in the circumstances of the debate, once these points had been established then the contemporary relevance of Saxon law had been secured.⁷⁹

So far I have examined the principal ideas in Tyrrell's theories of government in general and the English Constitution in particular. His political writings were long and elaborate, but a fairly simple argument ran through them. His purpose was to present an interpretation of the English Constitution. Englishmen had natural rights, part of which they gave up in order to reap the benefits of civil life. They agreed to a constitution which guaranteed the rights they retained. In return they owed allegiance to their government. The violation of the constitution (established by contract and altered by consent) gave a constitutional right of resistance. This was the crux of Tyrrell's defence of the anti-monarchical movement which forcefully manifested itself from the Exclusion Crisis to its culmination in 1688. The whole argument was presented as according with English constitutional law. The Patriarcha Non Monarcha, for example, was written "in defence of the Government as it is established, and the just Rights and Liberties of all true English-men".⁸⁰ The purpose of the massive and wide-ranging Bibliotheca Politica was summarized by 'Freeman' in revealing detail as follows:

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. Secondly, That there is such

a thing as an Original Contract however ignorant you are pleased to make yourself of it. Thirdly, That by the Abdication or Forfeiture of King James (call it which you please) the Throne did really become vacant; and that it is legally filled by their present Majesties. That the Oath of Allegiance is of perpetual Obligation, I also grant; but it is still on condition, that the King shall likewise truly keep and perform that part of the Contract contain'd in his Coronation Oath, without going about to alter and invade our Religion and Civil Liberties by an armed Force, and arbitrary Power ... These are indeed the Principles I have all along maintain'd, and I hope I shall never have occasion to be ashamed of them. 81

But two outstanding problems confronted any 'constitutional' justification of the Revolution. The one concerned the statute laws of Charles II outlawing armed resistance;⁸² the other concerned James II's son's title to the throne. In meeting these problems, Tyrrell was obliged to by-pass constitutional laws and appeal to natural law. But he refused to admit that he had shifted the grounds of his defence. In response to the first of these, for example, Tyrrell argued that despite Charles II's laws Englishmen

still have a good and sufficient Right left them of defending their Lives, Religion, and Liberties against the King ... in case of a general, and universal Breach and Invasion of the Fundamental Laws of the Kingdom, or Original Contract, (if you will call it so). 83

But his final statement on this problem shows how far outside positive law he was prepared to go in order to defend what he felt right. Yet he still believed that his justification had to be related to constitutional grounds and not to the much more general and abstract ideas of natural law and natural rights:

I do not deny that ... our written Laws do no ways allow any Resistance, or Imprisonment of the King; but however, there are divers Actions, which, tho' not justifiable by the strict Letter of the Law, yet being for the publick Good, and Preservation of the Government, and original Constitution thereof and, in cases of extreme Necessity, when done indeed, ought to be justify'd and pardon'd by subsequent Parliaments. 84

In response to the second problem, Tyrrell was even more explicit in forsaking the strictly 'constitutional' law and appealing to a 'higher' law. The problem arose because Tyrrell accepted that the monarchy was hereditary and that James may have had a legitimate son just before the Revolution. Both points were fiercely contested by some writers at the time since an inescapable implication seemed to be that James' son had a constitutional right to succeed should James II, for whatever reason, be removed from the throne. Tyrrell, however, argued:

I will not deny that the legal and common course of Succession ought to be inviolately observed according to the Rules ... laid down, when ever it may consist with the publick good and safety of the Kingdom; and yet for all that I cannot believe, that the King himself much less any other, that only pretends as next Heir to him, can have such an absolute Right to a Kingdom, as that no considerations whatsoever can make him lose or forfeit the Right thereunto; ... [For] in the Right to a Kingdom, I take it to be a true Maxim, That the Representatives of a Nation (as the Convention was) ought to have more regard to the happiness and safety of the whole People, ... than to the Dignity or Authority of any particular Person whosoever ... when it is evident that the advancement of such a Person to the Throne, will prove destructive to our Religion, Civil Liberties, and Properties. 85

Thus in justifying William and Mary's rights to the throne, Tyrrell by-passed strictly positive law and appealed to a 'higher' law. Yet he still believed that his justification

was 'constitutional', for the higher law was at least 'implicit' within the positive law.

This final point highlights the connection between Tyrrell's Social Contract Theory and his theory of the English Constitution. We may conclude our examination of his works with a number of remarks on that connection. Tyrrell's analysis of the general nature and extent of political authority took place within a rationalist framework. It had all the trappings of natural rights, natural law, state of nature, social contract, etc., that were involved in the political theory of 'Constructivist Rationalism'.⁸⁶ But Tyrrell refused to allow that there was anything 'hypothetical' or 'abstractive' about his theory. At every turn he looked for empirical equivalents. Logical consistency was not enough, his theory had to accord with the evidence from history and contemporary 'primitive' societies. He was much more at home with the common-sense Empiricism of Locke (which he greatly admired) than with seventeenth century Rationalism. His interest in 'origins' was an historical and not a philosophical one. Many of the peculiarities of his Social Contract Theory spring from this. For example, the sometimes confusing and contradictory ways in which he used the term 'state of nature' becomes a little more comprehensible if that concept was concerned with 'the earliest age of the world' rather than with determining the fundamental character of civil society. But perhaps most important, Tyrrell's historical concern

accounts for the otherwise extraordinary absence of any precise notion of a 'social contract' in his 'Social Contract Theory'. As we have seen, Tyrrell's characterization of life in the state of nature was similar to Pufendorf's 'mixed state of nature'. Yet for Tyrrell a 'social' state of nature seemed to imply that there was no problem in explaining how social life originated, whereas Pufendorf was at pains to explain that society originated in contract. The crucial difference here was that Tyrrell and Pufendorf were asking themselves different questions. Tyrrell wanted to know what human life was like in the earliest times (and the Bible answered this for him), Pufendorf wanted to characterize the kind of relationship between individuals that was presupposed in social life. Hence Pufendorf began his enquiry with the individual abstracted from social relations, and Tyrrell did not.

Tyrrell's Social Theory performs two functions in his political arguments. It served to combat the basic principles of Filmerian Patriarchalism and it provided the general outline of a 'legitimate constitution'. Since the English Constitution was 'legitimate', the Social Theory provided in 'general' what a proper examination of English constitutional law and history provided in 'particular'. A 'rationalist' Social Theory could do this because English constitutional history was written by Tyrrell in the light of the theory. Thus the 'critical points' in the history

(the origin of the Saxons, the original contract, the 'implicit' reservations in English laws, the Danish and Norman contracts, etc.) were presented not as what simply was the case, or what may have been the case, but rather as what must have been the case.

It was to be a comparatively easy task for writers like Hume to show that the historical account of the origin of society and government presented by Tyrrell here was wrong: there are hardly any contracts in history. Even at the time Tyrrell was writing, doubt was being cast on the validity of Biblical history⁸⁷ and thus his 'crucial' evidence from this source was losing its persuasiveness. Yet despite his appeals to evidence, Tyrrell's theory was rationalist in form. As such it was open to still further lines of attack. Tyrrell himself was aware of two main difficulties: the 'artificiality' of the social bond, and the concomitant foundation of political obligation in the subjective will. Bernard de Mandeville, in the first decade of the eighteenth century, was soon to revolutionise the conception of social cohesion (at least implicitly) by introducing a middle term into the ancient dichotomy of nature and art. Society might no longer be viewed as either natural or artificial but it could be a sort of mixture: 'the result of human action but not of human design'.⁸⁸ The problem of political obligation could be re-examined along similar lines. A partial solution came with Hume. We do not obey governments because we have

consciously chosen so to do, but because of habit or custom. Yet in the meantime the ideas we have examined in Tyrrell claimed many adherents. They did, after all, and despite the problems they involved, serve a popular political purpose.

PART VCONCLUSION.CHAPTER XIAPPEALS TO CONTRACT IN ENGLISH POLITICAL THOUGHT
DURING THE LATE SEVENTEENTH CENTURY

In the preceding pages I have attempted to clarify the understandings of 'contract' that are exhibited in English political literature of the late seventeenth and early eighteenth centuries. Many commonly accepted generalizations both about the history of Contract Theory and about political ideas and groups in the late seventeenth century must be rejected or considerably modified in the light of the evidence I have examined. There was not one Contract Theory that has appeared in a variety of more or less incomplete forms throughout history.¹ Contractual political theory was not "universally associated with the rights of the individual person, with consent as the basis of government, and with democratic, republican, or constitutional institutions."² References to a "Social Compact" were not only concerned "to furnish either (A), a theory of political duty, or, (B), a theory of political origins."³ Appeals to a "Social Contract" were not solely concerned with the "nature" rather than "the origin" of society.⁴ The "state of nature" was often "meant to be taken as a historical fact."⁵ And English political theory after the Restoration was not neatly divided "between two main schools - the Anglican

Royalists who believed in the divine hereditary right of kingship, and their Whig opponents" who held the contract of government as a "cardinal principle".⁶

Appeals to 'contract' in late seventeenth century English political argument seem rather to fall into one or other of three categories. These categories I have called Philosophical, Constitutional and Integrated Contractarianism. The differences between these types of contractualism are most immediately apparent in terms of their distinctive vocabularies. In Philosophical Contract literature we constantly come across terms like natural rights, natural law, state of nature, and social contract. In Constitutional Contract literature we keep meeting terms like fundamental rights, fundamental law, fundamental liberties, fundamental contract, original contract and fundamental constitution. In Integrated Contract literature we find these two vocabularies related together in a particular way. The differences in vocabulary reveal much more substantive differences between the various kinds of contractualisms. They reveal that different questions are being asked and different evidence is being referred to. This is most apparent in the distinction between Philosophical and Constitutional Contractarianism. Philosophical Contractarianism was concerned to answer questions like: why is civil society necessary, what is the essential nature of civil relations and what sort of government ought men to have? Constitutional Contract Theory asked: how did this particular constitution

originate, what kind of constitution is it, what specific rights and duties do its laws define and guarantee and what implications does all this have for current political practice? Philosophical Contractarianism appealed primarily to reason; Constitutional Contractarianism appealed to the evidence of history and law. Integrated Contract literature seemed to pose the same questions as both Philosophical and Constitutional Contractarianisms, and it appealed to the evidence of history, law and reason. The actual issues at stake in all three kinds of contractualism were frequently the same. But as between Philosophical and Constitutional contractualisms, those issues were transposed into different idioms and were accordingly treated differently. In respect of these idioms, the most difficult distinction to draw is that between Constitutional and Integrated contractualism. For both of these differed from Philosophical Contractarianism in that they were explicitly concerned to answer questions about the particular requirements of particular constitutions (usually the English Constitution). But in Constitutional Contractarianism an attempt was made to portray the positive law as rational - though the emphasis was always on positive law. In Integrated Contractarianism, on the other hand, the attempt was made to incorporate the rational into the positive law - the emphasis was always on natural law as both an integral part of, and the source of, the positive law.

The burden of my argument has been to insist that

there was not a single Contract Theory to which various writers subscribed with greater or lesser degrees of 'completeness'. Yet this fallacious view seems to have been held by most writers who have considered the history of Contract Theory. If we accept their view then we miss the crucial differences of levels of argument, types of question asked and kinds of evidence invoked by contractarian writers of the seventeenth and eighteenth centuries. Furthermore, we import into our account of Contract Theory entirely inappropriate criteria of criticism. For we may be tempted to criticise as 'incomplete' works that could never have been intended to be 'complete' according to our preconceived notion of what the Contract Theory was really about. Similarly, we may be tempted to exaggerate the historical importance of certain contractarian works which seem the more 'complete' and to underestimate the importance of supposedly 'incomplete' works. For example, in terms of the literature I have reviewed it would seem in part for this reason that the importance of Locke's Two Treatises has been exaggerated whilst the writings of Atwood, Ferguson, Tyrrell and Sidney have been neglected. In short, if we adopt the kind of approach to the history of contractarianism characteristic of Gough's The Social Contract then we are certain to misunderstand the meaning of appeals to 'contract' to both writers and audiences at any particular time.⁷

Some of the differences between the various kinds of contractualism that I have depicted have not, of course,

entirely escaped the notice of historians of late seventeenth century political thought. Gough himself pointed to differences between Locke's Two Treatises and the majority of Whig pro-Revolutionary tracts. But these he interpreted in terms of his 'mechanistic' division of the Social Contract Theory into two parts - a contract of government and a contract of society.⁸ Sir Leslie Stephen, however, came much closer to the point when he spoke of two different 'schools' of contractarian thinkers - social contract/natural law theorists and writers of "a different school" who believed the "compact" to have been an historical reality which "might vary indefinitely according to circumstances, and be the foundation as well of a democracy as of a despotism." This second type of contractualism, he asserted, "was used ... not to preserve the absolute character of certain laws, but to justify the most purely empirical methods."⁹ And Professor Pocock has noted that around 1688 the 'common law view of the Ancient Constitution' did in some respects turn into a 'conservative and legalistic version' of Contract Theory.¹⁰ But none of these authors pursued their suggestions much further.

Although it has been my point to insist on the differences between the various kinds of contractualism, I have attempted to show that they did share certain features in common. In particular, I have argued that the coherence and persuasiveness of each depended upon the widespread acceptance of 'rationalist constructivism'.

But even in the late seventeenth century (the 'heyday' of contractarian thought¹¹) some of the central notions of 'rationalist constructivism' as well as notions more immediately related to the three types of contractarian argument were coming under attack. In 1705 Mandeville's The Grumbling Hive was published. Although the potentialities of the work were not realized until well into the eighteenth century, still Mandeville's argument implicitly attacked 'rationalist constructivism' by denying that social and political institutions were solely the product of human design. Human institutions, it appeared, were the product of human action but not of human design. In making this claim, Professor Hayek has argued, Mandeville "made Hume possible"¹² In terms of political explanation there is evidence, too, of attention being directed away from the search for rational 'origins' that was characteristic of 'constructivist rationalism'. Sir William Petty's Political Arithmetick, published in 1691, exemplifies one of the directions in which a new kind of explanation of political phenomena was sought. Petty himself declared that his "Method" was "not yet very usual":

for instead of using only comparative and superlative Words, and intellectual Arguments, I have taken the course (as a Specimen of the Political Arithmetick I have long aimed at) to express my self in Terms of Number, Weight or Measure; to use only Arguments of Sense, and to consider only such Causes, as have visible Foundations in Nature. 13

In his A Discourse Of the Contests and Dissensions Between the Nobles and the Commons in Athens and Rome (1701),

Jonathan Swift seems to have been infected by a similar kind of spirit as Petty when he declared that his task was the new one of presenting a "pathology of politicks".¹⁴ His concern, that is to say, was with the relations of power within states and the causes of strength and weakness rather than any search after 'origins'. But Swift did not engage in the 'weighing and measuring' characteristic of Petty's work. Both Petty and Swift do, however, indicate the rise of a new focus of attention in political enquiry: a focus of attention concerned not with 'origins' but with the relations of power, indeed, the 'balancing of powers' within states.¹⁵

Of the three types of contractualist argument, it was Constitutional Contractarianism that came under the most severe and sustained attack as the period I have considered advanced. The Marquess of Halifax, for example, in his unpublished Political Thoughts and Reflections¹⁶ savagely and wittily criticised the notion of "Fundamentals". Three of his remarks may serve to indicate how at least one of the Constitutional Contractarians' audience viewed their use of this central idea:

Every Party, when they find a maxim for their turn, they presently call it a Fundamental. They think they nail it with a peg of iron, whereas in truth they only tie it with a wisp of straw.

