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Natural Rights and The Declaration of Independence: Ambivalence Towards Natural Rights Theory Before the American Revolution. (Part II).

It is well known that the convictions of early American revolutionaries regarding their rights and liberties played a key role in the events leading up to the Declaration of Independence and ultimately in the founding of a United States. But the exact nature of that American thinking on liberty and rights has been subject to significant debate over the last thirty years among scholars studying the American colonial writings and thinking leading up to the Revolutionary War. One significant strand of that debate concerns whether or not American revolutionaries were primarily and heavily influenced by the natural rights philosophy of John Locke, the author of the *Second Treatise on Government* and one of the most important modern political philosophers on government and freedom.

The place of Locke's thought in early American thinking is more than simply an interesting historical problem, although it is that as well. The historical issue of how our founders understood liberty and rights is tied up in a much larger social debate in this country on the nature of the Constitution and the role of the Supreme Court in shaping American law. If "the purpose of government, and of the Constitution, was to protect man's natural rights" [1]then that may have implications for how the Court reads the constitution and law. Whether the Court should be "activist" and how the Court construes the founder's intent are all issues that intersect with the historical question of why the founders revolted against England, what they had in mind when they created the Constitution and the Bill of Rights. Just how much the Court should be tied to and determine particular conceptions of constitutional meaning is itself an interesting and much debated question.[2]

But for those who do think that the Constitution and Bill of Rights embody conceptions of liberty and that those conceptions are relevant in deciding the meaning of law today, the question of Locke's place in early American thought is more than just idle historical speculation. Locke's view of liberty, as articulated in his *Second Treatise of Government*, is one of the most important modern philosophical expositions on government. The reason it matters whether American thinkers were heavily dependent on Locke is that Locke's understanding of liberty and government represents a particular view based on a philosophy of natural rights with particular conceptions about the relationship of the individual rights to the public good, the nature of the government, and so forth. If the American revolutionaries were more influenced by other traditions and ideas than by Locke, then a very different

understanding of America's revolution and vision of the founders emerges. To the extent that the American revolutionaries and framers of the constitution embraced Lockean conceptions of government and liberty, then, can be relevant in deciding constitutional issues today of a similar nature.

It is into this debate that Michael Zuckert has offered an important perspective in his book, *Natural Rights and the New Republicanism*. *Natural Rights* is an important and illuminating book relevant for political philosophers, theorists of liberty, and historians of the American republic. *Natural Rights* can be profitably read in two different ways. At one level, it provides a very comprehensive look at the major theories and ideas about liberty and natural rights from the early seventeenth century to the American Revolution. On these grounds alone, Zuckert's book is a masterpiece well worth reading.

But Zuckert does much more than this. He also brings a particular and important thesis to bear that ties together his complex analysis of natural right's development. His argument is that Locke's ideas did in fact have an enormous impact on Thomas Jefferson's Declaration of Independence but that the dominance of Locke's thought among Whig opposition thinkers did not occur until after the Glorious Revolution of 1688. In making this argument, Zuckert is taking on and disputing two different views of history that have some notable supporters.

First, he is offering a fresh argument on the importance of Locke's thinking to Thomas Jefferson's *Declaration of Independence*. Zuckert argues that the American Declaration has to be understood as a heavily Lockean document. Zuckert is here taking on views such as that of Gary Wills who argued that Jefferson may not even have read Locke at all.[3] Zuckert is also contesting the views of those who make what Zuckert calls a "republican synthesis" argument. [4] By the latter, Zuckert has in mind a series of important books in the last thirty years that have downplayed the impact of Locke's natural rights philosophy on American colonists and instead found greater influence coming from other European and classical sources. These views were developed in a series of important historical monographs by Bernard Bailyn, Gordon Wood, and J. G. A. Pocock. Although these writers do not all agree with each other, and hence their "republican synthesis" is not really a single argument, they all share the tendency to downplay and minimize the importance of Locke for the American colonists in the years leading up to the revolution. Instead of seeing the American colonists as acting on commitment to Lockean ideas about natural rights and liberty, they see the colonists responding to other republican ideas. Bailyn, who is thought of as the progenitor of this view, argued that it was not abstract philosophy that that shaped American responses but an ideology shaped by many sources but in particular by the Whig Opposition tradition by the likes of John Trenchard and Thomas Gordon. Gordon Wood for his part sees a classical republican tradition at the heart of the American response, connecting Whig or opposition tradition to the Renaissance and to classical authors like Cicero

and Aristotle. For Wood the essence of republicanism was the calls for "the sacrifice of the individual interests to the greater good of the whole" . Pocock, also traced the Whig Opposition back to the ancients, especially Aristotle. He saw English writer James Harrington as the central link between the ancient conceptions and the American context. Pocock defines this tradition as "civil humanism" by which he means "a style of thought … in which it is contended that the development of an individual towards self-fulfillment is possible only when the individual acts as a citizen, that is, as a conscious and autonomous participant in the autonomous decision-taking community, the polis or republic." Though differing from each other in fundamental ways, Bailyn, Wood and Pocock all share the view that Locke's ideas were not that central for the American context. Zuckert disagrees. He argues that indeed Locke was critical and that this "republican synthesis" misreads the development of natural rights theory in the European context and its impact on the American revolutionaries.

In Zuckert's view, the Declaration of Independence has to be read as a point by point articulation of Lockean philosophy. There are five key claims in Locke's philosophy that can all be found in the Declaration and that differentiate Locke from earlier contract theories. The five critical points are 1) a right to abolish government 2) equality of human beings, 3) government is an artifact of human creation, 4) political power comes from consent of the governed, 5) that rights are bestowed by the creator and are "natural." [5] It is not just that these five points can be found the Declaration of Independence. The same points distinguish Locke and thus the Declaration's intellectual ancestry in some critical ways from earlier Whig thinking that had been dominated by Hugo Grotius, the other dominant philosopher of the seventeenth century.

In linking the Declaration to Locke, Zuckert returns to the view articulated in the early twentieth century by Carl Becker in his *Declaration of Independence*. Becker had argued that ideas of Locke had gained increasing popularity in the years leading up to the revolution until they reached their fullest articulation in the Declaration. Zuckert's work thus complements and further supports recent writings lately that have found support for the view that Locke's thinking was critical to the American colonists in the period leading to revolution.

Natural Rights and the Declaration of Independence

In what follows, I want to probe more the claim that the Declaration of Independence embodies John Locke's theory of natural rights and present an alternative way of understanding Locke's influence on Jefferson and the Declaration of Independence. While there is no doubt that Lockean like notions appear in the Declaration of Independence, the story of Locke's reception in the American context in the period leading up to the revolution (1765-1776) is more complicated than Zuckert's story suggests. Locke's

ideas and philosophy is a very strong presence in the writings and thought leading up to the revolution. But Locke's natural rights philosophy is contested both in its meaning and use. The colonists were in fact ambivalent about some of Locke's natural rights ideas. They did not uniformly invoke Locke, and when they did invoke Locke, they did not always interpret him the same way or for the same purpose. Some key pamphlet writers clearly avoided invoking Locke's natural rights altogether. Others invoked Locke to make certain points but ignored Locke at other times. Still other writers seem influenced by Lockean ideas even as they deny relying on Locke and as they offer what they consider a new theory of the origin of government.

As the conflict with Great Britain escalated in the mid 1760's, Locke's natural rights was neither the only nor the standard way of justifying the American rights. Instead, we see Locke's natural rights justification operating alongside several other arguments that justified the American claims and rights. Those claims, moreover, were drawn from earlier contract and common law traditions that were not based on Locke at all. These other arguments based British American rights on the ancient British rights embodied in the British constitution and on the charters granted to the American colonies. At times, these alternative theories of rights are offered as a sole justification of colonial American rights. At other times, they appear alongside a Lockean natural rights argument. Locke is also put to different uses in the decade leading up to the Revolution. At first, Locke's ideas are used to justify particular rights, particularly the right not to be taxed without representation. But as the decade moved on, Locke ideas were also used to justify the right of individuals to leave their mother country and set up new states with their own social compact, and eventually the right to revolution itself. Thus the uses of natural rights were various and shifted as the resistance unfolded.

The fact that colonists were using multiple justifications for rights, and using Locke inconsistently, sheds a different light on the claim that the Declaration of Independence embodies a Lockean natural rights philosophy. At the very least we have to ask why the Declaration principally favored a Lockean natural rights philosophy when the literature leading up to the Declaration was much more ambivalent. What prompted Jefferson, John Adams, Benjamin Franklin and the Continental Congress to favor a philosophy of natural rights over other theories at that moment in time?

As the nature of the argument over rights between the American colonies and Great Britain changed, the safer alternative theories of rights were no longer tenable. Locke's ideas of natural rights were the best of available theories to support the new argument, even though the colonists had some ambivalence about them. And the new arguments focused on the limit of Parliamentary authority, the equality of the colonies in the empire and then eventually on the right to revolution. For reasons to be discussed, the arguments form charters and British rights no longer seemed sufficient by themselves.

The precise meaning of the Declaration's preferential position towards Locke is nonetheless debatable. It is possible that the Declaration's adoption of Lockean ideas meant that a consensus had been achieved in the way Americans understood rights. If so, the Declaration represented a culmination and consensus of thinking and not merely a temporary position. But an alternative view suggested here is that the Declaration's use of natural rights was much more ambivalent. Because the Declaration was attempting to state a unified colonial position, its language attempted to smooth over and hide areas of disagreement about natural rights. On this view, the Declaration on this view represents an equivocal and tentative embrace of natural rights, rather than a full out endorsement and consensus. There are some textual clues that can support this reading of the Declaration. First of all, the Declaration specifically declares its purpose as justifying revolution to the nations of the world, not articulating a general theory of rights or government. Second, there are some subtle but noticeable linguistic ways in which the Declaration is "not Lockean". These linguistic departures from classically Lockean language could have been avoided and are not merely stylistic considerations, as we shall see. Had the intention been strictly to endorse Locke there are much clearer ways to have done so that were well known to the colonial writers. The Declaration thus affirms Locke even as it seems to deny Locke, suggesting some remaining ambivalence about natural rights even as that a certain part of that philosophical foundation was used to justify the revolution. It is as if the Continental Congress and Jefferson papered over some of the earlier doubts about natural rights theory in an effort to state a unified American view justifying revolution. But some of that earlier ambivalence is still evident in the language of the Declaration.

This alternative account of Locke's influence on the Declaration and in the American context puts a different spin on Zuckert's portrayal of Locke's rise to prominence in America. It suggests a more tentative embracing of Locke, bound up in a particular situation and for particular purposes, rather than a wholehearted, unambivalent embracing of Lockean natural rights theory as the foundation of American thinking.

