

“Oh, Ye Are For Anarchy!”: Consent Theory in the Radical Libertarian Tradition

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The twentieth century libertarian movement has experienced an ongoing debate between the minarchists, the advocates of “limited” government, and the anarchists, who argue that the ultimate implications of libertarian principles are “no” government. Few of the parties to these arguments realize that they are participating in a discussion whose roots can be traced back well over three centuries. Nor do they realize how the argument has shifted over time. In the beginning, those who defended existing governments argued for state absolutism and the divine right of kings. Their opponents argued that no persons could be bound in a political sense except by their own consent. The argument that the “ruled” had individual rights meant that the monarch ought not to violate those rights. In response, the divine-rightists or patriarchalists, as they became known, urged that such a “limited” government or “mixed monarchy,” as they called it, was a contradiction in terms. These critics offered “no”-government-anarchy as the *reductio ad absurdum* of individual rights and government by consent. As Oliver Cromwell so aptly put it, at the time of the Putney Debates in 1647: “The consequences of this rule tends to anarchy, must end in anarchy.”¹

In the English-speaking part of the world, the “limited” government versus anarchy controversy has evolved in at least three stages. The first stage was the critique by such people as Sir Robert Filmer (and later the opponents of the Levellers, as we have noted above) and others that government by consent led straight to anarchy. In this phase of the discussion, there were as yet no defenders of anarchy—only defenders of limited government and their opponents, the patriarchalists. The second stage of the controversy witnessed both the moral and practical triumph of the libertarian ideal (especially after the success of the Glorious Revolution of 1688 and the American Revolution in 1783) that each person is unique

Author's Note: I would like to thank George Smith for originally pointing out many of the historical connections to be made in the intellectual history of the consent doctrine, especially for his references to Filmer and Tucker.

and possesses proprietorial rights over him- or herself. Only the most dyed-in-the-wool statist could continue to argue after those victories that no one should have any say in the political matters affecting him- or herself. Whereas the absolutists had argued that the people had no rights, eventually it became commonplace to recognize that they did have rights, even if their "life, liberty, and property" could be entrenched upon in certain situations. Although as late as the 1780s the ideal of government by consent seems to have won the day, it would still be difficult to find any proponents of the social ideal of anarchy.

Finally, after nearly a century and a half of discourse, there arose a group of radical thinkers who were brave enough actually to brandish the *reductio ad absurdum* of anarchy. This constituted the third phase of the limited- versus no-government controversy. People like William Godwin were prepared to accept the logical implications of their beginning premises, namely, that no outside coercive authority had any jurisdiction over the nonconsenting individual and that each person should be left totally free of coercive molestation. Godwin and the individualist-anarchist movement he spawned realized that "to contend that consent is the moral justification for government is to lay the groundwork for anarchy."² Subsequent thinkers explained the various moral and practical ramifications of anarchy, but the point had finally been reached where anarchism was set against any and all forms of government. Unknowingly or not, latter-day anarchists repeated many of the arguments originated by Sir Robert Filmer to explain why no government could ever be "limited." Many political theorists were caught on the horns of this dilemma. On the one hand, they believed in government by consent and in individual rights, but on the other, they were not prepared to accept the anarchist implications raised by either Filmer or Godwin. In order to try to salvage their own position, thinkers like John Locke developed and relied upon the doctrine of "tacit" consent to prove that existing governments did in fact rest on some sort of consent. "Tacit" consent meant that one accepted the government one lived under simply because one continued to live in the geographic area over which it maintained jurisdiction. Owning property according to governmental law and using government services of one sort or another indicated one's support. "To trace the history of the tacit consent doctrine is to trace" the "tortuous route whereby political theorists . . . attempted to void the anarchistic implications" of their consent doctrines.³

The basic issues in the anarchy versus limited-government debate are the same now as they were over 300 years ago. The only difference is that radical libertarianism has advanced to the point where the *reductio* argument is no longer that but is a position it willingly accepts and defends. If consent is to mean anything, it must mean the explicit voluntary consent of each and every person over whom government exercises control. Since no government can document that it rests on individual consent and since payment of taxes is not voluntary, no government can demonstrate that it has the consent of the governed (otherwise the

imposition of physical force, and the threat of physical force, to collect taxes would not be necessary). Three hundred years ago this was a novel argument used by the defenders of kings to discredit their limited-government opponents, but it is now a perfectly valid argument used by the no-government defenders of anarchy. This, then, is one of the purposes of this paper: to show how the early critics of consent theory argued that such ideas inevitably led to anarchism. Other purposes of this paper are to (1) describe the historical development of consent theory in general, and (2) demonstrate how this theory has become part and parcel of the radical libertarian tradition.