The word soundeth so well that the impropriety of it hath been the less observed. But as weighty as the word appeareth, no feather hath been more blown about in the world than this word Fundamental.

.....

Fundamental is a word used by the laity, as the word sacred is by the clergy, to fix everything to themselves they have a mind to keep, that nobody else may touch it. 17

Daniel Defoe, from within the ranks of the contractarians, attacked the Constitutional Contractarian appeal to the 'intentions of their ancestors' and the supposedly 'magnificent' Saxon Constitution. In The True-Born Englishman (1700) he insisted:

Thus from a Mixture of all Kinds began,
That Het'rogeneous Thing, An Englishman:
In eager Rapes and furious Lust begot
Between a painted Briton and a Scot;
Whose gendering offspring quickly learnt to bow
And yoke their heifers to the Roman plough;
From whence a Mongrel half-bred Race there came,
With neither name nor Nation, speech or Fame.
In whose hot veins new Mixtures quickly ran,
Infused between a Saxon and a Dane,
While their rank Daughters, to their Parents just,
Received all Nations with promiscuous lust.
This nauseous Brood, directly did contain
The well extracted Blood of Englishmen.

....
Then let us boast of Ancestors no more,
Or Deeds of Heroes done in days of Yore,
In latent Records of the Ages past,
Behind the Rear of Time, in long Oblivion plac'd.

....
What is't to us, what Ancestors we had?
If Godd, what better? or what worse, if Bad?

And in a similar vein to Defoe, Humphry Hody criticised the whole debate about the Norman Conquest as pointless since whatever had taken place some seven centuries earlier could make no significant different to the present constitution.¹⁸

Many of the major elements in late seventeenth century contractualist thought, then, were under scrutiny and attack from various quarters. Appeals to 'contract' eventually lost their purchase in political argument. But the story of how they did so is long and complicated. The ideas of

'contract' that I have examined all changed their meaning as the eighteenth century proceeded. But any account of those changes must begin with the recognition of how complex the understandings of 'contract' were in the age of the 1688 Revolution.

APPENDIX A

THE IDEA OF 'CONQUEST' IN THE CONSTITUTIONAL
CONTROVERSIES OVER THE 1688 REVOLUTION

James II himself was partly responsible for introducing the notion of conquest into the debates over the Revolution. In a Declaration of 28 September 1688, he announced that the Dutch were planning "an absolute Conquest of these our Kingdoms."¹ To many observers also, the arrival of a Dutch fleet and army, the skirmishes in the West Country, the eventual armed escorts for James and the replacement of English troops in the City by Dutchmen might fairly reasonably have appeared as a conquest. The famous 'Invitation', the several 'Associations' of English noblemen in support of William, and the Prince's own declaration of purpose (as limited to ensuring the election of a free Parliament), need not necessarily have modified this view. The form of the conquest might have altered, but it could still be seen as a conquest nonetheless.

The events of the Revolution, then, gave some credence to the belief that England had been conquered by William. But one of the strangest features of appeals to conquest in the Revolutionary debates was that they appeared most prominently in defences of the rightfulness of 1688. Conquest arguments, that is to say, were not so much arguments from might, as from right. Blount's King William and Queen Mary Conquerors (1693) illustrates the point.

Blount divided his defence of the Revolution into four parts. In the first he asserted that William and Mary had just grounds for war with James because he had both attempted to subvert the fundamental frame of the English government, "which the next Heirs are supposed under obligations of preserving", and because he had, by a trick, imposed "an Heir to the Crown upon their Majesties, and these three Kingdoms."² In the second part he attempted to prove that James had been conquered, but that his conquerors had gained "no Right ... over the Laws, or the Peoples Liberties."³ This he claimed followed because only James and those who had actively fought against William had in fact been conquered. The third part argued that conquest in a just war gave William and Mary a lawful title to their thrones, because, by provoking a war and loosing it, James was no longer able to "answer the Ends of Government" - thus his former subjects were left with "a rightful Liberty of transferring ... Allegiance to the Conqueror" who was now the only one in a position to 'answer' those ends - and any attempt to restore James would expose the nation to the ruin of another war.⁴ And in the final part, Blount listed a number of conclusions which he felt his arguments 'proved' - conclusions which certainly would have been supported by most defenders of the Revolution. Viewing the Revolution as a conquest in a just war, proved, so he claimed, first, that William and Mary had acted with "Justice and Honour"; second, that their subjects could

swear allegiance to them as "Princes de jure"; third, that non-juring was a "very great Sin"; fourth, that James II no longer had any claim to the throne and that if he were to attempt to regain his crown he should be treated as an invader; fifth, that the legitimacy or illegitimacy of the Prince of Wales was no longer of any interest since he had lost whatever rights he might have had along with his father's fall; and finally, that the Church of England had not been disloyal in transferring allegiance to William and Mary.⁵

The attraction of this kind of argument was that it effected some sort of reconciliation between beliefs in passive obedience, non-resistance and the sacredness of oaths and beliefs in the rightfulness of the Revolution. It could do this because in an age still deeply religious and indeed superstitious a conquest could pass as the determination of a benevolent Providence. Since a regime thus established must be presumed rightful before God, man must acknowledge its rightfulness and swear obedience to it. This sort of argument was quite common in the Revolutionary debates and, as Burnet reported at the time, it "brought off the greatest number of those who came in honestly to the new government."⁶

But the idea of conquest was peculiarly ambiguous in the late seventeenth century. This ambiguity explains why 'conquest' was so soon rejected by Parliament as an adequate justification of the Revolution. During the

constitutional controversies of the early 1680s 'conquest' had become practically the monopoly of the champions of royal as against parliamentary power.⁷ To talk of a conquest invited associations with the debates over the Norman Conquest and Tory attacks on parliamentary rights as simply the concessions of conquering kings. Jeremy Collier emphasised this association when he attacked the Revolution in general, and one of Gilbert Burnet's defences of it in particular, on the grounds that the "Kings of England claim their Authority by Conquest and Succession" and hence the liberties of the citizens were "but Acts of Royal favour, and Condescensions of Sovereignty."⁸ And in the early 1680s William Atwood had summed up a principle position of the assertors of parliamentary rights against the king in these words: "Admit a Conquest [in 1066], and the Inheritance which every one claims in the Laws will be maintainable only as a naked Right".⁹ In 1688, too, a conquest would destroy the old laws and require a new defence of the liberties which Englishmen had sought to secure by resisting James. Those liberties might appear as simply the concessions of the new conqueror, the Prince of Orange, to be resumed at his will and pleasure in exactly the same way as Royalist constitutional historians had claimed the king could do in the pre-1688 constitution which they held had been established by the Norman Conquest.¹⁰

Given these associations of 'conquest' with absolutism, it is hardly surprising to find appeals to 'conquest' in

arguments totally opposed to one another. The author of The Dear Bargain (1690) pleaded for the restoration of James II because William's government was illegitimate and based upon self-destructive contractarian principles, it was raised "by parricide and usurpation, entered into by violation of his [William's] own declaration, supported by the overthrow of all our laws sacred and civil, and the perjury of the nation."¹¹

Jeremy Collier argued to a similar point and insisted that James II remained de jure king as lawful successor to William the Conqueror.¹²

Edmund Bohun, however, asserted the legality of William's regime on the grounds of a just conquest in a just war.¹³

And Gilbert Burnet amplified this point by indicating, in a similar way to Blount's, what the grounds of the just war were - i.e. that "by all the laws of the world, even private as well as public, he that has in him the reversion of any estate, has the right to hinder the possessor, if he goes about to destroy that, which is to come to him after the possessor's death."¹⁴

The author of A Letter to a Bishop concerning the present Settlement (n.p., n.d.)

insisted that at the Revolution "the King alone was conquered and not the nation with him," so that (again like Blount) he could conclude that the usual consequences of a conquest such as the subject's loss of liberty and property had been avoided in this case!¹⁵

And finally, the Bishop of St. Asaph attempted to persuade the conscience-troubled non-jurors that allegiance could be sworn to

William and Mary without sin because God had expelled James and given the kingdom to the new monarchs as just conquerors in a just war.¹⁶

Arguments from 'conquest', then, certainly played a significant role in justifications of the Revolution. They proved unsatisfactory, however, because they might equally be used to attack the rightfulness of the William and Mary regime. The ambiguity of the idea stemmed in part from the association of conquest with slavery and absolutism on the one hand, and with the determination of a benevolent Providence on the other. But the ambiguity also stemmed from abstract nature of the notion of 'conquest'. The notion was simply too abstract for the specific purpose which defenders of the Revolution wished to put it. In this respect the idea of conquest portrayed the same kind of ambiguity as a host of other notions (like 'liberty', 'justice', 'rebellion', 'revolution') portray in practical political argument. They are open to almost any specific, particular interpretation.

Although appeals to 'conquest' in defence of the Revolution were shortlived, there is considerable evidence to suggest they were significant in rallying support to the new regime. This evidence, however, appears to have been overlooked by recent historians interested in the idea. J.G.A. Pocock, for example, in his study of historical and legal thought in seventeenth century England noted many authors arguing against justifications of the absolute

power of English kings based on the idea that they were descended from a conqueror, but was unable to find any of the original assertors of this view. He was thus forced to conclude that if there were any proponents of the conquest case they must only have expressed themselves in the most ephemeral and now lost literature.¹⁷ And Peter Laslett, following Pocock's evidence, pushed this argument even further. Laslett denied that an argument from conquest had any relevance at the time of the Revolution. When, in producing his critical edition of Locke's Two Treatises Laslett came across Chapter 16 of the Second Treatise the problem of conquest confronted him directly. For Locke determined to refute in that chapter the "many" who "have mistaken the force of Arms, for the consent of the People; and reckon Conquest as one of the Originals of Government." But because of the supposed absence of any writers who believed that conquest conveyed a right to govern, Laslett concluded that Locke did not have any immediate opponents to refute when he published this part of his Treatises: he was simply "writing in the tradition which dictated that the conquest argument had to be refuted."¹⁸ Having surveyed the debates about conquest from 1688-1693, however, we can see that Jeremy Collier, a leading member of the non-juring Church, argued precisely along the lines which Pocock expected but could not find, and that arguments from conquest were far from irrelevant at the time of the Revolution.

NOTES

1. Quoted by E. Bohun - *The History of the Desertion*, p. 44.
2. *Loc. cit.* p. 4.
3. *Ibid.* p. 31.
4. *Ibid.* pp. 35-6.
5. *Ibid.* pp. 53-7.
6. *Bishop Burnet's History of His Own Time*, p. 523.
7. See J.G.A. Pocock - *The Ancient Constitution and the Feudal Law*, esp. Ch. 8. See also Ch. III above.
8. *Vindiciae Juris Regii*, pp. 13-14.
9. *Lord Hollis His Remains*, p. 293. See above Ch. IV.
10. See above Ch. III.
11. *Loc. cit.* p. 377.
12. *Collier - op. cit. passim.*
13. *The Doctrine of Non-resistance or Passive Obedience no way concern'd in the Controversies now depending*, p. 350.
14. *Burnet - op. cit.* p. 474. See also his *Pastoral Letter*, *passim.*
15. *Loc. cit.* p. 381.
16. *A Discourse of God's ways of Disposing of Kingdom's*, *passim.*
17. Cf. Pocock - *op. cit.* esp. pp. 53-4 and 148-50.
18. See P. Laslett's notes to *John Locke: Two Treatises of Government*, II. Ch. XVI, esp. pp. 431-2.

APPENDIX B

PETYT'S CONTRACTUALISM

Even in The Antient Right of the Commons of England Asserted (1680), the work which most consistently presented the Common Law view of the Ancient Constitution, Petyt can be found arguing that "the ancient Coronation Oath of our Kings ... certainly shews, that the peoples Election had been the foundation and ground of antient Laws and Customs."¹ Both this argument and the assertion that the Saxons had transplanted into England the government they had been used to in Germany,² were expanded in Petyt's manuscripts of the late 1680s. The Ancient Constitution was still presented as a Mixed Monarchy. It was of the same kind as "the Antient and General Government of All Kingdoms in this Part of the World".³ It was a "Rare Mixture":

A Kingdom of a Perfect and Happie Composition; wherein 1. The King hath his Full Prerogative, 2. The Nobles All Due Respect, 3. And the People, amongst other Blessings perfect in This, That They are Masters of their own Purses and have a strong Hand in the Makeing of their own Laws. ⁴

But now this Mixed Monarchy, although Germanic in origin, was compared with the 'excellent' Roman Government which had harmoniously combined "Majesty", "Authority", and "Incorrupted Liberty".⁵ And the link which this appeal to Roman excellence suggests with the more radical parliamentary arguments, is confirmed by Petyt's further claim that the monarch's prerogatives were "settled upon Them by Original Grants from the People."⁶

Arguments of this sort certainly modified Petyt's interpretation of the 'immemorial' Ancient Constitution. He did continue to deny that there had ever been a Norman Conquest but now he emphasised the contractualist argument for the legal continuity between the Saxon and Norman Constitutions. William I, he insisted, "had taken the Sovereignty upon Compact with the English and that solemnly ratified and confirmed by his sacred Coronation oath."⁷ Yet despite all these concessions to contractarian argument (arguments that were increasingly used to justify the legal sovereignty of Parliament), Petyt still insisted that the English Constitution was a Mixed Monarchy and that he was writing to defend "the Immemorial Freedom and Liberties" of the various constitutional partners.⁸ He never wrote about 'the original English contract' and he never made use of the most important single source of historical evidence for Constitutional Contractarianism: Andrew Horn's The Mirror of Justices. Peter Allix, William Atwood, James Tyrrell and Sir Robert Atkyns all made use of one important passage from this work.⁹ And there is evidence too that John Locke believed The Mirror of Justices important for an understanding of the Ancient Constitution of England.¹⁰ But Petyt was perhaps too good an historian to have accepted the validity of either The Mirror as an authentic account of Saxon government or of an original contract as the historically provable origin of the English Constitution.