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Locke and Natural Rights In First American Responses to the Sugar and Stamp Act

Two new acts by the British Parliament in the mid 1760's triggered the American colonists to begin thinking more deeply about their fundamental rights and turn to John Locke's natural rights philosophy among other theories to justify those rights. Those legislative acts were the Sugar Act (April 1764) and the Stamp Act. It was the Stamp Act more than the Sugar Act that prompted the colonists to react by claiming their rights were being

violated by Parliament. The two acts were proposed under the leadership of George Grenville, who had become Prime Minister, and who proposed both acts to address a growing problem of national debt that had almost doubled in the Seven Year's War.[6]

In early March 1764, Greenville proposed his new resolutions which included a range of new trade restrictions and duties, including a ban on rum, a new duty on Madeira wine, coffee, foreign indigo and foreign sugar. All of the resolutions were known as the "Sugar Act", which revived and adjusted the early Molasses Act which had been legislated in 1733. That law had placed duties on Molasses and rum but had never been effectively enforced. The new Sugar Act was intended to reinstate and adjust that earlier law, lowering the duties from 6d per gallons to 3d but with stricter custom controls to ensure it was enforced. In addition, new means of enforcing the laws were proposed with new procedures for determining what a vessel was carrying and where a ship had previously been. More troubling, once a violation had been detected, they would be prosecuted in the admiralty courts which operated without juries and had been deciding maritime cases in the colonies since 1697. The goal of the new regulations to eliminate smuggling that had been condoned by local judges and friendly juries.

The Sugar Act also included a fifteenth resolution that announced an intention to charge a Stamp Duty, a charge on various documents and articles made of paper. The intention of the Stamp Act was to generate revenue by forcing the colonists to buy and use paper with a tax stamp for use in essentially any commercial or legal transaction, including all legal documents, permits, commercial contracts, newspapers, wills, pamphlets, and even playing cards. The proposal for the Stamp Act was announced in the resolutions of the Sugar Act but set aside for a year ostensibly to get colonial feedback.[7]

The colonists in general saw these two acts somewhat differently. They saw the Stamp Act as a kind of "tax" and fundamentally different in character than the Sugar Act which they regarded as at least in part a "duty on trade". The colonists initially had a fundamentally different understanding of their rights with respect to taxes and trade regulations. They believed it was their fundamental right to consent to any taxes that would be imposed on them by Parliament. Since in their view they were not represented in Parliament, and therefore, could not by definition consent, they viewed taxes imposed by Parliament as a violation of their fundament rights. As Stephen Hopkins will put it: "For it must be confessed by all men that they who are taxed at pleasure by others cannot possibly have any property, can have nothing to be called their own."

The colonists initially had a different view of trade regulations in general. They believed Parliament had the authority and right to set trade regulations for the good of the whole empire without consulting them and

without granting them representation. How and why the colonists distinguished trade duties from taxes is an interesting point to which we return later for it tells us something about their notions of rights.[8]

In response to the Sugar and Stamp Acts, the colonists wrote a series of pamphlets articulating their discontent with these new regulations. In some of these pamphlets, the colonists cite and use John Locke to defend their rights against Parliament. It is worth noting the irony in using Locke to argue that Parliament overstepped its power. Locke after all was mostly concerned with limiting the power of monarchy and with expanding the control of Parliament and the rights of the people. In Locke's own historical context of the 1680's, Parliament's powers were still in danger of infringement by the monarchy and royalist tendencies still had strong support, in the writing of Filmer and others. The British Americans were using Locke to criticize the very institution whose role and power Locke's work had been designed to strengthen. But the use of Locke by the colonists was erratic. Not only was Locke not cited consistently, but the colonists relied heavily on several other arguments to justify what they regarded as their fundamental rights. Moreover, when they did cite Locke, he was used for various purposes and sometimes not to justify the notion of natural rights at all. Indeed, we see evidence that the colonists were not at all comfortable with the idea of natural rights, although not always for what we might take to be "good reasons". In fact the appeal to Locke in this first phase of resistance was potentially risky for the colonists and arguably even weakened their arguments. American loyalists poked fun at their fellow colonists for basing arguments on "metaphysical jargon". They also charged the colonists with sedition and desires of independence, which was not really on the colonists' minds initially, but could be inferred from use of rights arguments. Furthermore, Locke's ideas may have had a more radical edge than colonists were willing to articulate or even completely recognize this early in the game. Indeed, as the argument unfolded the use of Locke's natural rights naturally becomes more radical in its use, which explains the growing use of natural rights arguments as the resistance unfolds.

Let's look first at the place of Locke in the early set of pamphlets written by Stephen Hopkins, Thomas Fitch, James Otis and Oxenbridge Thatcher as well as some of the responses elicited to their pamphlets.

Stephen Hopkins, governor of Rhode Island and leader of a local political faction, wrote two pamphlets that are of interest in this early phase of the resistance. In the first, *An Essay on the Trade of the Northern Colonies published* in Feb 1764, Hopkins summarizing thinking of his constituents in Rhode Island, responds to the announcement of the Sugar Act, arguing on strictly economic grounds that the act would hurt both the colonies as well as the British Empire.[9] Like other pamphlets written at this early stage, the argument is economic and pragmatic in orientation and makes no use of Locke or rights language at all.[10] We shall consider in a moment why this is so.

In the essay, Hopkins gives a detailed look at "principal branches of commerce" of the northern colonies, making observations about how the soil and climate shape the regions commerce and increase the need for colonial consumption of British manufactures. At the heart of the essay is the question of what types of economic activities should be regulated, or as he puts it, his purpose is to determine "whether this commerce, taken together, or any branches of it, be detrimental to the true interest of Great-Britain, or in any degree injurious to the British sugar colonies…" [11] And then expressing a sentiment that would be echoed throughout the early colonial debates, Hopkins explains that "And first we shall acknowledge, that whatever business or commerce in any of the northern colonies interferes, or is any way detrimental to the true interest, manufactories, trade or commerce of Great Britain, we reasonably expect will be totally prohibited."[12]

Hopkins acknowledges that certain types of colonial commerce can be detrimental to the best interests of Great Britain, such as the fishing trade with Spain and Italy in which the colonies buy those countries' manufactures and not those of Great Britain. He has no objection to regulations prohibiting those commercial activities. But there are some types of regulations which rest on a mistaken analysis and lack of information. For example, the trade of the colonies with North Africa may appear to compete with the trade of Great Britain. But on deeper analysis and with more knowledge, Hopkins argues, Parliament would realize this American trade actually has long term benefits for Great Britain.

But with regard to the Sugar Act, Hopkins argues there was no doubt about the disastrous economic consequences that would ensue. "And here we shall by no means make the same concessions, which our duty to, and dependence on the mother country, obliged us to make in discussing the former part of this question; but shall here take it for granted, that every branch of business and commerce in the northern colonies, which is beneficial to them, altho' it may in a less degree be injurious to the sugar colonies, ought notwithstanding that, to be countenanced and encouraged."[13]

Using strictly economic style arguments, and appealing to early mercantile concepts of supply and demand, monopoly, and pricing fluctuations, Hopkins argues that the Sugar Act will produce detrimental economic consequences and backfire. If the new duty, for example, is intended to protect the price of sugar in the British Sugar colonies, it will fail, for the colonists will simply not be able to buy as much sugar. And if the intent of the duty on sugar purchased from non-British colonies is to lower the cost of the northern colonies' goods to the British Sugar colonies that strategy will also fail. Indeed, the duty will also fail to raise revenue for Great Britain, its ostensive purpose, since the impact of the duty will drive down the overall trade volume which can not support that kind of duty. [14]

Hopkins argues that consequences will be transformative on the commerce of the northern colonies, which will be forced to abandon or reduce their current forms of economic activity and develop their own manufactures. Since the colonies were an important market and source of revenue for Great Britain, Hopkins is implying that if Great Britain was not careful in its trade regulations, the colonies would no longer be a good market for British goods. Such veiled threats about the development of American manufacture appear in many subsequent pamphlets . In fact, the colonists would in fact embargo the importation of British goods in October and November 1765, which ultimately led the British merchants to pressure Parliament to repeal the Stamp Act.

It is interesting and significant for our purposes that Hopkins never argues here that the rights of the colonies have been violated. His argument is framed in strictly economic and consequentialist reasoning: Instead of serving the best interest of the American and Sugar colonies and Great Britain, the Sugar Act would be detrimental to all. One might reasonably see in arguments such as these an early American tendency towards "free trade" arguments. But Hopkins and other writers to follow in this early phase generally do not link the argument against trade restrictions to liberty or freedom, with some exemptions. Liberty and economic arguments over trade regulations have not yet fused here in these early American writings. [15]

Hopkins pamphlet is of interest in the present context precisely because of its lack of rights talk. The lack of rights talk may be because it was early in the debate. As Bailyn notes,

> Yet in the overall development of the Revolutionary movement, these statements of colonial opinion, written before the passage of the Sugar Act, are of considerable importance. For not only do they express the colonists' objections to the economic reorganization of the empire, but they mark the last point at which objections to Parliamentary action affecting them could generally be voiced without reference to ideology. The most striking fact about these addresses and petitions is their entire devotion to economic arguments: nowhere do they appeal to constitutional issues; nowhere was Parliament's right to pass such laws officially questioned. But ideological questions were just below the surface. [16]

Some American commentators have tended to see the development of rights talk as almost "natural" or "inevitable". Morgan, for example, writes that "Undoubtedly the drastic economic effects the colonists anticipated from the Sugar Act prompted the alarm they felt, but it was natural for them to inquire into the right of the matter."[17]

But the move away from strictly economic arguments to rights language seems more than simply an inevitable shift. It is also likely the

result of the fact that the Sugar Act, which was the first focus of colonial attention, was more of an ambiguous violation of rights as the colonists understood them, than the Stamp Act which was announced but not yet approved. In the early years of the resistance, the colonists recognized that Parliament had an undisputed right to regulate trade for the benefits of Great Britain's interests as a whole. To be sure, the colonists did not always believe Great Britain understood its own best interests economically, or fully understood the outcome of economic policy. The colonists would therefore challenge trade regulations on economic and pragmatic grounds initially, as was the case with Hopkins.

But the colonists believed that Parliament had no right to tax them without their consent. This they believed to be a fundamental right. The problem of differentiating between a tax and a trade duty would emerge shortly in the debate. [18] And the Sugar Act was at least partly ambiguous. On the surface, the Sugar Act looked like a traditional trade regulation since it imposed duties on imports and forbade certain types of trade between parts of the empire. But the language of the resolutions made it clear that the intention of the law was to raise revenue. "And whereas it is just and necessary, that a revenue be raised, in your Majesty's said dominions in America, for defraying the expences of defending, protecting and security the same; we, your Majyesty's most dutiful and loyal subjects, the commons of Great Britain,…have resolved to give and grant unto your Mjyesty the several rates and duties hereinaftermnetioned;" [19]

And herein arose an ambiguity. Could trade duties be in effect taxes? The Sugar Act, therefore, was a kind of "wolf in sheep clothing." It was "betwixt and between" to borrow a term of anthropologist Victor Turner, ostensively a duty for the purpose of revenue. Should the colonists fight it on the basis of rights, or on the basis of economic arguments and justice? In general, the colonists chose to fight the Sugar Act on economic and pragmatic grounds although they worried it violated their rights but were not yet ready to say so as explicitly.[20]

There was no ambiguity at all, however, with regard to the Stamp Act which clearly was not a regulation of trade between parts of the empire and which imposed direct tax on the colonists by a method by which they had in fact earlier taxed themselves. Stamp Duties were used by colonists themselves on more than one occasion to tax themselves.[21] As the colonists began to shift attention from the Sugar act to the Stamp Act, which had been announced in March 1764 but not yet implemented, their language expanded from strictly economic and utilitarian arguments to broader rights language. The economic arguments would not go away. Some strictly economic essays would continue to be written much later. [22] But in the future the economic arguments were typically blended with and complementary to rights claims.

To gauge this shift in perspective, we can turn to another essay written by the same Stephen Hopkins seven months after he penned his

earlier essay. Now his focus has shifted to include the Stamp Act in an essay entitled, *The Rights of the Colonies Considered* (Dec. 1764).[23] This was not the first response to the Stamp Act as we shall see. But it provides an interesting measure of the shift in perspective that had occurred in seven months time from one writer's perspective.

With the prospect of Stamp Act coming into focus, the language of rights has now shifted to the fore. The Stamp Act, Hopkins writes, "hath much more, and for much more reason, alarmed the British subjects in American than anything that had ever been done before."[24] But interestingly enough, for our purposes, Hopkins does not appeal at all to Locke. And in avoiding Locke, we find our first clue why the colonists felt ambivalent about Locke. At the start of the essay, Hopkins writes:

> Liberty is the greatest blessing that men enjoy, and slavery the heaviest curse that human nature is capable of. This being so makes it a matter of the utmost importance to men which of the two shall be their portion. Absolute liberty is, perhaps, incompatible with any kind of government. The safety resulting from society, and the advantage of just and equal laws, hath caused men to forego some part of their natural liberty, and submit to government. This appears to be the most rational account of its beginning, although, it must be confessed, mankind have by no means been agreed about it. Some have found its origin in the divine appointment; others have thought it took its rise from power; enthusiasts have dreamed that dominion was founded in grace. Leaving these points to be settled by the descendants of Filmer, Cromwell and Venner, we will consider the British constitution, as it at present stands, on Revolution principles, and from thence endeavor to find the measure of the magistrates' power and the people's obedience.[25]

Hopkins is clearly appealing initially to and signaling agreement with a very Lockean-like conception of rights, although he nowhere mentions "natural rights" or Locke by name. But he alludes in Lockean terms to "natural liberty" and the impulse to forgo some natural liberty because of the advantages of submitting to government. This is a good short summary of Locke's theory of natural rights and the social contract. Hopkins regards this as the "most rational account of" government's beginning.

But Hopkins acknowledges this account of the origins of government is not unanimously accepted and that there are other competing theories of government's origins. Some argue that government was established by God, or arose from power, or was founded in grace. We shall see that similar doubts about government's origins are expressed by other writers such as Maryland lawyer and politician, Daniel Dulany, for example, in his "Consideration on the Propriety of Imposing Taxes in the British Colonies for

the Purpose of Raising a Revenue" (August 1765). Dulany argues that the charters "founded upon the unalienable rights of the subject and upon the most sacred compact, the colonies claim a right of exemption from taxes *not imposed with their consent.* They claim it upon the principles of the constitution, as once English and now British subjects, upon the principles on which their compact with the crown was originally founded." Then expressing exactly the same concern as Hopkins about the theoretical origins of government, Dulany argues that the source of rights in charters is not subject to the problem of social compact theory generally. "The origin of other governments is covered by the veil of antiquity and is differently traced by the fancies of different men; but of the colonies the evidence of it is as clear and unequivocal as any other fact."[26] We shall see a similar but more detailed critical survey of such theories of government's origins in an essay by James Otis, written some months before Hopkins, to which we return below. [27]

Hopkins is reluctant to base his argument on natural rights precisely because there is lack of agreement on the origins of government. He therefore gives a different basis for individual rights that he believes everyone will subscribe agree to. Specifically, he locates the origin of rights in the British constitution and the original compact of the British people.

> The glorious constitution, the best that ever existed among men, will be confessed by all, to be founded by compact, and established by consent of the people. By this most beneficent compact, British subjects are to be governed only agreeable to laws to which themselves have some way consented; and are not to be compelled to part with their property, but as it is called for by the authority of such laws. The former, is truly liberty; the latter is really to be possessed of property and to have something that may be called one's own.[28]

The "glorious" British Constitution was founded by a compact and creates fundamental rights ensuring that subjects "are to be governed only agreeable to laws to which they some way consent and are not to be compelled to part with their property but as it is called for by the authority of such laws." Herein lies the protection on taxation without consent:

> For it must be confessed by all men, that they who are taxed at pleasure by others, cannot possibly have any property, can have nothing to be called their own. They who have no property can have no freedom, but are indeed reduced to the most abject slavery; are in a condition far worse than countries conquered and made tributary…[29]

This quotation could have been lifted almost word for word from John Locke. And the statement seems to suggest that the right to consent to taxes is universally recognized "confessed by all men", though Hopkins never tries

to anchor it in natural rights and instead links it only to the original British compact.

Given what Hopkins assumes to be widely shared premises about the origin of British rights, the "chief point examined" in his essay considers "whether the British American colonies on the continent are justly entitled to like privileges and freedom as their fellow subjects in Great Britain. [30] Not surprisingly, the core of Hopkins argument is that indeed the British Americans are entitled to all the rights embodied in the British constitution. The arguments to justify that position are similar to ones repeated incessantly throughout colonial writings.

Hopkins, then, is appealing to a notion of social contract and common law that does not depend on natural rights theory. British rights, as distinct from natural rights, are provided by a specific and historical compact (the glorious constitution). This theory of the "common law" or "ancient constitution" was in fact a standard English understanding of contract before Locke's rise to prominence after the 1680s and inspired by the Dutch writer Grotius, as Zuckert has shown. So we see here, early in the American resistance, Hopkins considers it far safer to work off agreed, uncontested assumptions about the origin of British rights than contested notions of universal natural rights.

Since Hopkins regards the origin of government to be debatable and historically obscure, he wants to avoid using natural rights theory as the basis of his argument. He clearly is partly concerned about reaching his more religiously oriented readers who might favor a theory of government originating in divine appointment, or his more empirically oriented readers who might argue that historically government was founded by power.[31] It is as if to say, whatever our beliefs about government's origin in general, we can all agree that there are specific historic rights that British subjects have.

As an aside is important to note that Hopkins' reservation about a natural rights theory stems from what is arguably a misunderstanding of Locke, by current standards. Hopkins is worried that the theory of natural rights and social compact is essentially rests on a particular historical understanding of the government's origin. Locke can be read that way.[32] But Locke never entirely rested his argument about the social contract or the state of nature strictly on historical evidence. For Locke, the social compact was *also* an ideal agreement or construct that *should* structure the relations between individuals and society. Although Locke believed there were historical examples of social compacts, and cited some, and although he identified the State of nature with the description of creation in Genesis, as did his contemporaries, he also conceives of natural rights as moral obligations that should structure any relationship between individuals and government. In most compelling contemporary readings of Locke, Locke's theory of government is taken, not as an actual description of how

government developed, but as an ideal set of rights that should be protected by government.) [33]

Hopkins reservations about natural rights and social compact theory thus rest on the then current and (arguably mistaken) reading of Locke. It is also interesting that Hopkins is worried that natural rights would seem incompatible to those of a more traditional religious orientation who believe government was "appointed by God". This worry as we shall see was on the mind of other colonists as well. Although Locke himself was clearly anchoring rights in the Law of Nature and the Law of Reason, which he equated with God's Law, the colonists see a tension between Locke's view and a more traditional religious perspective.[34] Hopkins clearly assumes that some of his religious readers would think Locke's natural rights account still gives too much consent to human beings, and not enough to God. We shall see that James Otis worries about precisely the same issue below.

From Hopkins early essay, we now have a working interpretation of why American writers felt more comfortable arguing from British rights than natural rights. The colonists did not want to be sidetracked debating contested theories about the origin of government and the existence of the State of Nature. They wanted to start from a well accepted point of departure and they felt that arguing from the origin of British rights rather than natural rights was a far safer and more compelling starting point.

This understanding accounts for why some other pamphleteers and resolution writers focus exclusively on British rights and do not even acknowledge the arguments from natural rights. Another example is written by Thomas Fitch, governor of Connecticut, who outlines what he believes to be general consensus about the origin of British rights in a pamphlet written on behalf of the colony in Connecticut in summer 1764. In his "Reasons Why the British Colonies In America Should Not be Charged with Internal Taxes," Fitch organizes his essay according to four principles that he takes to be uncontested:

> First. The people in the colonies… are really, truly, and in every respect as much the King's subjects as those born and living in Great Britain are…Secondly. All the King's subjects, both in Great Britain and in the colonies and plantations in America, have the right to the same general and essential privileges of the British constitution, or those privileges which denominate them a free people…Thirdly. In order that the King's subjects in the colonies and plantations in America might have and enjoy the like liberties and immunities as other their fellow subjects are favored with, it was and is necessary the colonies should be vested with the authority and power of legislation; and this they have accordingly assumed and exercised from their first regular settlement down to this time…Fourthly, that charging stamp

> duties or other internal taxes…will be an infringement of the aforementioned rights and privileges…

Fitch does not even bother mentioning the question of government's origin or natural rights at all.

Hopkins was not the only writer to explicitly express an ambivalence about natural rights theory and social compact. Similar but more detailed reservations are expressed about Locke's social compact theory in an essay written by James Otis, written some five months before Hopkins essay. Otis was already a well-respected Boston politician and lawyer and famous already for his role in a legal case defending Boston merchants against the writs of assistance. The writs were general search warrants that enabled customs officials to enter businesses and homes in the hope of finding vaguely defined contraband. In arguing the case, Otis delivered a lengthy oral argument in which he maintained that the writs were a violation of the colonist's natural rights. After the announcement of the Sugar Act, Otis wrote an essay called, "*The Rights of the British Colonies Asserted and Proved"* (July 1764) which was one of the most well known and widely read pamphlets in the colonies.