NOTES

1. Loc. cit. pp. 59-60.
2. Ibid. Preface p. 6.
3. Petyt IT. MS. 512 'U' (fol. 253).
4. Ibid. (fol. 284).
5. Ibid.
6. Ibid. (fol. 66).
7. Petyt IT. MS. 512 'H' (fol. 12).
8. Petyt IT. MS. 512 'U' (fol. 341). In this case Petyt was defending the House of Lords.
9. See above Ch. III.
10. Locke quotes John Sadler - The Rights of the Kingdom, and Customs of our Ancestors (1649) and recommends the work to the prospective student of English politics (see Ch. VII above). Sadler's argument relies heavily on The Mirror of Justices.

APPENDIX C

'CONTRACTS' AND 'REASON' IN LATE SEVENTEENTH CENTURY
HISTORICAL THOUGHT.

During the late seventeenth century England was certainly not alone in having an original contract written into its constitutional history. Indeed, a group of historical writers that included James Tyrrell, Bernard Conner, John Savage, Peter Allix, Robert Molesworth and Gilbert Burnet, believed that most of the European kingdoms could be shown to have either originated by contract or to have present constitutions which embodied a contract. These writers accepted that Germany was "the common Parent"¹ of the European states. This meant that their first constitutions followed the Gothic model, or, as Peter Allix asserted:

that all those Kingdoms [of Western Europe] never in the least supposed that their King had an Absolute Power over them. And ... that almost all those States have always maintained, That the Power of their Sovereigns was so limited,

1. That they could make no Laws without the States-General of the Kingdom.
2. That they could not levy any Money on their Subjects without their Consents.
3. That they could not break the Laws according to their Will and Pleasure.
4. That in case of their violating the Fundamental Laws of the State, they were liable to be deprived of a Power which they abused.
5. That the States were free to chuse such a Form of Government, and such a Person for to govern them, as they thought most expedient for them. 2

These were precisely the same constitutional provisions as those Atwood wished to prove were part of English constitutional law. But Allix was concerned to show that

they were not only the 'fundamentals of English law' but also of "Poland, France, Scotland, and England".³ And in a number of studies of Germany,⁴ Holland,⁵ Denmark,⁶ and Poland,⁷ either the ancient or the contemporary constitutions of those countries were represented as embodying a contract. In some of these studies the Coronation Oath was emphasised as the mark of such a contract⁸ in exactly the same way as many writers about England were insisting.

These studies did not go unchallenged particularly where, as in accounts of England, their relation to practical political argument was clear. But the idea of History which lent credence to them was much more generally accepted. Despite the prevalence of Antiquarian scholarship, History was not valued for its own sake. John Locke appears to have expressed a common view when he wrote:

I do not deny but history is very useful and very instructive of human life; but if it be studied only for the reputation of being an historian, it is a very empty thing, and he that can tell all the particularities of Herodotus and Plutarch, Curtius and Livy, without making other use of them may be an ignorant man with a good memory, and with all this hath only filled his head with Christmas tales. 9

And even such a devoted Antiquary as Thomas Hearne felt moved to defend the practical utility of historical study. His Ductor Historicus (1698) was written against Norris's Reflections Upon the Conduct of Human Life with relation to Learning, which had argued that only the study of Religion and Morals was necessary for the proper conduct of life. Hearne insisted that History was just as necessary as these

and produced a list of the benefits that studying history brought. At times this list becomes incredible. History, he claimed, informs us of past happenings that we would otherwise be ignorant of; it was "the most excellent and most entertaining Diversion that a Man could possibly have"; it provided an invaluable guide to those "design'd for great Employs" because it presented experience to the inexperienced and bestowed greatness on the good and ignominy on the bad; it also, amazingly, "has those Charms, that it has recovered its Readers from the most dangerous Sicknesse, nay even when the Art of Medicine has been at a loss for a Remedy. Examples of which we have in two Kings, of Spain and Sicily, Alphonsus and Ferdinand, both whose Maladies were so charm'd by reading Livy and Curtius, that they were restor'd to their Health when they had been given over by all their Physicians"; and finally, History was "of that known Benefit in discovering the Truth of the Christian Religion, that without the Assistance of it and Philosophy, we could never be able to oppose Atheists and Pirrhenians."¹⁰

Hearne certainly appears exceptional in attributing the power of healing to History, but his other characteristics were widely accepted. This was especially true of the idea that history was a study of the utmost importance as a guide to right conduct in public and private affairs.¹¹

It was generally regarded as the duty of the historian to interrupt his narrative and point out the moral of the tale. Thus, for example, Hearne insists:

Politick Reflections are to be always practis'd,
for what good will reading do a Man if he make
no use of it? 12

Histories of particular countries were written as illustrations of a general moral. Robert Molesworth, for example, wrote his Account of Denmark (1694) to show that:

Want of Liberty is a Disease in any Society or Body Politick, like want of Health in a particular Person; and as the best way to understand the nature of any Distemper aright, is to consider it in several Patients, since the same Disease may proceed from different causes, so the disorders in Society are best perceived by observing the Nature and Effects of them in our several Neighbours. 13

This prescription for a sort of Comparative Politics has an interestingly modern ring to it. Yet it appears to have been simply a more thoughtful version of the popular understanding of History as expressed by the author of The History of Man (1704):

"This Treatise" he wrote, "is chiefly design'd to encrease Knowledge, promote Virtue, discover the Odiousness of Vice, and furnish Topicks for Innocent and Ingenious Conversation. And if that Maxim be true, That Men are more influenced by Examples, than Precepts, here are enough to better Men's Lives, by Imitating the Examples of the Just, and to deter others from the Commission of Gross Enormities, by abhorring the Practices of the Wicked. By these Examples Princes may know how to Govern, and Subjects to Obey." 14

Although History was thus viewed as essentially the recounting of moral stories, this did not imply that the historian had a completely free rein with his evidence. The historians of the late seventeenth century imposed two limitations on the cavalier use of historical evidence. One was that the historian should be impartial in his account, and the other was that he should not accept

uncritically previous histories particularly of the earliest ages of the world. Thomas Hearne, once again, may serve to illustrate the first of these. "Partiality", he declared, "how well soever managed, will ever be prejudicial to History, and therefore that Rock ought principally to be avoided".¹⁵ Sir William Temple's strictures against previous accounts of early English history are well known. He set out to attack:

Those Tales we have of what passed ... before [Caesar's] time, of Brute and his Trojans, of many Adventures and Successions, [since these] are covered with the Rust of Time, or involved in the Vanity of Fables, or pretended Traditions; which seem to all Men obscure or uncertain, but to me, forged at Pleasure, by the Wit or Folly of their first Authors, and not to be regarded. 16

And this scepticism was reflected in the works of many other writers of the time. Bernard Conner, for example, in his History of Poland (1698) noted that:

The first Writers of the Polish History, like most other Historians, were credulous and superstitious, and have fill'd their Writings with a great many Romantic and almost fabulous Stories, which I have omitted. 17

But these limitations in no way interfered with the historian's principal task of presenting a moral guide. Gilbert Burnet, for example, in his The History of the Rights of Princes In the disposing of Ecclesiastical Benefices and Church-Lands (1682), declared:

I have endeavoured to write as becomes an Historian that is of neither Party, and approves and condemns both sides, as he sees cause for it, and not for any partial affection to either of the Courts of Rome, or of France; since I can hardly measure for which of these I am least partial in my

inclinations or wishes. I hope I shall offer to the Reader some useful parts of Ecclesiastical Learning, that may not only entertain him as they are Historical Relations, but give him some Lights to judg of several other things. 18

Since the task of History was thus viewed as the presentation and illustration of moral principles, it is easy to see why Reason and History should have been inextricably intermingled. The principles of morality, whether derived from Revelation or Natural Law, were established as principles by Reason. These principles were the primary element in good historical writing, as Locke implied when he recommended history only "to one who hath well settled in his mind the principles of morality, and knows how to make a judgement on the actions of men".¹⁹ In this way Reason became essential to historical reflection, and this, coupled with the premisses that we have seen as basic to Atwood's history,²⁰ established Reason as the essential criterion of historical truth.

NOTES

1. John Savago - The Antient and Present State of the Empire of Germany, p. 1.
2. Reflections Upon the Opinions of Some Modern Divines, pp. 61-2.
3. Ibid. p. 62.
4. E.g. Anon. - 'The Present State of Germany; and J. Savage - op. cit.
5. E.g. G. Burnet - 'Parliamentum Pacificum', in A Collection of Eighteen Papers etc., pp. 76-7.
6. E.g. R. Molesworth - An Account of Denmark, etc.

7. E.g. B. Conner (and J. Savage) - The History of Poland, etc. 2 Vols.
8. E.g. Anon. - The Present State of Germany, p. 83; and P. Allix - An Examination of the Scruples etc., p. 303.
9. J. Locke - The Educational Writings (ed. J. Axtell), pp. 409-410.
10. Loc. cit. pp. 97-102.
11. Interesting aspects of the Augustan Idea of History are examined in: H. Davis - 'The Augustan Conception of History', in Reason and the Imagination: Studies in the History of Ideas 1500-1800, ed. H. Davis; R.N. Stromberg - 'History in the Eighteenth Century', in The Journal of the History of Ideas (April 1951); and S. Krieger - 'History and Law in the Seventeenth Century: Samuel Pufendorf', in The Journal of the History of Ideas (April 1960).
12. T. Hearne - op. cit. p. 110.
13. Loc. cit. Preface.
14. Loc. cit. Preface.
15. T. Hearne - op. cit. p. 111.
16. An Introduction to the History of England, p. 19.
17. Loc. cit. Preface p. viii.
18. Loc. cit. Preface p. 105.
19. J. Locke - op. cit. p. 422.
20. See above pp. 133 ff.

APPENDIX D

FERGUSON: "THE PLOTTER"

The political activities of Ferguson, from his association with Shaftesbury in 1679 to his ardent Jacobitism during the reign of Queen Anne, were sufficiently full of intrigue and conspiracy to justify the epithet that has become attached to his name. His career seems to lack consistent political objectives, and attempts to supply these have done injustice to the complexity of his character and motives. J.R. Jones has recently argued that Ferguson "worked against every administration because he believed that all ministers were and must, under the existing system, be always oppressive, corrupt, and parasitic."¹ But since Ferguson never justified himself on these grounds, and since he plotted for so many different ends, Jones's attributions of consistent moral principles behind Ferguson's shifting political persuasions clearly miss the point.

Gilbert Burnet, Ferguson's contemporary, and a fellow Scotsman, imputed a consistency to his career on psychological grounds. Thus Ferguson appears as simply "a hot and bold man, whose spirit was naturally turned to plotting" and who was always "setting on some to mischief".² Burnet, however, like Jones after him, undervalued Ferguson's own explanations of his conduct.

The many pamphlets that issued from Ferguson's pen between 1680 and 1706 indicate two overriding concerns.

The first was the protection of the Protestant religion from Catholicism. The second was a concern with his own well-being. Each of the intrigues in which he was engaged were justified especially in terms of the needs of religion. And each of the explanations of his own conduct after the intrigue had failed (which in fact they all did) were attempts to maintain his life.

He was a party to all the major conspiracies against King and government during the turbulent years of the 1680s and '90s. He plotted with the more radical Exclusionists against James, Duke of York and Charles II, and a Royal Declaration in 1683 described him as "the common agitator between all parties in the several conspiracies".³ West, a fellow conspirator in the Rye House Plot, accused him of being "by far the most guilty man in every part of the conspiracy".⁴ Ferguson himself escaped to Holland, where he spent most of the 1680s.

In 1683 a "reward of 500 l. each for apprehension of James, Duke of Monmouth, Ford, Lord Gray, Sir Thomas Armstrong, and Robert Ferguson, who conspired against the King and the Duke of York" was offered by the Crown.⁵ In 1685, Ferguson sailed with Monmouth in the desperate attempt to rid England of James II that ended in total failure. In an effort to save his own life, Monmouth accused Ferguson of having pressured him into undertaking the invasion,⁶ but Ferguson escaped again to Holland with another warrant being issued for his arrest for treason. He returned to

England once more in the fleet of William of Orange - the only successful attempt to rid England of its King in the late seventeenth century, and the only attempt in which Ferguson appears to have played no significant part (at least in terms of planning) although he did write one of the most popular justifications of it.

From 1679 to 1688, Ferguson's career in politics does have a strongly consistent element apart from any psychological need to be constantly engaged in treasonable activities. He considered the dominant political issue to be the conflict in the state between Catholics and Protestants. This conflict could never end in compromise because Catholicism implied the need to convert (by force if necessary) all people to the Catholic religion, and all states to the service of the Papacy. He was far from alone in this diagnosis of the crucial contemporary political issue, and to himself and many fellow-travellers it seemed that potential force must be met by force. The Popish Plot was a straightforward attempt by Catholics to possess the State, and Exclusion was necessary to prevent a Catholic prince ascending the throne. When Exclusion failed, attempted assassination of the Catholic James and the increasingly pro-Catholic Charles II was necessary. When the Rye House Plot failed, Monmouth, the popular, Protestant, bastard son of Charles II appeared to offer the best "replacement" for a Catholic and therefore "hostile" King. After Monmouth's failure, the Protestants William and Mary appeared to offer a last

chance of rescuing England from the clutches of the Pope. At no stage in his career of treason did Ferguson consider altering the monarchical nature of the Constitution;⁷ his career to 1688 was consistent in that he was prepared to support and fight for any prospective or actual monarch, provided they defended and upheld the Protestant religion.

Yet only some eighteen months after William's successful landing in England, Ferguson was again suspected of plotting against the Crown⁸ - this time in the interests of James II. A warrant was issued for his arrest in June 1690, and his seized papers revealed that he had been in "constant correspondence" with some of the "Jacobite Club".⁹ According to Carmarthen, Wildman and Ferguson were so deeply involved in Jacobite conspiracies that they could "give all if they would of all the transactions of the Club, who appear to be engaged wth the Late King ..."¹⁰ Ferguson, however, once more escaped arrest, and his name appeared again in connection with Lord Atholl's plot against William III in 1696. Another warrant was issued for his arrest, yet again he escaped. Indeed, the only success that Ferguson's "plotting" career reveals is the ability to avoid punishment - an ability that allowed him to run the full length of his life, and to die simply of old age.

The unusual volte-face in Ferguson's career during 1690, from support of the successful William and Mary to the defence of the claims of James II, has caused most difficulty to the few historians who have remarked upon

the ideas of this interesting and influential political figure.¹¹ J.R. Jones's attempt to understand it in terms of Ferguson's high moral scruples is unfortunately based upon no evidence and indeed conflicts with Ferguson's explanations of his own conduct. G. Burnet's account, accepting the contradictions and accounting for them in terms of Ferguson's psychological defects, whilst it may be partially justified,¹² does not take note of the evidence Ferguson himself provides of the consistency of his stands. To Ferguson, the battle between Protestantism and Catholicism for a dominant voice in British affairs of state neither ended with James II's departure nor even produced significant gains for the Protestant cause.¹³ He admitted making two serious mistakes of judgement, neither of which involved his general view of the main issue in British politics, or his willingness to go to any lengths to see that Protestantism was secure. His first mistake was his failure to see that Charles II and eventually James II were genuinely committed to upholding the Protestant religion, and his second was his failure to recognise that William III was really a Catholic adventurer who cared little for Britain or the Protestant religion. The result was that Britain, and especially England, had been deceived into overturning its Constitution, ousting the rightful King, putting the whole institution of monarchy in jeopardy and yet still letting in Catholicism unmolested.¹⁴

Concern for the Protestant religion, then, marks the

main explicit motive behind Ferguson's political career through all its twists and turns. He may well have been wrong in his analysis of the attitudes and motives of the various political figures whose causes he chose to champion; but we must take seriously the consistent concern that was his main criterion for taking sides in the controversies. James Ferguson, Robert Ferguson's only biographer, attempted to reconcile the apparently conflicting elements in his career by portraying him as the consistent defender of James II.¹⁵ Thus his participation in the plots against Charles II and James is made to appear as an attempt to thwart their designs from "the inside". James Ferguson's case, however, rests upon only one piece of evidence, and that is Ferguson's own account of his activities during the Rye House Plot, written in exile in Holland, probably as an attempt to vindicate himself should he ever be caught.¹⁶ Ferguson's account in this document is completely at odds with the evidence of all the other participants in the plots,¹⁷ and it is doubtful whether much significance can be attached to it as a faithful account of the proceedings.

NOTES

1. "The First Whigs". (Durham, 1962) p. 15.
2. G. Burnet - "History of My Own Time" (ed. O. Airy, 1897-1900) Vol. II. p. 357.
3. C.S.P.D. July - Sep. 1683. p. 197.
4. C.S.P.D. May 1684 - 5 Feb. 1685. p. 40.
5. C.S.P.D. Jan. - June 1683. p. 366.

6. State Trials (ed. Cobbett) Vol. XI.
7. See above Ch. V.
8. State Papers 44/339 p. 266.
9. Lord Carmarthen to William III, 13 June 1690
(S.P. Dom. King William's Chest 7, No. 50).
10. Lord Carmarthen to King William III, 26 June 1690
(S.P. Dom. King William's Chest 7, No. 66).
11. It is sufficient to note here that Shaftesbury considered Ferguson a most useful pamphleteer (See K.H.D. Haley - "The First Earl of Shaftesbury", Oxford, 1968, p. 717.); that his name appears as a principal conspirator in all the major treason trials of Charles II's, James II's and William III's reigns; and that William III rewarded him for his service with a minor treasury post in 1689.
12. Burnet claimed to know Ferguson. But at the time when he wrote his "History", Ferguson was opposing the 1688 Revolution, and Burnet was defending it. There appears, then, to be some ground for assuming that Burnet's account in this respect (as in many others) is not entirely impartial. In 1702 Ferguson in fact attacked Burnet for being an historian who encouraged bias in accounts of the past because Burnet felt that it was natural for an historian to take sides in the events he was recounting. (See, A Large Review of the Summary View etc. pp. 4-6).
13. For the following, see above, Section V, Ch.V. pp. 174 ff.
14. For Ferguson's clearest statement of this theory of the 1688 Revolution, see his "History of the Revolution" (1706).
15. Robert Ferguson the Plotter or The Secret of the Rye-House Conspiracy and the Story of a Strange Career. (Edinburgh, 1887.) Passim.
16. For a similar conclusion see Haley, op. cit. p. 719.
17. See Cobbett (ed.) - State Trials, Vol. X.

NOTESCHAPTER I

1. For a valuable discussion of the issues involved in the historical interpretation of texts see, Q. Skinner - 'Meaning and Understanding in the History of Ideas', in History and Theory, VIII (Nov. 1969).
2. Cf. G.S. Holmes and W.A. Speck - The Divided Society: Parties and Politics in England 1694-1716, pp. 1-3; and J.H. Plumb - The Growth of Political Stability in England 1675-1725, pp. 45-74.
3. The Social Contract (2nd Edition 1957), *passim*.
4. *Ibid.* p. 126.
5. *Ibid.* p. 145.
6. J.L. Duncan - 'Juristic Theories of the British Revolution of 1688', in The Juridical Review, XLIV,1 (1932), p. 36.
7. O.W. Furley - 'The Whig Exclusionists: Pamphlet Literature in the Exclusion Campaign, 1679-81', in The Cambridge Historical Journal, XIII,1 (1957), p. 29.
8. Journal of the House of Lords (1688-9), p. 110.
9. J.W. Gough - John Locke's Political Philosophy: Eight Studies, p. 121.
10. E.g. respectively: R. Ferguson - The Late Proceedings and Votes of the Parliament of Scotland (Glasgow 1689), p. 24; S. Johnson - Remarks Upon Dr. Sherlock's Book, Intituled The Case of Resistance etc. (London 1689), Preface p. vi; T.H. - Political Aphorisms: Etc. (London 1690), p. 29; P. Allix - An Examination of the Scruples of those who refuse to take the Oath of Allegiance (1689), in State Tracts I, p. 302; Sir R. Atkyns reported speech to the Convention Parliament in The Historical Manuscripts Commission, 12th Report, Appendix Part VI, 'The MSS of the House of Lords 1689-90, p. 15.
11. E.g. respectively: R. Ferguson - A Brief Justification of the Prince of Orange's Descent into England (London 1689), p. 25; S. Johnson - Remarks Upon Dr. Sherlock's Book, Intituled The Case of Resistance etc. (London 1689), Preface p. x; G. Burnet - An Enquiry into the Measures of Submission to the Supreme Authority (1689), in Harleian Miscellany, Vol. 9 (London 1810), p. 204; J. Savage - The Ancient and Present State of Germany (London 1702), p. 36; W. Atwood - The Fundamental Constitution of the English Government (London 1690), pp. 9-10.

12. Sir Ernest Barker states: "We must therefore hold, if we are thinking in terms of contract, that besides the contract of government, there is also a contract of society." *Social Contract: Locke, Hume, Rousseau. World Classics Edition, (O.U.P. 1947), p. xiii.*
13. E.g. respectively: S. Johnson - *Remarks Upon Dr. Sherlock's Book, Intituled The Case of Resistence etc. (London 1689), Preface p. vi*; R. Ferguson - *Whether the Preserving the Protestant Religion was the Motive unto, or the End that was designed in, the Late Revolution? in Somers Tracts, Vol. 3, (London 1751), p. 423*; W. Atwood - *The Superiority and Direct Dominion of ... England over ... Scotland, Reasserted. (London 1705), p. 9*; *The Observator, Num. 86, Feb. 17 1702/3*; C. Lawton - *The Jacobite Principles Vindicated, etc. (1691?), in Somers Tracts, Vol. X (Scott ed.), p. 526*; T.H. - *Political Aphorisms: Etc. (London 1690), p. 16*; W. Atwood - *The Fundamental Constitution of the English Government, p. 84*; Anon. - *An Entire Vindication of Dr. Sherlock, etc. (London 1691), p. 14*; Anon. - *A Political Conference between Aulicus, a Courtier; Demas, a Countryman; and Civicus a Citizen: Etc. (London 1689), pp. 22-23.*
14. P. Laslett - *John Locke: Two Treatises of Government. (Mentor Books 1965), Introduction p. 80.* For the immediate reception of Hobbes, see S.I. Mintz - *The Hunting of Leviathan (C.U.P. 1969)*, and J. Bowle - *Hobbes and His Critics (Jonathan Cape: London 1951).*
15. See Ch. 5 below.
16. From considerations like these Q. Skinner has recently argued that an idea is an improper focus of attention for historians of thought. See, 'Meaning and Understanding in the History of Ideas', in *History and Theory, VIII (Nov. 1969), esp. pp. 35-39.*

CHAPTER II

1. Cf. H. Butterfield - *The Whig Interpretation of History, passim.*
2. G.M. Trevelyan - *The English Revolution 1688-9, passim.*
3. D. Bahlman - *The Moral Revolution of 1688, passim.*
4. J.H. Plumb - *The Growth of Political Stability in England 1675-1725, passim.*
5. D. Abel - 'Liberty v. Authority in Stuart England', in *The Contemporary Review (Jan. 1944), passim.*

6. T.B. Macaulay - The History of England from the Accession of James II. Vol. II, p. 210.
7. "'The Violent Party": the Guildhall Revolutionaries and the Growth of Opposition to James II', in Guildhall Miscellany (April 1970), p. 121.
8. G.M. Trevelyan - op. cit., pp. 138-141.
9. E.g. L. Stephen - History of English Thought in the Eighteenth Century. Vol. 2, Ch. X, passim.; R.W. Lee - The Social Compact, passim.; H.J. Laski - Political Thought in England: From Locke to Bentham, Chs. 1 and 2.
10. W.H. Greenleaf - Order, Empiricism and Politics, pp. 14-94.
11. G.L. Cherry - 'The Legal and Philosophical Position of the Jacobites, 1688-9.' Reprinted in G.M. Straka - The Revolution of 1688: Whig Triumph or Palace Revolution?, pp. 59-67.
12. G.M. Straka - 'The Final Phase of Divine Right Theory in England', reprinted in G.M. Straka (ed.) - op. cit.
13. E.g. E. Bohun - The History of the Desertion etc., p. 38.
14. E.g. see the refutation of this standpoint in S. Johnson - An Argument Proving, That the Abrogation of King James by the People of England etc., passim.
15. E.g. W. Lloyd - A discourse of God's ways of Disposing of Kingdoms, passim. For the modification of this view, see Anon. - A Vindication of the Divines of the Church of England, etc., p. 7.; and also W. Sherlock - A Vindication of the Case of Allegiance etc., pp. 12-13. Sherlock argues that conquest can convey a right because it destroys the government and thereby forces the conquered subjects to submit to a new regime. This he claims amounts to a consent and therefore the conqueror gains a right to govern by natural law.
16. E.g. J. Collier - The Desertion Discuss'd etc., p. 111.
17. E.g. Anon. - A Letter to a Bishop concerning the present Settlement etc., p. 381.
18. E.g. G. Burnet - A Sermon Preached in the Chappel of St. James's ... the 23rd of December, 1688 etc., passim.
19. E.g. S. Johnson - Remarks Upon Dr. Sherlock's Book, Intituled, The Case of the Allegiance etc., Preface p. vi.

20. E.g. C. Lawton - *The Jacobite Principles Vindicated etc.*, passim.
21. E.g. see W. Sherlock - *A Letter to a Member of the Convention*, p. 1.
22. Ibid.
23. E.g. Anon. - *Reflections upon the present State of the Nation*, p. 203.
24. E.g. Anon. - *Some short Considerations relating to the settling of the Government etc.*, passim.
25. E.g. see W. Sherlock - *A Letter to a Member of the Convention*, p. 2.
26. E.g. Anon. - *Now is the Time etc.*, passim.
27. 'Religion, Politics and Oaths in the Glorious Revolution', in Review of Politics, X (Oct. 1948), passim.
28. E.g. see P. Hazard - *The European Mind 1680-1715*; Sir G.N. Clark - 'The Augustan Age', in F.J.C. Hearnshaw (ed.) - *The Social and Political Ideas of Some English Thinkers of the Augustan Age*; and S.L. Bethell - *The Cultural Revolution of the Seventeenth Century*.
29. *The History of Passive Obedience since the Reformation*, Preface.
30. Quoted in W.C. Costin and J.S. Watson - *The Law and Working of the Constitution*, Vol. I.
31. Sir R. Atkyns - *Parliamentary and Political Tracts*, p. 189.
32. W. Atwood - *The Fundamental Constitution etc.*, Preface p. xxxii.
33. Anon. - *The Case of the Oaths Stated*, pp. 342-3.
34. Anon. - *Reflections upon our late and present Proceedings in England*, p. 179.
35. Cf. C.F. Mullet - 'A Case of Allegiance: William Sherlock and the Revolution of 1688', in Huntington Library Quarterly, X (1946-7), passim.
36. *The Case of Allegiance due to Sovereign Powers etc.*, Preface.
37. Cf. G. Every - *The High Church Party 1688-1718*, p. 64.
38. Loc. cit. pp. 1-2.

39. Ibid. p. 3.
40. Ibid. p. 5.
41. Ibid. p. 14.
42. Dr. Sherlock's Case of Allegiance Considered. Etc., p.1.
43. Ibid. p. 74.
44. E.g. T. Downes - An Examination of the Arguments ...
In Dr. Sherlock's Case of Allegiance etc., pp. 14-15;
Cf also, Anon. - Historio-Theologicus (London 1715),
Preface p. 3. Here Hobbes appears as the intellectual
forbear of all those who changed allegiance in 1689.
45. Dr. Sherlock's Two Kings etc., p. 4.
46. The Second Part of Dr. Sherlock's Two Kings etc., p. 3.
47. The Title of an Usurper etc., p. 32.
48. The Revolution of 1688, p. 87.
49. This specific phrase is taken from Sir G. Eyres -
Reflections Upon the Late Great Revolution, p. 1.
50. Remarks Upon Dr. Sherlock's Book, Intituled, The
Case of Allegiance etc., Preface p. iii.
51. Loc. cit. p. 34.
52. Loc. cit. p. 3
53. Anchitell Grey (ed.) - Debates of the House of
Commons. Vol. X. pp. 297-8.
54. Cobbett's Parliamentary History of England. Vol. V.
p. 756.
55. Anchitell Grey (ed.) - op. cit. p. 297.
56. See Appendix A.
57. See Ch. VII below for a discussion of Locke's notion
of 'consent'.
58. Loc. cit. pp. 12-13.
59. Loc. cit. p. 13.
60. Q. Skinner - 'History and Ideology in the English
Revolution', in The Historical Journal, (8, 1965),
esp. pp. 171-8. See also Ch. III below.