In this essay, Otis expresses his reservations about social compact theory and the question of government's origin:

> What shall we say then? Is not government founded on *grace*? No. Nor on *force*? No. Nor on compact? Nor *property*? Not altogether on either. Has it *any* solid foundation, any chief cornerstone but what accident, chance, or confusion may lay one moment and destroy the next? I think it has an everlasting foundation in the *uncheageable will* of God, the author of nature, whose laws never vary. [35]

We shall explore Otis' "alternative theory" of government later, for it turns out at first blush not to seem all that different from Locke's account. But it actually represents an attempt of sorts to reconcile more traditional religious thinking with Locke's natural rights thinking. Otis lays out in quite some detail the problem with Locke's "social compact theory". It is worth quoting Otis at length on this point.

> On the other hand, the gentlemen in favor of the *original compact* have been often told that *their* system is chimerical and unsupported by reason or experience. Questions like the following have been frequently asked them, and may be again.
>
> "When and where was the original compact for introducing government into any society, or for creating a society, made? Who were present and parties to such compact? Who acted for infants and women, or who appointed guardians for them? Had these guardians power to bind both infants and women during life and their posterity

> after them? ….Is it possible for a man to have a natural right to make a slave of himself or of his posterity? ..What will there be to distinguish the next generation of men from their forefathers, that they should not have the same right to make original compacts as their ancestors had? If every man has such right, may there not be as many original compacts as there are men and women born or to be born? Are not women born as free as men? Would it not be infamous to assert that the ladies are all salves by nature? If every man and woman born or to be born has an will have a right to be consulted and must accede to the original compact before they can with any kind of justice be said to be bound by it, will not the compact be ever forming and never finished, ever making but never done?…"
>
> I hope the reader will consider that I am at present only mentioning such questions as have been put by highfliers and others in church and state who would exclude all compact between a sovereign and his people without offering my own sentiments upon them; …Those who want a full answer to them may consult Mr. Locke's discourse on government, M. De Vattel's law of nature and nations, and their own consciences. [36]

Otis concludes:

> And say the opposers of the original compact and of the natural equality and liberty of mankind, will not those answers infallibly show that the doctrine is a piece of metaphysical jargon and systematical nonsense?" Perhaps not. [37]

We see here a number of various reservations about Locke's social compact theory. There is a worry that the historical social compact is "chimerical" and "metaphysical jargon", lacking evidence to support it. But we see other probing questions as well, some of which have a more philosophical bent, and touch on points that Locke actually dwelt on in quite some detail in his Second Treatise. What kind of force does the law have for those who were not at the original compact and are descended from those who were? Do they have the same rights and obligations? Can they go off and make a new social compact? Why not? What about children and women? Were they included in the social compact? These questions raise important philosophical and moral questions at the heart of social contract theory, as Locke himself understood.

That critics did indeed think rights theory was "metaphysical jargon" is evident in an early response to Hopkins and Otis' essay. Martin Howard, a lawyer in Newport Rhode Island and key spokeperson for a group who were critical of Rhode Island's independent political bent.

Howard was one of the early American colonists to reject colonial rights arguments and his ideas were repeated by later loyalists. In August 1765, his

effigy was dragged around the streets of Newport and then hanged and burned. His house was also destroyed. And he fled to the safety of a British ship in the harbor. [38]

Here is how Howard puts in his first response to Hopkins and Otis:

> "The honorable author has not freed this subject from any of its embarrassments: vague and diffuse talk of rights and privileges, and ringing the changes upon the words liberty and slavery only serve to convince us that words may affect without raising images or affording any repose to a mind philosophically inquisitive. For my own part, I will shun the walk of metaphysics in my inquiry, and be content to consider the colonies' rights upon the footing of their charters, which are the only plain avenues that lead to the truth of this matter."[39]

Given the lack of consensus on the social compact theory and natural rights argument, and the tendency to think of rights talk as "metaphysical jargon", we can understand why Hopkins and other pamphlet writers were reluctant to base their arguments against the Stamp Act initially on natural rights. As Hopkins puts it, "Leaving these points to be settled by the descendants of Filmer, Cromwell and Venner, we will consider the British constitution, as it at present stands, on Revolution principles, and from thence endeavor to find the measure of the magistrates' power and the people's obedience."[40] This was thought to be a known empirical point of departure and thus much safer and stronger a starting point for the rights of the colonists who thought of themselves as British Americans.

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If the turn to British rights as the foundation for colonial rights was thought to be a less problematic line of argument than natural rights, the colonists would soon find out otherwise. In basing colonial rights on the British constitution and the rights of British subjects, the burden for Hopkins, and other pamphleteers who followed the same route, was to demonstrate that American colonists share fully and equally in these British rights. This turned out to be a somewhat more thorny problem than the colonists expected and explains in part why the colonists turn more heavily to arguments from natural rights. For while the notion of British rights was itself a point of consensus, ascribing such rights to the "the British Americans" was by no means a settled question. While everyone agreed that British subjects had rights from the common law and that those rights included protections on life, liberty and property, what about the Americans? Were they included and on what basis?

The core of the problem was the status of colonies. What are colonies? Are colonies part and parcel of Great Britain or unique in some sense? Do colonial subjects enjoy the same rights as subjects living in the mother

country? Are they still "part of the people" who made the original English compact, just as British subjects? Were colonies included in the original British compact or are they unique in some sense and not covered by the original constitution? Who inherited the original compact anyway? How did such rights get transferred to and remain with the colonies? What if not all colonists were British in origin? And how had various British historical events (such as the Civil Wars, the Commonwealth, and the Glorious Revolution) affected the British American rights? Did the colonists bring their rights to America when they came there and if so did they retain them? These were the kinds of issues that came up and had to be addressed in arguments that based colonial rights on original British rights. The answer to these questions turned out to be as contentious as the "origin of government" and in some sense analogous to that question. And this is the burden of the argument for writers like Hopkins and Fitch who base colonial rights strictly on British rights.

Arguing that the colonies did in fact possess British rights, for example, Hopkins makes a number of arguments familiar throughout colonial writings. He argues that the first settlers never would "leave their native country and go through the fatigue and hardship of planting in a new uncultivated one for the sake of losing their freedom..." Moreover, the "terms of their freedom" was fully settled before they left the mother country "they were to remain subject to the King, and dependent on the kingdom of Great Britain. In return, they were to receive protection and enjoy all the rights and privileges of free-born Englishmen." Fitch would put it this way: "Though the subjects in the colonies are situated at a great distance from their mother country, and for that reason cannot participate in the general legislature of the nation….it may not be justly said they have lost their birthright by such their removal into America".[41]

As evidence of this agreement, Hopkins appeals to the charters provided to the Massachusetts colony and to Connecticut and Rhode Island. Fitch for his part appeals to the Connecticut charters. And in the Stamp Resolves that followed later, each colony would trot out its rights based on its own charters. Since each colony had its own charter, arguments from charters tended to undermine a unified response across colonies, an issues which became more important as the resistance developed. Hopkin's argument from Massachusetts charters could not help Fitch who had to argue from Connecticut charters. One reason the appeal to natural rights became more appealing was to find the ground for rights that the colonies could share equally.[42]

But there were other problems with relying on charters too. A charter could be construed as granting a privilege, rather than a right, which could be theoretically taken away. Indeed, as one British writer would write under the penn name of William Pym "let me inform my fellow subjects of America, that a resolution of the British parliament can at any time set aside all the charters that have ever been granted by our monarchs;."[43] Furthermore,

some charters were granted before the Civil Wars and Glorious Revolution. And the question therefore arose as to how those grants of rights, if they were rights at all, were affected by these fundamental changes in the British constitution.

This may explain why Hopkins says he is basing his argument on "revolution principles", referring presumably to the Glorious Revolution, and trying to get around the question of how the Glorious Revolution or English Civil Wars impacted the early American migration or the "British birthright". But surely there was a question lurking hidden here. For if Americans brought rights with them originally when they migrated, what ensured those rights stayed with them as the English government went through political upheavals of Civil War, Commonwealth, restoration and then revolution.

As if sensing the vulnerability of the appeal to strictly British rights and charters, Hopkins appeals to general historic evidence as well, trying to ground the rights of colonies in something more than just the British compact. "There is not any thing new or extraordinary in these rights granted to the British colonies; the colonies from all countries, at all times, have enjoyed equal freedom with the mother state."[44] Here Hopkins attempts to find some anchor for American rights beyond just British rights, turning to what he considers real historical precedent as if to find some more universal or general footing for the colonies' rights. This same impulse to look beyond British rights accounts for the reliance on natural rights arguments as the debate unfolds. Summarizing his position, Hopkins writes:

> From what hath been shown, it will appear beyond a doubt, that the British subjects in America, have equal rights with those in Britain; that they do not hold those rights as a privilege granted them, nor enjoy them as a grace and favor bestowed; but possess them as an inherent, indefeasible right; as they and their ancestors, were freeborn subjects, justly and naturally entitled to all the rights and advantages of the British constitution.[45]

It is important to note the use here of the language of "inherent, indefeasible rights" to describe rights based, not on natural rights, but on the common law. Rights from the British constitution were also thought to be "inherent" "inalienable," "indefeasible" and "indubitable". The fact that the language of inherent rights can describe rights that originate in either common law or from other sources is significant. For we shall see that the colonists sometimes prefer the language of "inherent" rights to "natural rights" and seemingly take advantage of the ambiguity about which type of right they are talking about.

Having established that Americans have equal rights with Britons, and therefore the right not to be taxed without representation, Hopkins goes on to consider the respective role of Parliament and local American legislatures. Hopkins starts with the acknowledged realm of Parliament's authority.

Parliament has supreme authority to regulate "things of a more general nature, quite out of the reach of these particular legislatures, which it is necessary should be regulated, ordered and governed. One of this kind is the commerce of the whole British empire, taken collectively, and that of each kingdom and colony in it as it makes a part of that whole.[46]

But with respect to taxes, Hopkins argues Parliament has no right to tax the colonies because it does not represent them.

> If the British house of commons are rightfully possessed of a power to tax the colonies in America, this power must be vested in them by the British constitution, as they are one branch of the great legislative body of the nation. As they are the representatives of all the people in Britain, they have, beyond doubt, all the power such a representation can possibly give; yet, great as this power is, surely it cannot exceed that of their constituents. And can it possibly be shown that the power in Britain have a sovereign authority over their fellow subjects in America? Yet such is the authority that must be exercised in taking people's estates from them by taxes, or otherwise, without their consent. In all aids granted to the crown by the Parliament, it is said with the greatest propriety, "We freely give unto Your Majesty;" for they give their own money and the money of those who have entrusted them with a proper power for that purpose. But can they with the same propriety, give away the money of the Americans, who have never given any such power?[47]

Now if this argument and position sounds confusing and inconsistent, some American and British readers thought so too. Hopkins is arguing that the colonies are part of the social compact for the purposes of British rights but not represented by and thus not subject to the supreme authority of parliament for the purposes of taxes. Yet, on the other hand, the colonies are subject to Parliamentary authority for the purposes of trade regulations and other laws which are necessary for the good of the whole. Fitch will struggle to express the same point in his essay. [48]

How is it that the colonies can be subject to parliament's authority on one set of matters but not another. Are the colonies subordinate to Parliament or not? In attempting to answer this question, Hopkins offers an early version of the "hub and spokes" vision of the empire in which the colonies are each independent spokes with equal rights to other spokes.