61. **An Enquiry into the Measures of Submission to the Supreme Authority (1689). This pamphlet ran to at least six editions within a year.**
62. **Ibid. p. 9.**
63. **Ibid. pp. 9-10.**
64. **Ibid. p. 10.**
65. **See Ch. III below.**
66. **Op. cit. p. 10.**
67. **Ibid. pp. 10-11.**
68. **Ibid. p. 10.**
69. **Dr. Sherlock's Two Kings etc., p. 4.**
70. **Ibid. p. 18.**
71. **Ibid. p. 21.**
72. **Ibid.**
73. **Remarks Upon Dr. Sherlock's Book, Intituled, The Case of Allegiance, p. 19.**
74. **Ibid. pp. 1-2.**
75. **On this argument from design, see below Chs. III, VI and VIII.**
76. **E.g. T. Wilson - God, the King and the Countrey, pp. 11 and 34.**
77. **E.g. see J. Collier's refutation of this argument in his Animadversions upon the modern Explication of 11. Hen. 7. Cap. 1: Or a King de Facto; and D. Whitby - Obedience due to the present King, passim.**
78. **E.g. Anon. - Four Questions Debated, passim; and Anon. - Their Present Majesties Government Proved to be Thoroughly Settled, p. 9.**
79. **E.g. S. Johnson - An Argument Proving, etc., Preface p. 3.; Anon. - Some short Considerations relating to the settling of the Government, passim.**
80. **See above p.8.**
81. **An Examination of the Scruples of those who refuse to take the Oath of Allegiance, p. 302.**

82. See A Collection of the Parliamentary Debates in England, from the Year M,DC,LXVIII To the present Time. Vol. II, pp. 248-9.
83. Ibid. p. 244.
84. Ibid. p. 204.
85. The Historical Manuscripts Commission, 12th Report, Appendix Part VI, The MSS of the House of Lords 1689-90, p. 15.
86. Ibid. pp. 15-16.
87. Good Advice before it be too late: etc., p. 21.
88. Sir J. Montgomery - Great Britain's just Complaint etc., p. 468; For R. Ferguson, see below Ch. V.
89. God, the King and the Countrey etc., p. 11.
90. Anon. - The Dear Bargain: etc., p. 377.
91. J. Collier - The Desertion Discuss'd etc., p. 110.
92. Vindiciae Juris Regii, pp. 42-3.
93. Ibid.
94. Cf. S. Kliger - The Goths in England, passim. See below Ch. III.
95. A Brief Justification of the Prince of Orange's Descent into England etc., pp. 5-6.
96. This term was frequently used to characterize those that opposed a right of resistance on the grounds that it was against the Church's doctrine of Passive Obedience.
97. See below Chs. VII, IX, and X.
98. Anon. - Some Remarks upon Government: etc., pp. 6-7.
99. Anon. - A Political Conference etc., pp. 22-3.
100. E.g. J. Locke - Two Treatises of Government, II. ss. 105, 110.
101. Anon. - Some Remarks upon Government: etc., p. 7.
102. Anon. - A Political Conference etc., pp. 22-3.
103. The Jacobite Principles Vindicated etc., p. 526.
104. Loc. cit. p. 370.

105. The Title of an Usurper etc., p. 57.
106. Ibid. p. 59.
107. Loc. cit. II. ss. 97-99.
108. Ibid. p. 171.
109. See Ch. VII below.
110. As most writers who have considered this subject have suggested. Cf. J.W. Gough - The Social Contract, p. 135; and Sir E. Barker - Social Contract etc., Introduction pp. xv-xvi.
111. See Ch. VII below.
112. As J.W. Gough - The Social Contract, passim.
113. For a very clear and concise outline of the status of a similar kind of enquiry, See W.H. Greenleaf - Order, Empiricism and Politics, Ch. 1.

CHAPTER III

1. The Fundamental Constitution of the English Government, p. 32.
2. Ibid. p. 84.
3. Ibid. p. 59.
4. Ibid. p. 79.
5. Ibid. p. 78.
6. This information is derived mainly from F.W. Maitland's Introduction to W.J. Whittaker (ed.) - The Mirror of Justices, Seldon Society, London (1895); and H. Butterfield - The Englishman and his History, Archon Books (1970), Reprint of the 1944 C.U.P. edition, pp. 29-30.
7. Loc. cit. p. 6.
8. See Chs. 4 and 11 respectively.
9. Parliamentary and Political Tracts, p. 61.
10. See Ch. VII below.

11. For the first two of these traditions see, J.G.A. Pocock - *The Ancient Constitution and the Feudal Law*; and S.L. Kliger - *the Goths in England*. The latter, however, should be read very warily since it contains some astonishing errors of fact (see, for example, foot-note 4 to Chapter 10 below) and it also appears to exaggerate the extent of Gothicism during the seventeenth century (see Pocock, loc. cit. pp. 56-8).
12. This appears to have been the view of James Tyrrell (see below Ch. 10 pp. 329 ff.). Cf. S. Kliger - *The Goths in England*.
13. Pocock - op. cit. pp. 57-8.
14. See below Ch. IX.
15. Cf. C. Robbins (ed.) - *Two English Republican Tracts*. Introduction, passim.
16. Cf. B. Behrens - 'The Whig Theory of the Constitution in the Reign of Charles II', in the Cambridge Historical Journal Vol. VII, No. 1 (1941).
17. R. Brady - *An Introduction to the Old English History*. London 1684. The Epistle to the Candid Reader, pp. 3-4.
18. See: *An Introduction to the Old English History*. London (1684).
19. Petyt - Inner Temple (IT) MS. 512 'M' (fol. 22). Draft copy of "The Rights of the Commons of England reasserted against Dr. Brady." Cf. also, Petyt - IT MS. 512 'U' (fol. 304).
20. Ibid.
21. C.C. Western - 'Legal Sovereignty in the Brady Controversy', The Historical Journal, XV, 3 (1972). p. 417.
22. Petyt IT. MS. 512 'M' (fol. 22).
23. Cf. C.C. Western - op. cit. pp. 417ff. Western's criticisms of Pocock are thus wide of the mark.
24. See Appendix D.
25. Indeed one contractarian writer, Thomas Hunt, argued exactly this in the early 1680s. He was however severely criticized by William Atwood for doing so (See Lord Hollis His Remains, London 1682).

26. **Ius Anglorum Ab Antiquo. Preface.**
27. **Cf. T. Hunt - Postscript p. 6.**
28. **Cf. Pocock op. cit. pp. 217-8.**
29. **Ibid. pp. 217-228.**
30. **Cf. e.g. Filmer - 'The Anarchy of a Limited or Mixed Monarchy' in Patriarcha ... and other Political Works of Sir Robert Filmer (ed. P. Laslett), passim.**
31. **Cf. F.A. Hayek - 'Kinds of Rationalism' in Studies in Philosophy, Politics and Economics. Routledge and Kegan Paul (1967) p. 85.**
32. **Ibid.**
33. **R. Brady - A True and Exact History of the Succession of the Crown of England (London 1681) pp. 1-2.**
34. **R. Brady - op. cit. p. 2. and A. Seller - The History of Passive Obedience since the Reformation (Amsterdam, 1689) Preface.**
35. **R. Brady - op. cit. p. 2.**
36. **Anon. - The Royal Apology: or, An Answer to the Rebels Plea (London 1684). See full title in the bibliography.**
37. **A. Seller - op. cit. Preface.**
38. **Anon. - The Royal Apology (London 1684). To The Reader.**
39. **E.g. A. Sidney - Discourses p. 5.**
40. **E.g. James Welwood - A Vindication of the Present Great Revolution in England (London 1689) p. 2.**
41. **E.g. Anon. - The Supremacy Debated: Or, The Authority of Parliaments (formerly owned by Romanish Clergy) the Supremest Power. In State Tracts I, p. 231.**
42. **Cf. T. Hunt - Postscript pp. 1-5.**
43. **G. Burnet - 'An Answer to a Paper Printed with Allowance, Entitled, A New Test of the Church of England's Loyalty', in A Collection of Eighteen Papers, Relating to the Affairs of Church & State, During the Reign of King James the Second. (London 1689) p. 55.**
44. **Loc. cit. p. 3. This is the first page of the tract.**

45. Bishop Burnet's History of His Own Time. (London 1823) 1880) pp. 37-8. Vol. IV.
46. The Historian Unmask'd: Etc. pp. 7-9.
47. An Apology for the New Separation: etc. (London 1691) Preface.
48. Animadversions upon the modern Explication of 11 Hen. 7 Cap. I. Or a King de Facto. (n.p. n.d.) p.1.
49. See above p.37.
50. Christianity a Doctrine of the Cross: or, Passive Obedience, under any Pretended Invasion of Legal Rights and Liberties. (London 1691) p. 80.
51. E.g. C. Leslie - The New Association of those Called, Moderate-Church-Man, with the Modern-Whigs and Fanaticks. Third edition (London 1702) p. 10.
52. E.g. Sir G. Mackenzie - A Vindication of the Government in Scotland, During the Reign of King Charles II. (London 1691) in The Works, Vol. II p. 346. Cf. also, Anon. - The Character of a Rebellion, And what England May expect from one. (London 1681) p. 4.
53. A. Seller - op. cit. Preface.
54. An Inquiry Into the Remarkable Instances of History, and Parliament Records, used by the Author of the Unreasonableness of a new Separation on Account of the Oaths; whether they are faithfully cited and applied. (n.p. 1690) p. 20.
55. See above pp. 32ff.
56. The Title of an Usurper After a Thorough Settlement Examined, Etc. (London 1690) p. 32.
57. See J.C. Corson - 'Resistance No Rebellion', in The Juridical Review (Sept. 1930) pp. 245-6. Corson claims Pollock's authority for this point.
58. Loc. cit. p. 317.
59. Remarks upon Dr. Sherlock's Book, Intituled The Case of Resistance etc. (London 1689) p. 19.
60. A Sober Enquiry into the Nature, Measure, and Principle of Moral Virtue, Etc. (London 1673) p. 77.

CHAPTER IV

1. Similarly called William - see *The Case of William Esq., etc.*, (London 1703). This is not noted in the article on Atwood in the D.N.B.
2. The D.N.B. surmises this.
3. Most notable amongst these were Robert Brady in his *An Introduction to the Old English History etc.*, (London 1684) and James Anderson *An Historical Essay etc.*, (Edinburgh 1705). For Atwood's general reply see *The Scotch Patriot Unmasked* (London 1705) pp. 4-5.
4. *The Glorious Revolution of 1688*, p. 145.
5. *Fundamental Law in English Constitutional History*, p. 163.
6. *Order, Empiricism and Politics*, pp. 142, 187, 194, 280.
7. *Two English Republican Tracts*, p. 18.
8. *John Locke: Two Treatises of Government*, p. 90 f.n. 32.
9. *The Pillars of Parliament Struck at by the Hands of A Cambridge Doctor, OR a Short View of some of his Erroneous Positions, Destructive to the Ancient Laws and Government of England*, (London 1681) p. 9. In Petyt II. MS. 538. Vol. 16 (fol. 324ff).
10. *Argumentum Anti-Normannicum*, p. Lxix.
11. *Plato Redivivus*, in C. Robbins (ed.) - *Two English Republican Tracts*, p. 120.
12. In 1681 even James Tyrrell was writing to Petyt as his superior in historical learning. Petyt II. MS. 538. Vol. 17 (fol. 302). Letter dated Oxford Jan. 12, 1681.
13. *Jani Anglorum Facies Nova. Etc.* (London 1680); *Jus Anglorum ab Antiquo. Etc.* (London 1681); *Lord Hollis His Remains* (ed.); (London 1682); *Reflections Upon Antidotum Britannicum, etc.* (London 1682).
14. *Loc. cit.* p. 4.
15. *Lord Hollis His Remains*, p. 230.
16. *Jus Anglorum ab Antiquo*, p. 117.

17. Ibid. Preface.
18. Ibid.
19. Ibid.
20. Lord Hollis His Remains, p. 266.
21. E.g. "I know that it has been whisper'd about, as if I would have this Government to be new modelled, which I utterly abhor ..." Jus Anglorum ab Antiquo, Preface.
22. Lord Hollis His Remains, p. 271.
23. Jus Anglorum ab Antiquo, Additions etc., p. 37.
24. The Fundamental Constitution, etc. p. 2.
25. The legitimacy of James II's son was fiercely contested in 1688.
26. The Fundamental Constitution, p. 3.
27. Lord Hollis His Remains, p. 293.
28. The History, and Reasons, of the Dependency of Ireland upon the Imperial Crown of the Kingdom of England. (London 1698), p. 211. This book was directed against Molyneux' defence of Irish independence.
29. The Superiority and Direct Dominion of ... England over ... Scotland etc. (London 1704), p. 392.
30. Atwood, of course, was a lawyer.
31. The Fundamental Constitution, pp. 2-3.
32. See below, Part IV.
33. The Superiority and Direct Dominion of ... England over ... Scotland etc., p. 487.
34. Ibid. p. 391.
35. The Fundamental Constitution, Preface p. xxii.
36. Ibid. Preface p. xxi.
37. E.g. see above pp. 35 ff.
38. Lord Hollis His Remains, p. 271.

39. **The Fundamental Constitution, p. 4.**
40. **See above p. 96.**
41. **See below pp. 133 ff.**
42. **The Fundamental Constitution, pp. 9-10.**
43. **See above pp. 81-4.**
44. **The Superiority and Direct Dominion of ... England over ... Scotland etc., pp. 377-8.**
45. **See above pp. 58-60.**
46. **Atwood writes: "The Mirroir, at least, puts this Contract out of dispute; shewing the very Institution of the Monarchy, before a Right was vested in any single Family, or Person". He then paraphrases the quotation from the Mirror noted on p. 59 above. See The Superiority and Direct Dominion of ... England over ... Scotland etc., pp. 377-8; Cf. also The Fundamental Constitution, p. 30.**
47. **Loc. cit. pp. 31-2.**
48. **The Fundamental Constitution, Preface pp. xxxii-xxxiii.**
49. **Ibid. p. 59. Atwood is here quoting Robert Sheringham (1602-1678), a Royalist Divine.**
50. **Ibid. p. 50.**
51. **See above pp. 57-8.**
52. **Atwood's 'Apology for the East-India Company' (London 1690) was occasioned by "I. The two great Charges against the Company are the seizing of Ships and Goods of Interlopers, and condemning them as forfeited.**
- II. The passing**
- Sentences of Death, and executing Men, by the Governor of St. Helena, in a Method not wholly agreeable to the Laws of England; or else the procuring a Commission from the King, for trying and executing Men there, by Martial Law." p. 4.**
53. **An Apology for the East-India Company, p. 31.**
54. **The Fundamental Constitution, p. 78.**
55. **Ibid. p. 81.**
56. **The Superiority and Direct Dominion of ... England over ... Scotland etc., p. 524.**

57. **The Fundamental Constitution, p. 3.**
58. **B. Behrens - 'The Whig Theory of the Constitution in the Reign of Charles II', in the Cambridge Historical Journal, Vol. VII, No. I (1941). See below, Section IV, for a fuller examination of the Idea of History.**
59. **The Fundamental Constitution, p. 27.**
60. **Probably William Bedell (1571-1642), Bishop of Kilmore and Ardagh.**
61. **The Fundamental Constitution, p. 26.**
62. **Ibid. p. 61.**
63. **Ibid. p. 65.**
64. **Ibid. p. 64.**
65. **Ibid. pp. 78-9.**
66. **On this aspect of modern rationalism see M. Oakeshott - 'Rationalism in Politics', in his book of essays of the same title; and F.A. Hayek - 'Types of Rationalism', in *Philosophy, Politics and Economics*, (Routledge and Kegan Paul, 1957), Chapter 5, Cf. also Section V below.**
67. **See Chapter II pp. 23-4.**
68. **The Fundamental Constitution, p. 12. Exactly the same passage occurs in the Preface to 'Wonderful Predictions etc.' (1689) except the word "common" is spelt with a capital 'C'.**
69. **On the notion of 'fundamental law' in the early 17th century, see John D. Eusden - *Puritans, Lawyers and Politics in Early Seventeenth Century England*, (Yale Univ. Press, 1958). Cf. also J.W. Gough - *Fundamental Law in English Constitutional History* (O.U.P., 1961), for a general survey. The work was first published in 1955.**
70. **See, e.g., Sir C.K. Allen - *Law in the Making* (7th ed., Clarendon Press, Oxford, 1964), Ch. VI.**
71. **The Fundamental Constitution, Preface p. xxxii.**
72. **Ibid. pp. iii-iv.**
73. **Ibid. p. v.**
74. **Ibid. pp. v-vi.**

75. Ibid. p. 34.
76. Ibid. p. 36.
77. Ibid. p. 33.
78. Ibid. p. 84.
79. Ibid. p. 72.
80. Ibid. p. 100.
81. Ibid.
82. For a fuller discussion of Pufendorf see Chs. VI and VII below.
83. The Superiority and Direct Dominion of ... England over ... Scotland etc. p. 389.
84. See below Ch. VII p. 248.
85. The Fundamental Constitution, p. 101.
86. Ibid. p. 101.
87. Ibid.
88. Ibid. p. 102.
89. A brief summary of Pufendorf's Contract Theory is given by J.W. Gough - The Social Contract, pp. 121-124.
90. The Fundamental Constitution, p. 102. Cf. Wonderful Predictions etc., Preface.
91. The Fundamental Constitution, p. 85.
92. "the King for the time being, is the only Rightful King" Atwood asserted in Reflections upon a Treasonable Opinion, p. 2. Atwood's denial of the validity of a distinction between de jure and de facto kings in fact follows from his theory of the constitution only when applied to what he believed had occurred in 1688. Yet Atwood was here claiming the universal ineptitude of such a distinction. Here we see a first glimpse of what was to become a major problem for Whig constitutional historians in the first decade of the eighteenth century. Whig theorists were asserting that only contract kings were rightful kings. From this it followed that non-contract kings (kings, for example, by conquest), although de facto monarchs, were not rightful kings. In the post-1688 period,

however, many persistently argued that William and Mary were only de facto monarchs whilst James II remained king de jure. To combat these claims several Whigs compromised their insistence that legitimacy could only be derived from contract by either admitting that allegiance was due whenever 'protection' was effective, or by reinterpreting 'conquest' so that it inevitably involved 'consent' (cf. the Sherlock Controversy outlined in Ch. II above). From these it followed that an effective king, or a de facto king, because he was effectively king was also de jure. The Whig concern with legitimate government once again turned from a concern with the explicit ORIGIN to a concern with the CONTINUING PURPOSE of government. But in this process benevolent conquerors became legitimized and the Whigs themselves could argue, as Sir John Willes and William Higden did, that William I, though a conqueror in fact, had been de jure king because of the effective protection he gave to his subjects. The Norman Conquest thus became an event acceptable to Whig historians, whereas in the 1680s it solely featured in Tory histories of a Bradyite kind. On this aspect of the Norman Conquest debates see Quentin Skinner - 'History and Ideology in the English Revolution' in The Historical Journal, Vol. 8, No. 2 (1965), esp. pp. 171-178.

93. References to, and quotations from, all these writers begin to appear in Atwood's works only after 1689.
94. The Fundamental Constitution, pp. 3-4.
95. See above p. 103.
96. Wonderful Predictions etc., Preface.
97. See below Ch. VI.
98. The Fundamental Constitution, pp. 10-11.
99. B. Behrens - 'The Whig Theory of the Constitution in the Reign of Charles II', in Cambridge Historical Journal, Vol. VII, No. 1 (1941) pp. 50-53.
100. See above pp. 82 ff.
101. Reflections upon a Treasonable Opinion (1696). The Epistle Dedicatory to the Duke of Shrewsbury. The 'treasonable opinion' was that the English Constitution did not require taking an additional oath of allegiance to the present monarch and expressly disavowing allegiance to a pretender.
102. The Superiority and Direct Dominion of ... England over ... Scotland, p. 111.

103. Ibid. p. 559.
104. The Fundamental Constitution, p. 95.
105. The Superiority and Direct Dominion of England over ... Scotland, p. 20.
106. In, The History, and Reasons, of the Dependency of Ireland upon ... England, Atwood wrote "I'll agree with [Molyneux] that on consent depends the obligation of all humane Laws: insomuch that without it, by the unanimous Opinions of all Jurists no sanctions are of any force." p. 195.
107. Ibid. p. 5.
108. The Scotch Patriot etc. p. 35.
109. The Fundamental Constitution, Preface p. vii.
110. The Superiority and Direct Dominion of ... England over .. Scotland, p. 386.
111. Ibid. p. 569. Here Atwood argued "As I remember, that great Man Grotius, in his Treatise of the Truth of the Christian Religion, uses it as an undeniable argument of the Divine Providence, and interposition in Humane Affairs; that whatever form of Government, has obtained in any Nation, is preserved, notwithstanding all the Plots and Machinations of Men to the contrary." That this does not mean that any enduring form of government is legitimate in God's eyes is apparent from Atwood's translation of Grotius' text. The relevant stanza implies not only that men can impose other forms of government than those based on popular consent on their fellow citizens, but also that the Divine Providence is most apparent at the foundation of states (i.e. at the contract). The stanza runs:

XI. [That the universe is governed by God] ... prov'd
from the preservation of Governments.

The special Influ'ence of a Pow'r above,
Kingdoms and Common-wealths continued, prove.
A form of Government that first prevail'd,
Has not through many tracts of ages fail'd.
For this we might all Histories apply,
Where a Republick, where a Monarchy,
All the contrivances and Plots of Men,
If they unsettle, bring the same agen;
So that against a long fixt Pow'r to fight,
Seems ev'n the Providence of Heaven to slight.

The Human Wisdom might preserve it long,
 Yet the subjected Rabble are so strong,
 Such the Vicisitudes of human things,
 That none could fix them but the King of Kings.
 But then this Providence chiefly appears,
 When the Foundations of a State he tears;
 This Cyrus, Alexander, Caesar too,
Tartarian Cingi, and Namcaa shew,
 These Men in things where Prudence has a share,
 By far beyond its force successful are;
 Nay, the uncertainty of things below,
 Unto their prosp'rous Fortunes seems to bow;
 When like Events to the same constant end
 As 'twere by a Conspiracy do tend,
 They argue a direction from on high:
 Sometimes a lucky size turns on the Die;
 But if the same an hundred times you fling,
 'Tis evident it from some Art must spring.

Grotius, pp. 10-11.

112. The purpose of Grotius' work was essentially to prove this.
113. This was, of course, the age when Revelation itself was for the first time being opened to rational criticism. See P. Hazard - The European Mind 1680-1715, esp. Ch. 8.
114. See foot-note 111 above.
115. See above p.76.
116. See above p.106.
117. See Appendix B.

CHAPTER V

1. For an examination of some historical judgements on Ferguson's career, see Appendix C.
2. D.N.B.
3. These were: first, A Brief Justification of the Prince of Orange's Descent into England etc. (London 1689); and second, Whether the Preserving the Protestant Religion was the Motive unto, or the End that was designed in, the late Revolution? (1695). This last was a defence of the Jacobite cause.

4. Anon. - Robert against Ferguson: or a New Dialogue between Robert an Old Independent Whig, and Ferguson a New Tory Jacobite etc. (London 1704), Preface.
5. Loc. cit. p. 169.
6. Ibid. pp. 50-51.
7. Ibid. The Epistle Dedicatory, p. 2.
8. Ibid. p. 231.
9. Ibid. p. 82.
10. Ibid. p. 168.
11. Ibid. p. 160.
12. Ibid. pp. 117-118.
13. See, The Interest of Reason in Religion, etc. (London 1675), *passim*.
14. A Sober Enquiry, etc., p. 114.
15. Ibid. p. 51.
16. Ibid. p. 77.
17. Ibid. p. 54.
18. Ibid. pp. 56-66.
19. Ibid. p. 70.
20. Ibid. pp. 72-73.
21. Ibid. p. 72. My underlining.
22. Ibid. p. 80.
23. Ibid. p. 168.
24. Ibid. pp. 73-74.
25. "Conscience is properly nothing else; but the soul reflecting on it self and actions, and judging of both according to [God's] Law". Ibid. p. 63.
26. See Appendix C.
27. No Protestant Plot (London 1681), p. 37.

28. Anon. - A Word of Advice to the Author of that Scurrilous and Seditious Libel entitled No Protestant Plot (London 1681) p. 2.
29. See Appendix C.
30. Anon. - Mr. Ferguson's Lamentation For the Destruction of the Association and the Good Old Cause. (London 1683), p. 11.
31. Ibid. p. 13.
32. Under a new title of The Design of Enslaving England Discovered etc.
33. The Design of Enslaving England Discovered etc. (London 1689) p. 44.
34. Ibid.
35. Ibid. p. 43.
36. Ibid. p. 44.
37. Ibid.
38. Ibid. p. 38.
39. A Brief Justification of the Prince of Orange's Descent into England And of the Kingdoms Late Recourse to Arms. (London 1689), p. 26.
40. Ibid. p. 44.
41. Ibid. p. 18.
42. Ibid. p. 25.
43. Anon. - The Imposter Expos'd, In a Dissection of a Villanous Libell, ... Entitled A Letter to a Person of Honour, concerning the Black Box. (London 1681), p. 181.
44. Loc. cit. p. 1.
45. Ibid. p. 2.
46. Ibid. p. 1.
47. Ibid.
48. Ibid. pp. 1-2.
49. Loc. cit. p. 5.

50. Ibid.
51. Ibid.
52. Ibid.
53. Ibid. pp. 6-7.
54. These questions were considered by a few of his contemporaries. See below Parts III and IV.
55. Loc. cit. p. 1.
56. Ibid. p. 7.
57. Ibid. pp. 7-8.
58. Ibid. p. 11.
59. Ibid. p. 12.
60. As he did, for example, over the problems of the Statutes against resistance of Charles II's reign, and of the Norman Conquest as a break in the legal continuity of the Ancient Constitution.
61. A Brief Justification of the Prince of Orange's Descent into England etc., p. 29. Ferguson, of course, was insisting that Harold was not the legal king.
62. The Second Part of No Protestant Plot, p. 20. The example that Ferguson was considering here was 'trial by jury'.
63. "The several Charters, especially that stiled the Great Charter, in and by which our Rights stand secured, sworn, and entailed unto us and to our Posterity, were not the Grants and Concessions of our Princes, but Recognitions of what we had reserved unto our selves in the Original Institution of our Government, and of what had always appertained unto us by Common Law, and Immemorial Customs." A Brief Justification of the Prince of Orange's Descent into England etc., p. 13.
64. The Second Part of No Protestant Plot, p. 21.
65. The Design of Enslaving England Discovered etc., p. 20.
66. A Brief Justification etc., pp. 14-15.
67. Ibid. p. 14.

68. Ibid. p. 15.
69. Ibid. p. 17.
70. The Design of Enslaving England etc., p. 1.
71. A Brief Justification etc., p. 17.
72. Ibid. p. 24. Ferguson's statement here appears to be a very clear summary, and thus further evidence for, C.C. Weston's thesis about the role of the House of Lords in the constitutional theory of Mixed Monarchy during the late seventeenth century. See C.C. Weston - English Constitutional Theory and the House of Lords, 1556-1832. Esp. Ch. 3.
73. Ibid. p. 31.
74. Ibid. p. 29.
75. A Letter to a Person of Honour, concerning the Black Box, (London 1680), p. 3.
76. E.g. A Brief Justification etc., p. 27.
77. Ibid. pp. 13-14.
78. Ibid. p. 25.
79. Ibid. p. 19.
80. Ibid. pp. 19-20.
81. The Late Proceedings and Votes of the Parliament of Scotland; etc. (Glasgow 1689), p. 6.
82. A Representation of the Threatning Dangers, Impending Over Protestants in Great Brittain (n.p. 1687), p. 30.
83. Ibid. p. 31.
84. A Brief Justification etc., pp. 20-21.
85. Ibid. p. 18.
86. Ibid. p. 23.
87. Ibid. p. 32.
88. Ibid. p. 36.
89. Ibid. p. 24.
90. Ibid. p. 9.