> In an imperial state, which consists of many separate governments, each of which hath peculiar privileges, and of which kind it is evident the empire of Great Britain; is no single part, through greater than another part, is by that superiority entitled to make laws for, or to tax such lesser part; but all laws, and all taxations, which bind the whole must be made by the whole. [49]

In this view of the empire, the house of commons, though part of Parliament, was really just another separate government (or spoke) parallel to that of the colonies. This was a fairly radical reinterpretation of Parliament as critics would shortly point out. Hopkins is here anticipating a view of the empire that is developed in more detail by Richard Bland in his pamphlet "An Inquiry Into the Rights of the British Colonies" and Thomas Jefferson in his A Summary View.[50] Other colonial writers, like Fitch and James Otis, did not venture as far as Hopkins acknowledging instead that the colonial legislatures were subordinate to Parliament and the House of commons. But even in this subordinate position, writers like Fitch argued that the House of Commons still did not have a right to tax the colonies.

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We have seen so far that one group of colonial writers ignored natural rights arguments, thinking that their arguments for colonial rights would be more readily accepted when starting from the uncontested notion of British rights. But while the British rights indeed represented an uncontested starting point, they soon discovered that their extrapolations from that starting point were hotly contested by critics both at home and abroad. The criticisms of the "British rights" argument encouraged colonists to look for a grounding of rights outside of the British constitution and common law.

Let's take a brief look at early responses of Martin Howard, Soame Jenyns and Thomas Whately in England, who took on the colonial contentions like those of Hopkins and Fitch. These writers tended to concede the fact that Americans had British rights. But they argued that since Americans enjoyed British rights they were also subject to Parliamentary authority. One of the critical points of dispute was the authority of Parliament over the colonies with respect to taxes.

As Howard puts it commenting on Hopkins essay:

> However disguised, polished, or softened the expression of this pamphlet may seem, yet everyone must see that its professed design is sufficiently prominent throughout, namely, to prove *that the colonies have rights independent of, and not controllable by the authority of Parliament*. It is upon this dangerous and indiscreet position I shall communicate to you my real sentiments. [51]

It is interesting to see Howard accuse Hopkins of appealing to rights independent of and not controlled by Parliament. This is not exactly true. As we have seen, Hopkins actually went out of his way not to appeal to natural rights and instead relies on British rights only. Even so, Howard still feels that Hopkins has gone too far, accusing him of setting limits to Parliament's authority and by implication appealing to rights that seem to lie outside Parliament's authority. Hopkins did not appeal to rights outside of British

rights. But he did think there was a limitation on Parliamentary right from those British rights. As we have seen, Hopkins argued that Parliament had an absolute authority to regulate the commerce of the empire and other issues of a general nature. But he argued this was not the case with taxes. The house of commons, which is one part of parliament, was subordinate to Parliament in the same way as the colonies were and therefore on par with them with respect to taxes. Whether this meant that "the colonies have rights independent of, and not controllable by the authority of Parliament" would not have been the way Hopkins would have said it.[52] But it was the way Howard characterized it and thus drew a line in the sand that said "no rights limit Parliament's power."

Indeed, Howard accuses Hopkins of being a hypocrite. For one can not argue that rights derive from the common law but then turn around and argue that Parliament's authority is limited. As Howard put it,

> Can we claim the common law as an inheritance and at the same time be at liberty to adopt one part of it and reject the other? Indeed we cannot. The common law, pure and indivisible in its nature and essence, cleaves to us during our lives and follows us from Nova Zembla to Cape Horn; and therefore, as the jurisdiction of Parliament arises out of and is supported by it, we may as well renounce our allegiance or change our nature as to be exempt from the jurisdiction of Parliament. Hence it is plain to me that in denying this jurisdiction we at the same time take leave of the common law, and thereby, with equal temerity and folly, strip ourselves of every blessing we enjoy as Englishmen: a flagrant proof, this, that shallow drafts in politics and legislation confound and distract us, and that an extravagant zeal often defeats its own purposes.[53]

Howard also took on Hopkins attempt to ground American rights in historical precedent. We recall that Hopkins had appealed to historical precedent, arguing that all empires historically have granted to the colonies the same rights as the mother country. Howard rejects this argument as well, claiming that "The ancients have transmitted to us nothing that is applicable to the state of modern colonies..."[54]

With respect to the colonists' core claims that "they can't be taxed without representation", Howard offers an alternative view of "representation". In his view, the House of Commons by definition represents all British subjects everywhere.

> It is the opinion of the House of Commons, and may be considered as a law of Parliament, that they are the representatives of every British subject, wheresoever he be. In this view of the matter, then, the aforegoing maxim is fully vindicated in practice, and the whole benefit of it, in substance and effect, extended and applied to the *colonies*…

> In truth, my friend, the matter lies here: the freedom and happiness of every British subject depends not upon his share in elections but upon the sense and virtue of the British Parliament, and these depend reciprocally upon the sense and virtue of the whole nation.[55]

Howard does not quite claim that the colonists are "virtually represented" which is the way Thomas Whately, the official spokesperson of Grenville, will describe it in his The Regulations Lately Made published in late spring of 1765. But Howard essentially says the same thing. The House of Commons is by definition or in fact the representatives of the British people. By being elected, they become representatives of the people as a whole, whether those people voted for representatives or not. Moreover, he argues that the "freedom and happiness" rely not on representation per se but on the virtue of those who make govern for the good of the whole.

Soame Jenyns, a member of Parliament and member of the Board of Trade for ten years before the Stamp Act controversy, takes a different tack with regard to representation. In the spring of 1765, he wrote a pamphlet entitled, The Objections to the Taxation of our American Colonies by the Legislature of Great Britain, briefly consider'd" which was reprinted almost immediately in colonial newspapers. Jenyns in effect argues that there is no guarantee of representation in the British constitution. Individuals never consent to taxes, nor do all individuals have representatives in Parliament. [56]

> for every Englishman is taxed, and not one in twenty represented: copyholders, leaseholders, and all men possessed of personal property only, chuse no representatives; Manchester, Birmingham, and many more of our richest and most flourishing trading towns send no members to parliament, consequently cannot consent by their representatives, because they chuse none to represent them; yet are they not Englishmen? or are they not taxed?[57]

In Jenyns view, representation is not guaranteed to all British subjects but they are still "Englishmen."

Jenyns anticipates that the defenders of colonial rights might appeal to Locke and Sydney about rights and liberty. In stating what he imagines those arguments might look like, Jenyns shows just how far a distance the colonists would have to go to get British thinkers to understand colonial rights on the basis of natural rights. Jenyns writes that

> I am well aware, that I shall hear Locke, Sidney, Selden, and many other great names quoted to prove that every Englishman, whether he has a right to vote for a representative, or not, is still represented in the British Parliament; in which opinion they all agree: on what principle of common sense this opinion is founded I comprehend not, but on the authority of

> such respectable names I shall acknowledge its truth; but then I will ask one question, and on that I will rest the whole merits of the cause: Why does not this imaginary representation extend to America, as well as over the whole island of Great-Britain? If it can travel three hundred miles, why not three thousand? if it can jump over rivers and mountains, why cannot it sail over the ocean? If the towns of Manchester and Birmingham sending no representatives to parliament, are notwithstanding there represented, why are not the cities of Albany and Boston equally represented in that assembly? Are they not alike British subjects? are they not Englishmen? or are they only Englishmen when they sollicit for protection, but not Englishmen when taxes are required to enable this country to protect them?

This statement is interesting precisely in showing us how poorly one British Parliament member understood the potential implications of an American argument from Locke or natural rights. Jenyns assumes that if Locke or Sydney were cited, they would be used to justify the idea that British *subjects can be represented without voting*. But that of course is precisely the opposite of what the colonists were arguing. They were arguing that one had to have a vote to be represented. Jenyns sees Locke and Sydney as justifying, not the right to vote, but the right to be "virtually represented."

These American and British responses to colonial arguments help us understand the place of Locke in the early resistance literature for several reasons. First, they show that the early champions of colonial rights were correct in expecting push back from their critics for using natural rights arguments. These early defenders of Parliamentary authority--both in American and England-- argue that there is no source of rights outside the British constitution. But they go further. Since rights and Parliamentary authority both derive from the constitution, they argue there can be no source of rights that supersede Parliament's authority, even those that derive from the British constitution. If you build your case on British rights, you are completely subservient to Parliamentary authority.

The critics' arguments about representation further underscored the need for some set of rights that could be anchored outside of the British constitution. That some critics like Soame Jenyns could even argue that "representation" was not even a right at all, or, like Howard, that the colonies were by definition represented in the Parliament, underscored the growing need to look for secure footing for rights elsewhere. After all, representation was arguably core to Locke's arguments about natural rights. Locke had argued that the whole people had a right to vote but that the consent of the majority should be received as the act of the whole. This was due to the inconvenience of gathering everyone in one place because of business obligations, infirmities of health.[58] Locke's statements imply that everyone should be represented, but he did not give details on how that representation should be worked out. Cato further develops the notion of representation

arguing that "representatives…will always act for their country's interest; their own being so interwoven with the people's happiness, that they must stand and fall together.[59]

It is now understandable why an appeal to rights outside of the British common law looked more appealing to some colonists over time. It was not just the growing tendency to independence. For if British rights do not limit Parliament's authority, then surely natural rights, which exist outside of and prior to common law, can. The colonists needed to find some grounding, in other words, for rights outside of British common law, to make their case that the authority of Parliament does have limits. We will see arguments from non-British specific rights begin to emerge as one way to prop up the colonists' arguments. In fact, we have already seen the tendency in Hopkins, who appealed to historical precedent, looking beyond the British constitution in the attempt to justify American rights. At times the colonists call these other rights "natural rights", but they also explore other grounds for what could be called "antecedent" or "universal" rights that might lie outside and before the British constitution.

In sum, the colonists were caught on the horn of a dilemma. They thought the appeal to Locke's social compact theory and natural rights was fraught with problems since the origin of government was contested and "chimerical" Some of them also worried that natural rights were not sufficiently religious. But their attempt to ground American rights in common law only did not provide them with strong enough grounds to justify a limitation on Parliament's authority. Some set of rights was needed that derived from sources beyond the constitution which was the source of Parliament's own power and right.