91. A warrant was issued for his arrest on this charge (C.S.P.D., 1690-1691).
92. Whether the Preserving the Protestant Religion was the Motive unto, or the End that was designed in, the late Revolution? (1695), in Somers Tracts Vol. 3. (London 1751), p. 423.
93. The History of the Revolution (n.p. 1706), p. 6.
94. A Letter to Mr. Secretary Trenchard, etc. (n.p. 1694), p. 33.
95. Whether the Preserving the Protestant Religion etc., p. 439.
96. The History of the Revolution, p. iv.
97. "I know it had been industriously urged by several Catholics," Ferguson argued, "as improbable that King William should be of their Church, because he communicated with the Church of England. To this I answer, that Dispensations have been allowed to inferior Catholics, much more then to Kings and Princes, to disguise themselves under any Shape whatever necessary to carry on their Designs." Ibid. p. 31.
98. Whether the Preserving the Protestant Religion etc., p. 422.
99. Whether the Parliament be not in Law dissolved by the Death of the Princess of Orange? Etc. (n.p. 1695), p. 7.
100. Whether the Preserving the Protestant Religion etc., p. 422.
101. Ibid.
102. A Letter to Mr. Secretary Trenchard, etc., p. 5.
103. Whether the Parliament be not in Law dissolved etc., pp. 11-12.
104. Ibid. p. 14.
105. See below Part IV.
106. Whether the Parliament be not in Law dissolved etc., pp. 2-3. The quotation (underlined) in this passage was taken by Ferguson from Suarez.
107. Whether the Preserving the Protestant Religion etc., p. 423.

108. Whether Parliament be not in Law dissolved etc., pp. 17-18.
109. A Letter to Mr. Secretary Trenchard etc., p. 5.
110. Whether the Parliament be not in Law dissolved etc., p. 16.
111. Ferguson believed that the Civil War, like the 1688 Revolution, had been essentially inspired and led by Catholics intent on subjugating England to the will of the Pope. See, The History of the Revolution, p. iv.
112. Ibid. p. 49.
113. A Letter to Mr. Secretary Trenchard etc., p. 4.
114. Ibid. p. 4.
115. Ibid. p. 5.
116. Whether the Parliament be not in Law dissolved etc., p. 55.
117. A Letter to Mr. Secretary Trenchard etc., p. 6.
118. Whether the Parliament be not in Law dissolved etc., pp. 9-10.
119. Whether the Preserving the Protestant Religion etc., p. 417.
120. Whether the Parliament be not in Law dissolved etc., p. 56.
121. A Letter to Mr. Secretary Trenchard etc., p. 34.
122. See above p. 157.
123. John Locke: Ses Théories Politiques et leur influence en Angleterre, p. 82.

CHAPTER VI

1. J. Axtell (ed.) - Locke's Educational Writings, p. 400.
2. Ibid. pp. 400-401.
3. Above pp. 82ff.

4. Below Part IV.
5. See, Dijon Université, *Études sur le Contract Social*, passim.
6. Some Thoughts Concerning Education (1693), in J. Axtell (ed.) pp. 294-5.
7. The Whole Duty of Man According to the Law of Nature, To the Reader.
8. The Fundamental Constitution, p. 30.
9. Ibid. p. 87.
10. Loc. cit. p. x.
11. Loc. cit. Preface p. xxviii.
12. L. Krieger - The Politics of Discretion, p. 102.
13. Thomas Hobbes - Leviathan. Everyman Library Ed., Introduction pp. vii-viii. (1973).
14. Seventeenth Century Metaphysics, pp. 65-8.
15. Elementorum, II, Preface, p. xxx.
16. Cf. O. Gierke - Natural Law and the Theory of Society, pp. 142-4, 314-5, 337; and L. Krieger - op. cit. pp. 105-6, 284.
17. Quoted in L. Krieger - op. cit. p. 94.
18. De Officio I.3.13.
19. Ibid. I.4.1.
20. Ibid. I.4.9.
21. Ibid. I.4.8.
22. Ibid. I.6.1,2.
23. Ibid. I.6. passim.
24. Ibid. I.7.1.
25. Ibid. I.8.1.
26. Ibid. I.9.1.
27. Ibid. I.9.3.

28. Ibid. I.2.4.
29. Ibid. I.3.10.
30. Krieger - op. cit. pp. 107-8.
31. Ibid. p. 112.
32. Ibid. pp. 112-117.
33. De Officio II.5.1.
34. Ibid. II.5.2.
35. Ibid. II.5.4.
36. Ibid. II.5.6,7.
37. Ibid. II.5.8.
38. Ibid. II.5.9.
39. Ibid. II.1.9.
40. Krieger - op. cit. pp. 120-121.
41. De Officio II.6,7,8,9.
42. Ibid. II.6.10.
43. Ibid. II.10.1.
44. Ibid. II.6.13.
45. Ibid. II.8.2.
46. Ibid. II.6.14.
47. Ibid. II.9.1,2.
48. Ibid. II.11.3.
49. Ibid. II.9.6.
50. De Jure Naturae et Gentium VII.8.5.
51. Ibid. VII.8.5,6,7.
52. See, for example, L. Krieger - op. cit. pp. 123-132.
53. See above p.178.
54. Locke specifically recommended Paxton's work (see p. above). Cf. W.H. Greenleaf - Order, Empiricism and Politics, p. 176.
55. Loc. cit. The Preface Introductory.

CHAPTER VII

1. E.g. Leslie Stephen - *History of English Thought in the Eighteenth Century*, II, pp. 114-121.
2. E.g. R.I. Aaron - *John Locke*. 3rd ed., p. 270, and M. Seliger - *The Liberal Politics of John Locke*, p. 45.
3. See respectively: W. Kendall - *John Locke and the Doctrine of Majority Rule*, passim; C.B. Macpherson - *The Political Theory of Possessive Individualism*, Ch. V.; and L. Strauss - *Natural Right and History*, Ch. V.
4. E.g. R. Polin - *La Politique Morale de John Locke*, p.1.
5. J. Dunn - 'The Politics of Locke in England and America in the Eighteenth Century', in J.W. Yolton (ed.) - *op. cit.* p. 57.
6. W.S. Hudson - 'John Locke: Heir of Puritan Political Theorists', in G.L. Hunt (ed.) - *Calvinism and the Political Order*, p. 108.
7. T. Redpath - 'John Locke and the Rhetoric of the Second Treatise', in H.S. Davies and G. Watson (eds.) - *The English Mind*, p. 78.
8. P. Laslett - *Locke's Two Treatises of Government*, Introduction and his article in *The Cambridge Historical Journal*, XII, 1 (1956).
9. E.g. Laslett's dating of Ch. XVI of the Second Treatise fails to take account of the discussions of 'conquest' that I examined in Appendix A above; Tyrrell's *Bibliotheca Politica* (1692-4) and Sidney's *Discourses* (1698) were both popular during the 1690s and both contained arguments very similar to Locke's; Filermism was still a significant political doctrine, frequently attacked in the pro-Revolution literature after 1689.
10. 'Locke and English liberalism: The Second Treatise of Government in its contemporary setting', in J.W. Yolton (ed.) - *op. cit.* p. 36.
11. J. le Clerc - *Bibliothèque Universelle* (Octobre 1690), p. 573.
12. *Two Treatises II.s.1.*
13. *John Locke*. 3rd ed., p. 270.
14. *Patriarcha* (ed. Laslett), p. 239.

15. Cf. the studies by S.I. Mintz - *The Hunting of Leviathan*, and J. Bowle - *Hobbes and his Critics*.
16. Noted in T. Hunt - *Postscript*, p. 6.
17. Certainly it was Filmer who Sidney, Tyrroll and Hunt were concerned to refute. Cf. O.W. Furley - 'The Whig Exclusionists: Pamphlet Literature in the Exclusion Campaign, 1679-81', in The Cambridge Historical Journal, XIII (1957).
18. See below pp. 243ff.
19. See Chs. IX and X below.
20. i.e. 'Patriarcha; or, the Natural Power of the Kings of England Asserted.'
21. Two Treatises, Preface, p. 171.
22. Patriarcha, Chs. 21-32. See also *The Freeholder's Grand Inquest, The Anarchy of a Limited or Mixed Monarchy, and Directions For Obedience to Government in Dangerous or Doubtful Times*. All are included in Laslett's edition of Filmer's political works.
23. Two Treatises, Introduction pp. 89-91.
24. Two Treatises, Preface.
25. See Ch. II above.
26. E.g. Sir F. Pollock - 'Locke's Theory of the State', in *Proceedings of the British Academy* (1903-4), p. 241; W. Kendall - op. cit. p. 75; M. Seliger - op. cit. p. 83; J. Dunn - *The Political Thought of John Locke*, p. 97.
27. P. Laslett - op. cit. pp. 82, 111-2.
28. S.P. Lamprecht - *The Moral and Political Philosophy of John Locke*, pp. 130, 138, 140; R.H. Cox - *Locke on War and Peace*, p. 104.
29. W. von Leyden - 'John Locke and Natural Law', Philosophy (Jan. 1956), p. 25.
30. G. Schochet - 'The Family and the Origins of the State in Locke's Political Philosophy', in J.W. Yolton (ed.) - op. cit. p. 88.
31. This, of course, is practically universally held.

32. E.g. Cox - op. cit. pp. 72-3; Strauss - op. cit. pp. 224-5; Macpherson - op. cit. p. 241.
33. Both these views are suggested by H. Aarsleff - 'The State of Nature and the Nature of Man', in J.W. Yolton (ed.) - op. cit. pp. 101-2.
34. J. Dunn - op. cit. pp. 97-8.
35. Two Treatises II.s.77.
36. Ibid. II.s.14.
37. Ibid. I.s.58. Sir Leslie Stephen suggested that Locke understood the 'state of nature' as a 'Golden Age', op. cit. Vol. II, ch.X.s.9.
38. Two Treatises II.s.111.
39. Ibid. II.s.15.
40. Ibid. II.s.171.
41. E.g. Filmer (ed. Laslett) - op. cit. p. 81.
42. Two Treatises II.s.14.
43. Ibid, II.ss.14,15.
44. Ibid. II.s.101.
45. Ibid, II.ss.102,103.
46. Ibid. II.s.102.
47. Ibid. II.s.108.
48. Ibid. II.s.103.
49. Ibid. II.s.112.
50. Ibid. II.s.105.
51. Ibid. II.s.106.
52. Ibid. II.s.107.
53. Ibid. II.ss.74,75,76.
54. Essay Concerning Human Understanding, Bk.IV. Ch.X. passim.
55. Op. cit. p. 97.

56. Two Treatises, p. 99.
57. 'The English Revolution and Locke's 'Two Treatises of Government'', in Cambridge Historical Journal (xii, 1, 1956). passim.
58. Two Treatises, p. 98.
59. Ibid. p. 96.
60. Ibid. p. 96.
61. Ibid. p. 95.
62. Ibid. p. 96.
63. Ibid. p. 97.
64. Ibid. p. 99.
65. Loc. cit. p. 2.
66. Ibid. p. 3.
67. Ibid. pp.1-2.
68. See above pp.178.
69. Lovelace MS, f.5. fols. 76-8.
70. Ibid. fols. 81-3.
71. J. Axtell (ed.) - op. cit. pp. 395-6.
72. Loc. cit. Bk.IV.Ch.III.s.18.
73. Two Treatises II.s.4.
74. Ibid. II.s.6.
75. Loc. cit. Pt.I.Ch.III.s.1.
76. Ibid. Greetings to the Reader, pp. v-vi.
77. Two Treatises II.s.12.
78. Ibid.
79. Op. cit. Ch.14. passim.
80. D. Hume - A Treatise of Human Nature, Bk.III.Pt.II. passim.
81. Cf. J. Dunn - 'Consent in the Political Theory of John Locke', reprinted in G. Schochet (ed.) - Life, Liberty, and Property.

82. E.g. J. Plamenatz - *Man and Society*, I.Ch.6.III.passim.
83. *Journal*, 15 July 1679, quoted in J. Dunn - *op. cit.* p. 132.
84. *Loc. cit.* p. 183.
85. See respectively; *Discourses* p. 467, and *Civil Polity* pp. 173-5.
86. *Two Treatises* II.s.122. Locke's italics.
87. *Ibid.* s.119.
88. Cf. C.B. Macpherson - 'This Social Bearing of Locke's Political Theory', reprinted in G. Schochet (ed.) - *op. cit.* passim.
89. *Loc. cit.* (ed. J.C. Meredith), p. 192.
90. J. Axtell (ed.) - *op. cit.* Education ss. 188,189.
91. *The Rhetoric of Aristotle* (ed. L. Cooper), passim.
92. D. Hume - 'Of the Original Contract', in C.W. Hendel (ed.) - *David Hume's Political Essays*, p. 43.
93. C. Leslie - *The New Association*, Part II.
94. Anon. - *An Essay on Government*; and C. Leslie's Rehearsal (1705) Nos. 36,37,38,49,53,55,58,59,60, 61,66.
95. *The Original and Institution of Civil Government*, discuss'd. pp. 4-5.
96. *Loc. cit.* Octobre 1690, Avril 1691.
97. *Loc. cit.* Juin 1691.
98. 'The Politics of Locke in England and America in the Eighteenth Century', in J.W. Yolton (ed.) - *op. cit.* pp. 56-7.
99. See the letters of Molyneux to Locke July/August 1692, in J. Locke - *Works*, Vol. IX, pp. 291-2; and J. Tyrrell to Locke 30th August 1690, Lovelace MS. Locke c.22. fol. 119.
100. *Loc. cit.* (ed. T.H.).
101. *Loc. cit.* p. 100.
102. Des Maizeaux (ed.) - *Lettres de Mr. Bayle*, Vol.II. pp. 535-6. Letter dated 24 Septembre 1693.

103. 'An Essay Concerning Obedience to the Supreme Powers, and the Duty of Subjects in all Revolutions', in State Tracts II, p. 452.
104. The Case of Ireland's being bound by Acts of Parliament in England, pp. 18, 101-4.
105. An Answer to Mr. Molyneux His Case of Ireland's being bound by Acts of Parliament in England, Stated, pp. 30-1. Cf. almost exactly the same criticism of Molyneux by John Cary in his A Vindication of England, In Answer to a Book, written by William Molyneux of Dublin, p. 103.
106. Considerations of Importance to Ireland, pp. 3-4.
107. Lord John Somers - Jura Populi Anglicani, p. 30.
108. Op. cit. p. 57.
109. The Fundamental Constitution, pp. 101-2.
110. A Collection of the Parliamentary Debates in England, from the Year M,DC,LXVIII. To the present Time, II, p. 249.
111. Op. cit. p. 4.
112. Walter Moyle - The Whole Works, pp. 57-8.
113. Observator Vol. III. No. 100, 31 March 1705.
114. Ibid. Vol. II. No. 47, 15 September 1703.
115. Considerations of Importance to Ireland, p. 3.
116. The New Association, Pt. II. A Supplement, p. 4.
117. Cassandra. Num. 1, p. 4.
118. Rehearsal, No. 36, March 31 - April 7, 1705.
119. Ibid. No. 37, April 7 - 14, 1705.
120. Ibid. Nos. 38, 55, 56, 58, 59, 60, 61, 66, (1705).

CHAPTER VIII

1. Discourses, p. 436.
2. Jura Populi Anglicani, p. 31.
3. Dr. Sherlock's Case of Allegiance Considered, p. 96.

4. The Observator. Num. 99. 3 April 1703.
5. Loc. cit. n.p.
6. The Great Point of Succession Discussed. With a Full and Particular Answer To a late Pamphlet, Intituled, A Brief History of Succession, &c., pp. 25-6.
7. The group of M.P.s and others arrested for presenting a petition to the Commons which appealed for the voting of supplies so that the King could assist his allies in the conflict against France. They were arrested under an Act of 1664 against "tumultuous petitioning".
8. Loc. cit. p. 31.
9. Anon. - The Proceedings of the Present Parliament Justified, in State Tracts I, p. 178.
10. Loc. cit. pp. 119, 189.
11. Loc. cit. p. 119; and Two Treatises II.s.135.
12. See Ch. III above.
13. Loc. cit. p. 3.
14. Loc. cit, State Tracts.I.p. 284.
15. God, the King, and the Country, p. 10.
16. Loc. cit. p. 23.
17. T. Wilson - op. cit., p. 1.
18. Finch, H. Lord Nottingham - Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'. (ed. D. Yale), p. 189. Nottingham here was quoting directly from Lord Chief Justice Hobart.
19. An Enquiry into the Jurisdiction of the Chancery in Causes of Equity, p. 17.
20. Op. cit. p. 200.
21. Cf. P. Allix - Reflections Upon the Opinions of Some Modern Divines, p. 3; A. Sidney - Discourses, pp. 16-17; C. Leslie - The Case of the Regale and of the Pontificat Stated, pp. 214-8, for a report of several views incorporating this notion of the post-Flood origin of "Political Government".

22. See. R.W. Frantz - The English Traveller and the Movement of Ideas 1660-1732. Esp. Ch. V. passim.
23. Cf. S. Pufendorf - An Introduction to the History of the Principal Kingdoms of Europe, pp.1ff; and Ch. X. below.
24. See Ch. X. below.
25. E.g. T. Wilson - op. cit. p. 1.
26. Discourses, pp. 23-4.
27. Bibliotheca Politica. Third Dialogue, Advertisement to the Reader.
28. Lord J. Somers - A Brief History of the Succession, p. 265. Somers was presenting Divine Right arguments in order to refute them.
29. Sir. R. Filmer - Patriarcha, Chs. IV-XII.

CHAPTER IX

1. The Works of Algernon Sydney, p. 29.
2. G.P. Gooch - English Democratic Ideas in the Seventeenth Century, p. 282.
3. E.g. M. Ashley - England in the Seventeenth Century (1603-1714), p. 152.
4. C. Robbins - The Eighteenth-Century Commonwealthman.
5. B. Haydon - 'Algernon Sidney 1623-1683' in Archaeologia Cantiana, LXXVI (1961), p. 110.
6. G.H. Sabine - A History of Political Theory, p. 514.
7. G. Van Santvoord - Life of Algernon Sidney, passim.
8. A.C. Ewald - The Life and Times of the Hon. Algernon Sidney 1622-1683, Vol. II p. 330.
9. See above pp. 248 ff.
10. See above p.178.
11. 'The Arraignment, Trial, and Condemnation of Algernon Sidney', in The Works of Algernon Sydney, pp. 57-8.

12. 'Paper Delivered to the Sheriffs upon the Scaffold on Tower-Hill, on Friday, Dec. 7, 1683, Immediately before his Execution', in *The Works of Algernon Sydney*, pp. 37-8.
13. *Ibid.* p. 38.
14. 'Discourses Concerning Government', in *The Works of Algernon Sydney*, p. 1. (Henceforth: *Discourses*).
15. *Ibid.* p. 440 and 'Paper', p. 38.
16. *Discourses*, p. 3.
17. *Ibid.* p. 449.
18. *Ibid.* p. 14.
19. *Ibid.* p. 22.
20. *Ibid.* pp. 23-4.
21. *Ibid.* pp. 59-60.
22. *Ibid.* p. 75.
23. *Ibid.* p. 21.
24. *Ibid.* p. 77.
25. *Ibid.* p. 13.
26. *Ibid.* p. 389.
27. *Ibid.*
28. *Ibid.* pp. 13-14.
29. *Ibid.* p. 256.
30. *Ibid.* p. 269.
31. *Ibid.* p. 17.
32. *Ibid.* p. 29.
33. *Ibid.* p. 71.
34. Cf. *Ibid.* pp. 25-6.
35. *Ibid.* p. 79.
36. *Ibid.* pp. 79-80.

37. Ibid. p. 81.
38. Ibid. p. 444.
39. Ibid. p. 318.
40. Ibid. p. 98.
41. Ibid. p. 190.
42. See pp. 265ff. above.
43. Cf. F. Kern - Kingship and Law in the Middle Ages. Part II, passim.
44. Discourses, p. 366.
45. Ibid. p. 166.
46. Ibid. p. 265.
47. Ibid. p. 151.
48. Cf. Z. Fink - The Classical Republicans, passim.
49. E.g. Discourses, p. 462.
50. Ibid. p. 160.
51. Ibid. p. 443.
52. Ibid. p. 86.
53. Ibid. p. 3.
54. Ibid. p. 10.
55. Ibid. p. 386.
56. Ibid. p. 482.
57. Ibid. pp. 481-2.
58. Ibid. p. 281.
59. Ibid. p. 405.
60. Ibid. p. 188.
61. Ibid. p. 288.
62. Ibid. p. 347.
63. Ibid. pp. 82-3.

64. Ibid. p. 346.
65. Ibid. pp. 409-10.
66. Ibid. p. 329.
67. Ibid. p. 328.
68. Ibid. p. 327.
69. Ibid. p. 405.
70. Ibid. p. 342.
71. Ibid. p. 342.
72. Ibid. p. 459.
73. Ibid. p. 457.
74. Ibid. p. 479.
75. Ibid. p. 187.
76. Ibid. p. 191.
77. Ibid. pp. 451-2.
78. Ibid. p. 496.
79. Ibid. p. 312.
80. Ibid. p. 403.
81. See above Part II and J.G.A. Pocock - *The Ancient Constitution and the Feudal Law*, passim.
82. *Discourses*, pp. 420-1.
83. Ibid. p. 321.
84. Ibid. pp. 421-2.
85. Ibid. p. 422.
86. Ibid. pp. 451-2.
87. Ibid. p. 452.
88. Ibid. p. 451.
89. Ibid.
90. Ibid. p. 436.

91. Ibid. p. 417.
92. Ibid. p. 415.
93. Ibid. p. 361.
94. See above pp. 295-6.
95. Discourses, p. 345.
96. Ibid. p. 339.
97. Ibid. p. 91.
98. Ibid. p. 420.
99. Ibid. p. 457.
100. Ibid. p. 491.
101. Ibid. p. 496.
102. Ibid. p. 408.
103. Ibid. p. 463.
104. Ibid. p. 464.
105. Ibid. p. 465.
106. Ibid. pp. 163-4.
107. Ibid. p. 501.
108. Loc. cit. p. 285.
109. Order, Empiricism and Politics, p. 189.
110. See above p. 275.
111. Discourses, p. 403.
112. See above p. 146.
113. Discourses, p. 169.
114. Ibid. p. 138.
115. Ibid. p. 463.
116. Ibid. p. 144.
117. Ibid.

118. Ibid. pp. 144-5.
119. Ibid. p. 406.
120. Ibid. pp. 304-5.
121. Ibid. p. 145.
122. Ibid. p. 236. Sidney was discussing the decline of Greece and Rome. It is interesting to note that Sidney did not adhere to this principle when examining the decline of the English Constitution (see below pp. 298-9).
123. Ibid. p. 184.

CHAPTER X

1. Sir R. Filmer - Patriarcha. Introduction by Edmund Bohun (1685).
2. Postscript, p. 81.
3. Two Treatises I, s. 124.
4. S. Kliger somewhat inexplicably thinks the Bibliotheca Politica contains a dialogue between F. who "stands for an understanding Freeholder and J. ... a Justice of Peace." (The Goths in England, pp. 171-2.) But Tyrrell expressly informs us on the first page of the first dialogue that the discussion is between "Mr FREEMAN, a Gentleman; and Mr. MEANWELL a Civil Lawyer". It is possible that there is some connection between Mr. Kliger's confusion on this point and the fact that I am unable to locate any of his supposed 'quotations' from the Bibliotheca.
5. Loc. cit. p. 419. Cf. June 1692 ed.
6. S. Warren - Law Student (2nd ed. 1845, p. 260), quoted in Allibone's Dictionary of British and American Authors.
7. Cf. C. Robbins - The Eighteenth Century Commonwealthman, pp. 76-8.
8. Dec. 1692 issue.
9. July 1692 issue.
10. Noted in The Gentleman's Journal, Nov. 1692.

11. See Part II above.
12. English Scholars 1660-1730, p. 134.
13. See p.178 above.
14. The Superiority and Direct Dominion of ... England over ... Scotland, p. 13.
15. J. Milton - A Complete Collection. (Ed. J. Toland) p. 44.
16. A Vindication of those who take the Oath of Allegiance, pp. 79-80.
17. Quoted in Allibone's Dictionary of British and American Authors.
18. The Ancient Constitution and the Feudal Law, p. 188.
19. Quoted in Patriarcha Non Monarcha, p. 2.
20. Loc. cit. p. 10.
21. Patriarcha Non Monarcha, p. 13.
22. Bibliotheca Politica, p. 59.
23. Patriarcha Non Monarcha, p. 232.
24. Loc. cit. p. 265.
25. Patriarcha Non Monarcha, p. 14.
26. Ibid. pp. 16-17.
27. Ibid. pp. 102-3.
28. See Ch. VI above.
29. Loc. cit. (2nd ed.) pp. xxvii-xxviii.
30. Ibid. p. xxviii.
31. A Brief Disquisition, pp. 353-4.
32. Ibid. pp. 356-7.
33. Ibid. Epistle Dedicatory.
34. E.g. Patriarcha Non Monarcha, p. 74.
35. Bibliotheca Politica, p. 12.

36. Ibid. pp. 10-11.
37. Patriarcha Non Monarcha, p. 116₂ (The pagination of the 1681 edition is somewhat confused with two consecutive sections numbered 97-136)
38. E.g. Ibid. p. 91.
39. Bibliotheca Politica, p. 63.
40. Ibid. p. 104.
41. Patriarcha Non Monarcha, pp. 105₂ ff.
42. E.g. Ibid. pp. 82-3.
43. Ibid. pp. 84-5.
44. Ibid. p. 85.
45. Bibliotheca Politica, p. 63.
46. See p.²⁶⁹/142 above.
47. Bibliotheca Politica, p. 778.
48. Loc. cit. p. 347.
49. Ibid. pp. 348-9.
50. Bibliotheca Politica, pp. 946-7.
51. Ibid. p. 58.
52. Loc. cit. pp. 132-3.
53. E.g. Bibliotheca Politica, p. 154.
54. E.g. Patriarcha Non Monarcha, pp. 91-2.
55. See p.¹⁷⁷ above.
56. Bibliotheca Politica, p. 4.
57. Ibid. p. 10.
58. Cf. J.G.A. Pocock - The Ancient Constitution and the Feudal Law. See also Part II above.
59. Loc. cit. Vol. I. Bk. I. p. 4.
60. Ibid. p. 6.
61. See Chs. II and III above.

62. *Bibliotheca Politica*, p. 358.
63. *The General History of England*, Vol. I. Bk. III. p. 121.
64. *Bibliotheca Politica*, p. 356.
65. *Ibid.* p. 357.
66. *Ibid.* p. 352.
67. E.g. *The General History of England*, Vol. I. p. xlix.
68. E.g. *Patriarcha Non Monarcha*, p. 136₂.
69. *Bibliotheca Politica*, p. 670.
70. *Ibid.* p. 666.
71. *Fundamental Law in English Constitutional History*, pp. 153-156.
72. *Patriarcha Non Monarcha*, pp. 229-230.
73. *Ibid.* pp. 219-220.
74. E.g. *Bibliotheca Politica*, p. 814.
75. *Ibid.* p. 706.
76. See Part II above.
77. *The General History of England*, Vol. I. Epistle Dedicatory, p. iii.
78. *Ibid.*
79. See Ch. III above.
80. *Loc. cit.* Preface to the Reader.
81. *Bibliotheca Politica* (1727 ed.), p. 739.
82. See Ch. II. above.
83. *Bibliotheca Politica*, pp. 616-7.
84. *Bibliotheca Politica* (1727 ed.), p. 731.
85. *Bibliotheca Politica*, p. 879.
86. See Chs. III and VI above.

87. Cf. P. Hazard - *The European Mind 1680-1715*, Pt. II. Ch. 3. *passim*.
88. See F. Hayek - 'The Results of Human Action but not of Human Design' in *Studies in Philosophy, Politics and Economics*.

CHAPTER XI

1. Cf. J.W. Gough - *The Social Contract*, Introductory, *passim*.
2. Cf. P. Laslett - 'Social Contract' in *The Encyclopedia of Philosophy* (ed. P. Edwards).
3. Cf. R.W. Lee - *The Social Compact*, p. 1.
4. Cf. W. Kendall - 'Social Contract', in *The International Encyclopedia of the Social Sciences* (ed. D.L. Sills).
5. Cf. H. Arendt - *On Revolution*, p. 10.
6. Cf. J.W. Gough - *op. cit.* p. 126.
7. For a fuller account of Gough's 'method' see Ch. I above.
8. J.W. Gough - *op. cit.*, p. 135.
9. *History of English Thought in the Eighteenth Century*, II.x.5.
10. *The Ancient Constitution and the Feudal Law*, p. 231.
11. J.W. Gough - *op. cit.* p. 1.
12. Dr. Bernard Mandeville, *Lecture on a Master Mind*, British Academy (1966).
13. *Several Essays in Political Arithmetick*, Preface to *Political Arithmetick*.
14. *Loc. cit.* p. 48.
15. Cf. G.N. Clark - 'The Augustan Age', in F. Hearnshaw (ed.) - *The Social and Political Ideas of Some English Thinkers of the Augustan Age 1650-1750*. *passim*.

16. Unpublished during our period, that is to say.
They were first published in 1750.
17. Loc. cit. (ed. J.P. Kenyon), pp. 193, 198.
18. A History of English Councils and Convocations,
Preface.

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- ii. Collections of Tracts, Parliamentary Proceedings and State Trials.
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