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If Stephen Hopkins tried to avoid the dilemma by appealing to British rights, James Otis is one of the first writers who tries to navigate the horns of the dilemma in a different way. We have already seen how Otis offered an extensive review of criticisms to which Locke's social contract was subject. But instead of turning away from natural rights and strictly to British rights, the way Hopkins, Fitch and others did, Otis offers an alternative theory of government's origin, basing it on human nature. "I think it has an everlasting foundation in the *unchangeable will* of God, the author of nature, whose laws never vary…Government is therefore most evidently founded *on the necessities of our nature.* It is by no means an *arbitrary* thing depending merely on *compact or human will* for its existence*."*[60]

In Otis' view, there is no social compact or contract where people leave nature and enter society. In fact, there is no State of Nature at all. We are born as sexual creatures and the "The same omniscient, omnipotent, infinitely good and gracious Creator of the universe who made it necessary

that what we call matter should gravitate for the celestial bodies to roll round their axes…has made it equally necessary that from Adam and Eve to these degenerate days the different sexes should sweetly *attract* each other, form societies of single families, of which larger bodies and communities are as naturally, mechanically, and necessarily combined as the dew of heaven and the soft distilling rain is collected by the all-enlivening heat of the sun.

> Government is founded *immediately* on the necessities of human nature, and *ultimately* on the will of God, the author of nature; who has not left it to men in general to choose whether they will be members of society or not, but at the hazard of their senses if not of their lives" ? [61]

What is interesting about Otis's theory of government is that it does not seem all that far from Locke's theory, at least with respect to its implications for natural rights. Otis trots out all the familiar principles of natural rights familiar from Locke and quotes Locke approvingly on several occasions:[62] there needs to be a supreme power over society which can adjudicate law and this supreme authority is originally in the people. The people can never renounce this divine right. This power is given in trust to government which should incessantly consult the people's good. When the size of the people becomes too large or dispersed to consult, they have a right to representation. All of this sounds very much like Locke. And Otis quotes Locke favorably on several occasions and even denigrates Grotius and Pufendorf, though one might argue that his theory sounds more like Grotius than Locke.[63] In all of these ways, Otis is a clear Lockean. But it would be problematic to simply characterize as a Lockean. [64]

The main point of departure from Locke is around the idea of the "social compact", the state of nature, and the religiously tinged language that Otis uses. Otis abandons Locke's assumption that people have a choice about government. They do not live in a State of Nature and do not consent to enter government. Government is a necessity, as much a part of our natures as the need to procreate. There is no state of nature prior to society. Government emerges with human life, and thus is not an arbitrary decision or choice. [65]

Otis then attempts to secure American rights in what he also calls "natural rights", but he reinterprets what natural rights means and tries to avoid some of the problematic challenges that have been leveled against Locke's social compact theory. For the more empirically oriented readers, who may doubt the historical origin of government in social compact, Otis dispenses with that problem by anchoring government in human creation. There never was or needed to be a historical social compact. Don't bother looking for one. Government is founded in our natures.

And for the religious readers who preferred a theory of divine appointment, Otis puts much more emphasis on God's role in creating

government and anchoring it in human nature. Government is not an arbitrary decision but was created by God. In doing so, Otis is reaching out to more religiously oriented readers. Indeed, what Otis has done, essentially, is provide a justification of "natural rights" with a different more religiously tinged account of government's origin. Now natural rights –and Otis still calls them "natural rights"--are given by God. That Otis is trying to reach more religiously oriented readers is evident by the religious and theological rhetoric in which he couches his theory. "I think it has an everlasting foundation in the unchangeable will of God, the author of nature, whose laws never vary."[66]

> We have a King who neither slumbers nor sleeps, but eternally watches for our good, whose rain falls on the just and on the unjust: yet while they live, move, and have their being in Him, and cannot account for either or for anything else, so stupid and wicked are some men as to deny his existence, blaspheme his most evident government, and disgrace their nature.[67]

Locke, of course, also believed natural rights were founded in God's Law (in contrast to Grotius for example who did not).[68] But Locke never used the kind of theological-tinged language found here in Otis in his *Second Treatise*. The difference is both one of tone but also of substance. Locke was actually breaking free from more traditional theological ways of describing God and God's Law and moving towards a new understanding of religion founded on reason. His *Second Treatise*, though quoting Scripture occasionally, is noticeably light on scriptural interpretations, in contrast, for example to his *First Treatise* which was a refutation of Filmer and represents a natural rights reading of Genesis. Locke was writing at the beginning of the great deist critique of religion, which fundamentally subjected the notion of revealed religion to criticism by appeal to the religion of reason. Though Locke never went as far as many deists, and ultimately believed the religion of reason and revealed revelation were compatible, it is clear that to some of the colonists, a more theological tone and emphasis was critical than Locke had provided. [69]

That American readers found some tension to resolve between Locke's theories and their religious sensitivities is evident in writings prior to the Stamp Act controversy. In 1762, several years before the Stamp Act controversy, Abraham Williams reflected on the origin and end of government in "An Election Sermon." For a sermon to his Congregationalist pulpit in Sandwich, near Boston, he writes:

> As to the origin of civil Societies or Governments; the Author of our Being, has given Man a Nature fitted for, and disposed to Society. It was not good for Man at first to be *alone*; his Nature is social, having various Affections, Propensities, and Passions, which respect Society and cannot be indulged without a social Intercourse. The natural Principles of Benevolence,

> Compassions, Justice, and indeed most of our natural Affections, powerfully incite to, and plainly indicate, that Man was formed for Society. [70]

Here, and in Otis too, Locke's main ideas are being affirmed, but in religious overtones and language, that make Lockean ideas seem more traditionally religious than Locke's own writings in the Second Treatise. And there is much more emphasis placed on God's role in creating government than in the notion of social compact or consent.

> And Government is a divine Constitution, founded in the Nature and Relations of Things, -- agreeable to the Will of God, --what the Circumstances of his Creatures require: --And when Men enter into civil Societies, and agree upon rational Forms of Government, they act right, conformable to the Will of God, by the Concurrence of whose providence, Rulers are appointed.[71]

We still see here the notion that "men enter into civil societies" but now they are conforming to God's plan and will. In Locke, it is entirely up to people whether to choose society, although there are good reasons for doing so and people are inclined to do so because of their natures.[72] A similar shift in emphasis occurs with regard to elected officials. "In all Governments, Magistrates are God's Ministers, designed for Good to the People. The end of their Institution is to be Instruments of Divine providence, to secure and promote the Happiness of Society;"[73] The notion that magistrates are God's ministers, rather than elected officials of the people, if not a complete substantive shift, at least represents a significant shift in emphasis.

These are arguably "rewrites" of Lockean theory. We are both within Lockean purview and outside it. The attempt here is clearly to bring ideas of government much closer to traditional religious language, wrap religious texts and language around Lockean-like ideas, and ensure that God's role in the creation of government is underscored. Otis' account of government's origin moves in much the same terrain. But in the process of "theologizing" Locke and natural rights, something different emerges, not quite a theory of natural rights as propounded by Locke, but not entirely different either.

The upshot is that one can read Otis as attempting to save core Lockean ideas of consent, natural rights, and right to representation by jettisoning the historically problematic assumptions of social compact and shoring up the religious overtones. Now Otis has a theory of natural rights that should appeal to his religiously minded readers and that escapes the criticisms of his empirically oriented readers who are skeptical about historical origin of social compact. Otis, in other words, has tried to solve the problem that Hopkins had described in the start of his essay.

With this philosophical backdrop in hand, Otis turns to the rights of the colonies. Like Hopkins and Fitch, he too argues that Americans have British

rights from the common law. But he doesn't rest his whole argument on British rights alone. He also argues that the colonists have "natural rights". Natural rights for Otis now means rights given by God and embedded in our natures, a somewhat different meaning than intended by Locke, who understood natural rights as rights that existed in the Law of Nature, which was known by reason. But Otis' natural rights guarantee all the same Lockean principles of right to life, liberty and property that belong to all people, not just British subjects.

Otis acknowledges that even his own theory of government might not be accepted. Be that as it may, if not everyone can agree on the origin of government, they can at least agree on "its end." "The *end* of government being the *good* of mankind points out its great duties: it is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty and property".[74] Locke too would speak often about "the end of government." But here in the context of the American scene, the use of the word "end" carries additional overtones. Emphasizing the end of government is as good as saying that we don't need to dispute or worry about government's beginning. We can focus on "the end" of government or its purpose and ignore its "origin." "But let the origin of government be placed where it may, the end of it is manifestly the good of the whole."[75] The colonial emphasis on government's "end" therefore is language that helps emphasize the commitment to individual rights while setting aside the problematic question of how governments began. It was one way of splitting the question of right from historical origin. [76] By agreeing on the end of government, the colonists could paper over their differences on how government began.

Having explicated his notion of natural rights, Otis repeatedly couples and ties together British rights and natural rights. "Every British subject born on the continent of America or in any other of the British dominions is by the law of God and nature, by the common law, and by act of Parliament (exclusive of all the charters from the crown) entitled to all the natural, essential, inherent and inseparable rights of our fellow subjects in Great Britain." [77] This is the reason Otis keeps repeating that Americans are not just "subjects" but also "men" . [78]

Because the colonists have rights in nature, their rights don't depend on the colonial charters, as Hopkins and Fitch, among others would argue. What if the charters were declared void?

> What could follow from all this that would shake one of the essential, natural, civil, or religious rights of the colonists? Nothing. They would be men, citizens, and British subjects after all. No act of Parliament can deprive them of the liberties of such, unless any will contend that an act of Parliament can make slaves not only of one but of two millions of the commonwealth.[79]

Because natural rights originate in nature and not in the British constitution, they do serve as a source of right and wrong, independent of Parliament's own decision.

> Parlaments are in all cases to *declare* what is for the good the whole; but it is not the *declaration* of Parliament that makes it so. There must be in every instance a higher authority, viz., God. Should an act of Parliament be against any of *his* natural laws, which are *immutably* true, *their* declaration would be contrary to external truth, equity and justice and consequently void. And so it would be adjudged by the Parliament itself when convinced of their mistake.[80]

Natural rights exist outside of the British constitution and thus serve as a standard against which the justice and right of Parliament's decisions can be measured. Otis does not take the final step and argue that Parliament's authority over the colonies is limited. He draws back from crossing that line, and leaves that for others to do. But he does argue that Parliament can be wrong, although the colonies have to obey until Parliament comes to its senses. Thus natural rights serve as a standard by which to measure the rightness of Parliament's decisions. But they do not limit Parliament's authority. All the colonies can do is point out the mistake and try to bring Parliament to its senses.

Other critics of Otis, such as Martin Howard discussed earlier, will accuse Otis of crossing the line and claiming that Parliament's authority is limited. And one can see why critics would read Otis' that way. For if Otis didn't quite go there, the possibility of using natural rights to justify a limitation on parliament's authority and to even base claims of independence would not be a difficult next step. In a later essay responding to Howard, Otis himself does seem to back down from his claims somewhat in his response to Howard, but he does not renounce the use of natural rights as a source of right and wrong.[81]

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Conclusion

Having now looked in quite some detail at two early pamphlets, let us step back for a moment to the larger question at hand: the place of Locke's natural rights in the resistance literature leading up to the Declaration of Independence. We have seen early colonial ambivalence towards parts of Locke's theory. The grounding of natural rights in the social contract was viewed as problematic for two reasons: first, because it rested on a purported historical origin of government that was unproven, and second, because it did not seem "religious enough" to those who argued government

was appointed by God, not the outcome of human choice. We have seen two different responses to this dilemma. Hopkins chose to avoid using natural rights completely though he acknowledged finding it the most rational explanation of government's origin. Otis tried a different route, repudiating the social compact part of Locke's theory and thereby "theologizing" Locke to seem more compatible with religious readers and freeing natural rights from dependence on a historical social compact. Whether one wants to still call this Lockean is an interesting question, but if we do continue to call it a Lockean theory of natural rights, we at least have to see that Locke has been transformed and changed.

This ambivalence towards Locke that we have just reviewed is evident in 1764 more than 10 years before Jefferson writes the Declaration of Independence. Does this ambivalence towards Locke in 1764 and 1765 continue to animate colonial discussions up to the Declaration? Or does the Declaration of Independence represent the ultimate embrace of Locke in the colonies, as Zuckert seems to suggest?

To anticipate, we shall see in Part II of this essay that the ambivalence towards natural rights continues to animate colonial discussions up to the Declaration. To begin with, not all writers appeal to natural rights, and debate emerges, as we shall see, over whether or not to appeal to natural rights. When colonists do appeal to natural rights, moreover, they sometimes opt for the language of "inalienable" or "inherent" rights rather than "natural rights", as if to equivocate on whether they are invoking natural or British rights. But the ambivalence is no longer just about the social compact or the insufficient religious tone in natural rights theory, though those problems still trouble the colonists. The ambivalence is also about the potentially radical implications of natural rights theory itself. Natural rights arguments implied a limitation on parliamentary authority and a source of right outside of the British constitution and Parliament's purview. This was both why the colonists turned more and more to natural rights language but also why some felt nervous about doing so. As it became clear that their arguments from British rights failed and were contested, the colonies looked to more general rights on which to base their claims. Natural rights provided a source of right outside of the British constitution and outside of colonial charters. And in doing so, natural rights provided both a limit on Parliament's authority and a source of common and shared rights that all the colonies could appeal to.

But the very power and usefulness of natural rights arguments was also its danger. For natural rights arguments could be interpreted as veiled threats of independence. Though the colonists' intention was not to use natural rights in this way, at least initially, the danger was that appeals to natural rights would be so construed. And the colonists had already been criticized for wanting independence, even when making arguments that did not rely on natural rights at all. Natural rights theory was a two-edged sword. Natural rights arguments bolstered the colonies claims about their

rights not to be taxed without representation. The debate over whether to ground American arguments in natural rights therefore was also tied in with how explicit Americans felt they wanted to be in denying Parliament's authority over the colonies.

Carl Becker inn *The Declaration of Independence* is thus only partially right when he sees natural rights as arising with arguments for independence.

> Being now committed to independence, the position of the colonies could not be simply or convincingly presented from the point of view of the rights of British subjects….Separation from Great Britain was therefore justified on more general grounds, on the ground of natural rights of man; and in order to simplify the issues in order to make it appear that the rights of man had been undeniably and flagrantly violated, it was expedient that these rights should seem to be as little as possible limited or obscured by the positive and legal obligations that were admittedly binding upon British subjects. To place the Resolution of Independence in the best light possible, it was convenient to assume that the connection between the colonies and Great Britain had never been a very close connection, never strictly speaking a connection binding in positive law, but only a connection voluntarily entered into by a free people. On this ground, the doctrine of the rights of man would have a free field and no competitors.[82]

Becker is right that natural rights arguments lent themselves to revolution by the time that the colonists got there. But natural rights did not just emerge as a way to justify revolution. That was the end of a process.

Closer to the mark is Morgan, who understands that some colonists resisted the turn to natural rights, when they still believed that constitutional rights alone would suffice. Writing about why the Maryland lawyer and politician, Daniel Dulany, avoided use of natural rights and argued only from British rights, Morgan writes that:

> Other spokesmen for the colonial cause had already begun to argue in terms of the natural rights of man, but Dulany knew that however such arguments might appeal to Americans, they would carry small weight in the British Parliament. The question, as he saw it, did not hinge so much on natural rights as it did on constitutional rights. As long as the colonists had the constitution on their side—and he was sure that they had—it would be best for them to ground their arguments on it.[83]

But the story of natural rights in the period leading up to the Revolution is more complex. The colonists were in fact ambivalent initially about natural rights because of the problematic historic claims about the origin of government that seemed to be contained in the idea of a social compact. And they were not certain the classic Lockean natural rights position had sufficient religious overtones or gave sufficient credit to God in the creation of government. But as the debate unfolded, they found that natural rights or something like them were useful in first buttressing their claims for rights as British subjects. And they would find that natural rights were also useful for unifying the colonies' claims, rather than resting such claims on individual charters. Gradually, as separation from Great Britain became a possibility natural rights took on a more radical role in supporting the notion of separation. But even then the separation urged by natural rights was only partial and still reflected some of the earlier ambivalence that we found towards natural rights in the early part of the debate discussed here.

As the debate moved from protest towards revolution the colonial ambivalence about natural rights seems to lessen, although perhaps not to disappear entirely. Natural rights seems more and more like the only grounds on which to base colonial arguments. As arguments shifted from the justification of equal rights of British and Americans subjects to the right to break away, natural rights will take a more prominent role. Yet while the colonies lean more heavily on natural rights arguments to justify revolution, some of their earlier ambivalence and concern about Locke's natural rights theory remains in evidence. It is to this part of the story that I turn in the second part of this essay.

[1] Hirsch, *A Theory of Liberty*, p. 51.

[2] See for example the discussion in Hirsch, *A Theory of Liberty*, 1-28.

[3] Gary Wills, *Inventing America*, 167-192.

[4] See Zuckert, *Natural Rights*, 50, 152, 156, 160.

[5] Zuckert, *Natural Rights*, 6-12.

[6] See accounts in Bailyn, *Pamphlets*, 356, and Morgan, *Stamp Act*.

[7] Morgan, *Stamp Act*, 54-74 has an excellent analysis of what was on Grenville's mind.

[8] The early consensus that Parliament had a right to regulate commerce of the empire but not tax the colonies foreshadows in interesting and complex ways the later debates over Federal and State powers in the debate over the ratification constitution.

[9] The Rhode Island assembly commissioned the drafting of a remonstrance against the renewal of the Molasses Act. The document was written by the governor who based it on the earlier document of the Boston merchants called the State of Trade. See Bailyn, *Pamphlets*, 358, and Merrill Jensen, *Tracts*, 3-4.

[10] An example of another pamphlet that argues strictly in economic terms, see "Considerations Upon The Act of Parliament" in Bailyn, *Pamphlets*, 361-377.

[11] Jensen, *Tracts*, 7.

[12] Jensen, *Tracts*, 7.

[13] Jensen, *Tracts*, 9.

[14] Jensen, *Tracts*, 12

[15] An interesting partial exception is The New York Petition to the House of Commons" written on Oct. 18, 1764. This position does evoke Lockean natural rights and does link freedom of commerce to liberty. But it does so in the context of recognizing that Parliament retains the authority "to model the Trade of the whole Empire, so as to subserve the Interest of her own." "But a Freedom to drive all Kinds of Traffick in a Subordination to, and not inconsistent with, the *British* Trade; and an Exemption from all Duties in such a Course of Commerce, is humbly claimed by the Colonies, as the most essential of all the Rights to which they are intitled, as

Colonists from, and connected, in the common Bond of Liberty with the uninslaved Sons of *Great-Britain". See* Morgan, *Prologue*, 9, 11.

[16] Bailyn, *Pamphlets*, 358-59.

[17] Morgan, *Stamp Act*, 33.

[18] In his *Regulations Lately Made* (1765), Thomas Whately argues that "Duties laid for these Purposes, as well as for the Purposes of Revenue, are still Levies of Money upon the People. The Constitution again knows no Distinction between impost Duties and Internal Taxation and if some speculative Difference should be attempted to be made, it certainly is contradicted by Fact;" Quoted in Morgan, *Prologue*, 20.

[19] The Sugar Act, April 5, 1764. Quoted in Morgan, *Prologue*, 4.

[20] See note 14 where New York does frame the response to the Stamp Act in terms of rights.

[21] Bailyn, *Pamphlets*, 379.

[22] See, for example, John Dickenson's "The Late Regulations Respecting the British Colonies." December 1765. In Bailyn, *Pamphlets*, 659-691.

[23] For Hopkins, "Rights," see Bailyn, *Pamphlets*, 499-521. A shortened version is also available in Jensen, *Tracts*, 41-62.

[24] Hopkins, "Rights," quoted in Bailyn, *Pamphlets*, 516.

[25] Hopkins, "Rights," quoted in Bailyn, *Pamphlets*, 507.

[26] Dulany, "Considerations," quoted in Bailyn, *Pamphlets*, 634. For background on Dulany, see Bailyn, *Pamphlets*, 599-607.

[27] The fact that the origins of government were veiled explains why so many colonist writing emphasizes "the end" of government in contract to "the beginning". Be that as it may, the "end of government" can only be justified if there is some theory as to anchor that view of government. Emphasizing the end of government does not really provide a ground for justifying that end as opposed to other ends of government.

[28] Hopkins, "Rights," quoted in Bailyn, *Pamphlets*, 507.

[29] Hopkins, "Rights," quoted in Bailyn, *Pamphlets*, 516. Jensen, *Tracts*, 54.

[30] Hopkins, "Rights," quoted in Bailyn, *Pamphlets*, 508.

[31] Hopkins does not specify whose alternative theories he has in mind here. We can speculate that it could have been Harrington and possibly Hume.

[32] Locke asks about the historical evidence of the State of Nature and social compacts (II 2, 15, p. 277). "To those that say, There were never any Men in the State of Nature; I will not only oppose the Authority of the Judicious *Hooker*, …But I moreover affirm, That all Men are naturally in that State, and remain so, till by their own Consents they make themselves Members of some Politick Society; And I doubt not in the Sequel of this Discourse, to make it very clear."

Locke then takes up the question again (II 8, 100, [Laslett, 333-334]) where he discusses the origin of political societies. "To this I find two Objections made. *First, that there are no Instances to be found in Story of a Company of Men independent and equal one amongst another, that met together, and in this way began and set up a Government. Secondly, 'Tis impossible of right that Men should do so, because all Men being born under Government, they are to submit to that, and are not at liberty to begin a new one.* Locke gives a number of answers. First he says that it is no wonder that we have no accounts since the nature of that condition in a State of Nature drove people very quickly into society and do not leave a record of that stage. Secondly, Locke then points to certain societies such as Rome and Venice which he regards as examples of states that came together through social compact. But it is clear that Locke's argument does not simply rest on the need for historical examples. He also bases it on what's right. "For if they can give so many instances out of History, of Governments begun upon Paternal right, I think (though at best an Argument from what has been, to what should of right be, has no great force), one might, without any great danger, yield them the cause." The parenthetical clause here is interesting because Locke argues that history is essentially irrelevant for what is right. He then continues to show that history is only one part of his argument: "But to conclude, Reason being plain on our side, that Men are naturally free, and the Examples of History, shewing, that the *Governments* of the World, that were begun in Peace, had their beginning laid on that foundation, and were *made by the Consent of the People*; There can be little room for doubt, either where the Right is, or what has been the Opinion, or Practice of Mankind, about the *first erecting of Governments."* Locke clearly sees that his argument can have a foundation in Reason and what's right, even apart from any historical proof of a State of Nature.

[33] Laslett (*Locke*, 93) puts it this way: "When men think of themselves as organized with each other they must remember who they are. They do not make themselves, they do not own themselves, they do not dispose of themselves, they are the workmanship of God. ..To John Locke this was a proposition of common sense, the initial proposition of a work which appeals to common sense throughout. It is an existentialist proposition…and it relies not so much on the proved existence of a Deity as upon the possibility of taking what might be called a synoptic view of the world, more vulgarly a God's –eye view of what happens among men here on earth. If you admit that it is possible to look down on men from above, then you may be said to grant to Locke this initial position. John Rawl's work is the most well known example of providing social contract theory a theoretical and non-historical grounding in an "original position."

[34] It is beyond the scope of the present essay to look at the "religionizing" of Locke. Locke was clearly "religious" in the sense that he assumed natural rights were embodiments of God's law and in assuming that Scripture and Reason were compatible. But Locke is also the beginning of, and catalyst for, the great deist

critiques of the early eighteenth century. Those critiques used Reason to attack and undermine traditional notions of Revelation and ultimately lead to a new understanding of Christianity, Religion and Scripture. Locke himself did not take as radical a view as more critical deists such as Matthew Tindal and John Toland. But he did lay part of the foundation for this critique of traditional religion.

[35] Otis, "Rights", in Bailyn, *Pamphlets*, 423.

[36] Otis, "Rights", in Bailyn, *Pamphlets*, 419-420. De Vattel develops an extensive understanding of the rights and duties of nations based on natural rights philosophy.

[37] Otis, "Rights", in Bailyn, *Pamphlets*, 422.

[38] See Bailyn, *Pamphlets*, 524-530.

[39] Howard, "Halifax Letter" in Bailyn, *Pamphlets*, 535.

[40] Hopkins, "Rights," quoted in Bailyn, *Pamphlets,* 507.

[41] Hopkins "Rights," quoted in Bailyn, *Pamphlets*, 509.

[42] See the discussion of the Stamp Act Congress in Part II of this essay.

[43] This comment appeared in the London *General Evening Post* on Aug. 20, 1765 and reprinted in the *Newport Mercury*, Oct. 28, 1765. Cited in Morgan, *Prologue*, 97.

[44] Hopkins, "Rights", quoted in Bailyn, *Pamphlets*, 509.

[45] Hopkins, "Rights", quoted in Bailyn, *Pamphlets*, 511.

[46] Hopkins, "Rights", quoted in Bailyn, *Pamphlets*, 512. Fitch makes a similar claim. Hopkins also writes that "These with all other matters of a general nature, it is absolutely necessary should have a general power to direct them; some supreme and overruling authority with power to make laws, and form regulations for the good of all, and to compel their execution and observation. It being necessary some such general power should exist somewhere, every man of the least knowledge of the British constitution will be naturally led to look for, and find it in the Parliament of Great Britain."

[47] Hopkins, "The Rights", quoted in Bailyn, *Pamphlets*, 518-519. Jensen, *Tracts,* he says Otis and Steve Hopkins come out with early positions that Parliament is not completely sovereign but then retract those positions after the attack by the Gentleman at Halifax.

[48] Fitch, "Reasons Why", in Bailyn, *Pamphlets*, 395. Fitch makes a distinction between trade regulations that can be regulated for reasons of state. "And as such regulations will doubtless appear , upon examination, rather to be a preventing the subject from acquiring property than taking it from him after it is legally become his own, the objections relative to such establishment ought to be only against those that may be supposed unequal, unprofitable, or not expedient, the determination of which must nevertheless be left to the supreme authority of the nation." Then in a statement trying to distinguish these types of regulations from areas that the colonial legislature should have their own power, Fitch in somewhat convoluted sentence puts it this way: "But if restrictions on navigation, commerce, or other external regulations only are established, the internal government, powers of taxing for its support, an exemption from being taxed without consent, and other immunities which legally belong to the subjects of each colony agreeable to their own particular constitutions will be and continue in the substance of them whole and entire; life, liberty, and property, in the true use of the terms, will then remain secure and untouched."

[49] Hopkins, "Rights", quoted in Bailyn, *Pamphlets*, 519.

[50] See Merrill p. xxvi. "In effect, Hopkins was groping toward the conception of the British Empire as a commonwealth containing equal and independent legislatures, and yet one in which matters of a general nature had to be deal with by a supreme legislature."

[51] Howard, *Halifax Letter*, in Bailyn, *Pamphlets*, 534.

[52] Actually, at one point Hopkins does say something that sounds like this but he says it after he has already said that Parliament has authority and right to regulate commerce. "Indeed, it must be absurd to support that the common people of Great Britain have a sovereign and absolute authority over their fellow subjects in America, or even any sort of power whatsoever over them;" (Bailyn, Pamphlets, 519). Here Hopkins is making his argument that the House of Commons does not have power over the colonies as part of his hub and spoke view of the empire.

[53] Howard, *Halifax Letter*, in Bailyn, *Pamphlets*, 537.

[54] Howard, *Halifax Letter*, in Bailyn, *Pamphlets*, 535.

[55] The quotes are from Howard, *Halifax Letter*, in Bailyn, *Pamphlets*, 537-538.

[56] Background on Soame Jenyns can be found in Bailyn, *Pamphlets*, 600.

[57] Jenyns essay can be found at http://odur.let.rug.nl/~usa/D/1751-1775/stampact/object.htm

[58] Writing about how political decisions should represent the entire people, Locke (II 8:92, 332) writes: "But such a consent is next impossible ever to be had, if we consider the Infirmities of Health, and Avocations of Business, which in a number

though much less than that of a Common-wealth, will necessarily keep many away from the publick Assembly. To which if we add the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men, the coming into Society upon such terms, would be only like Cato's coming into the Theatre, only to go out again. For where the majority cannot conclude the rest, there they cannot act as on Body, and consequently will be immediately dissolved again."

[59] Gordon and Trenchard, "Cato Letters." Letter 24: "Of The Natural Honesty Of The People, to Consult Their Affections and Interest."

[60] Otis, "Rights", in Bailyn, *Pamphlets*, 423.

[61] Otis, "Rights", in Bailyn, *Pamphlets*, 425 (In anchoring rights in human nature and sociability, Otis comes closer to the theory of rights of Grotius more than Locke but he only mentions Grotius once in his essay and not in a very favorable light

[62] See for example Otis, "Rights" in Bailyn, *Pamphlets*, 434

[63] Otis, "Rights" in Bailyn, Pamphlets, 437. Speaking of the natural rights of the colonies Otis writes that "those who expect to find anything very satisfactory on this subject in particular or with regard to the law of nature in general in the writings of such authors as Grotius and Pufendorf will themselves much mistaken. It is their consent practice to establish the matter of right on the matter of fact…The sentiments on this subject have therefore been chiefly drawn from the purer foundations of one or two of our English writers, particularly from Mr. Locke, to whom might be added a few of other nations; for I have seen but a few of any country, and of all I have seen there were not ten worth reading."

[64] It is problematic to simply characterize Otis as a Lockean as Morgan does: "Otis, while acknowledging the supremacy of Parliament, argued in terms derived from Locke that Parliament ought not to violate the nature rights of the subject."

[65] Otis significantly contradicts his own theory later in the essay. After arguing essentially that there is no state of nature and no consent or social compact, he writes, "I say men for in a state of nature no man can take my property from me without my consent" taking for granted the notion of a state of nature. Otis, "Rights", 447.

[66] Otis, "Rights", in Bailyn, *Pamphlets*, 423.

[67] Otis, "Rights", in Bailyn, *Pamphlets*, 423.

[68] See Zuckert, *Natural Rights*, who emphasizes this distinction between Locke and Grotius.

[69] On the deist debates and changing view of religion in the eighteenth century, see Manuel, *The Eighteenth Century Confronts the Gods*, and Eilberg-Schwartz, *The Savage.*

[70] Abraham Williams, "Election Sermon," 6.

[71] Williams, "Election Sermon". 7.

[72] The closest Locke comes to assigning this to God is the following passage: God having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society,* as well as fitted him with Understanding and Language to continue to enjoy it. Locke II 7, 77 in Laslett, 318.

[73] Williams, "Election Sermon," 7.

[74] Otis, "Rights", in Bailyn, *Pamphlets*, 425.

[75] Otis, "Rights", in Bailyn, *Pamphlets*, 424

[76] The colonists tend to ignore important philosophical question in splitting the question of government's "end" from its "beginning." For the "end" or "purpose" of government has to be grounded in some moral theory. If the colonists did not have agreement on government's origin, then on what basis did they agree on "its end." The fact is the colonists had different and competing theories of where such rights came from and therefore concentrated on agreement about what those rights were ("the end of government") rather than moral source of those rights.

[77] Otis, "Rights", in Bailyn, *Pamphlets*, 444

[78] There was some understanding that the rights of "men" posed a particular issue for women, children and blacks. Locke and Otis both raise the question of women's place in the original contract and in natural rights. Abigail Adams sensed the discrepancy in a letter to her husband, John Adams, raising the question of women's rights as a problem of liberty.

[79] Otis, "Rights", in Bailyn, *Pamphlets*, 443

[80] Otis, "Rights", in Bailyn, *Pamphlets*, 454

[81] Otis, "Vindication," in Bailyn, Pamphlets, 545-579.

[82] Becker, *Declaration*, 21-22

[83] Morgan, Stamp Act, 87.

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