Probably the earliest glimmerings of consent theory in English history are found in *A Shorte Treatise of Politike Power*, written by John Ponet in 1556. Ponet (1516?–1556) was a Cambridge scholar who eventually became an English bishop and then, with the accession of Queen Mary to the throne in 1553, went into exile. His treatise was concerned with “the true obedience which subjects owe to their kings and other civil governors” and propounded a series of political questions: “whether kings, princes, and other governors have an absolute power and authority over their subjects,” “whether kings, princes and other politic governors be subject to God’s laws, and the positive laws of their countries,” “in and what things, and how far subjects are bound to obey their princes and governors,” “whether all the subjects’ goods be the kaisers and kings own, and that they may lawfully take as their own,” and finally “whether it be lawful to depose an evil governor, and kill a tyrant.”⁴

Ponet’s answers, although couched in a radical Protestant religious posture, nonetheless form the basis for a nonsecular, natural rights approach. Quentin Skinner, a twentieth century historian of this era, refers to their “anarchic implications”: “With citations from both the civil and canon laws, Ponet argues that the crimes of a ruler who exceeds the bounds of his office are in fact no different—and ought to be treated no differently—from the same crimes when committed by ordinary citizens. ‘If a prince rob and spoil his subjects, it is theft, and as a theft ought to be punished.’ And ‘if he kill and murder them contrary or without the laws of his country, it is murder, and as a murderer he ought to be punished.’ ‘And those that be judges in commonwealths, ought (upon complaint) to summon and cite them to answer to their crimes, and so to proceed, as they do with others.’”⁵

Ponet’s biographer, Winthrop S. Hudson, notes that his “writer becomes somewhat emotional as he thinks of those ‘evil princes’ who ‘claim all their subjects goods for their own.’ . . . To them he cites the example of Naboth refusing to sell his vineyard to the king, affirming that he rightly ‘refused to sell it, as he might do, for by God’s law he had a property therein, from which without his will and consent, he could not be forced to depart.’”⁶

The idea of consent played a prominent part in Ponet’s thinking. His view of natural law led to a restriction on the power of kings and governors, who derived

their authority from the people. "Neither pope, Emperor, nor king may do any thing to the 'hurt' of his people without their consent," nor may any king or prince break or dispense with the positive laws "but with the consent of the people."⁷ The institution of government and its magisterial offices are in the nature of a trust, which ultimately rests upon the consent of the governed.

Is any man so unreasonable to deny, that the whole may do as much as they have permitted one member to do? Or those that have appointed an office upon trust, have not authority upon just occasion (as the abuse of it) to take away that they gave? All laws do agree that men may revoke their proxies and letters of Attorney, when it pleaseth them: much more when they see their proctors and attornies abuse it.⁸

It was not understood until the heyday of Lysander Spooner some 300 years later that this view of civil authority as "merely a delegation of power which might be revoked when it was abused" might be used to destroy the very concept of political representation.⁹ It was certainly used by Ponet and other sixteenth century thinkers to justify tyrannicide.¹⁰ "To affirm, as Ponet does, that a private man may kill a magistrate is, to be sure, nothing less than the rankest anarchy."¹¹ Ponet made the people (and by the people, Ponet included the poor) custodians of natural and divine law with the power to enforce it, by means of establishing that form of government they thought most conducive to their interests. When their governors and kings violated their trust, then they forfeited their power, whether they relinquished their positions voluntarily or whether they had to be removed forcefully.

Although Ponet was not an oft-quoted theorist during the century following his death, his *Shorte Treatise* was republished twice during the Puritan era. "By virtue of these two editions of 1639 and 1642, it is evident that Ponet was still a living source of ideas in the seventeenth century."¹² His authorship of the tract was not well known, and in fact it was not until after the American Revolution that Ponet actually received the recognition due him. "By that time a charge of rebellion made little difference, and so John Adams felt no hesitation in quoting from the 1556 edition and declaring that it "contains all the essentials of liberty which were afterwards dilated on by Sidney and Locke."¹³

Although there is no evidence that Ponet used the word "anarchy" or any of its derivatives, there is proof that the term was used to identify the "absence of government" and "a state of lawlessness" or "political disorder" by other sixteenth and seventeenth century writers. The term itself may have been derived from the medieval Latin *anarchia* and the French *anarchie*, which were cited by Randle Cotgrave's *A Dictionary of the French and English Tongues*, published in 1611. The earliest entry for the use of the word "anarchy" in *The Oxford English Dictionary* is from the 1552 edition of Richard Taverner's *Proverbs or Adages with New Additions, Gathered out of the Chiliades of Erasmus*, originally published in 1539: "This unlawful liberty or licence of the multitude is called

an Anarchy."¹⁴ By the 1640s in England it was common to find the word "anarchy" being used quite seriously. In a tract entitled *The Resolving of Conscience* (1642), attacking the social contract theory of government, Henry Ferne wrote that if the doctrine of the original power of the people "must be a Fundamentall" then "it is such a one as upon it this Government cannot be built, but confusion and anarchy may be readily raised."¹⁵ Clement Walker in his *Anarchia Anglicana, or the History of Independency, The Second Part* (1649) referred to those "who under colour of merchandise vent antimonarchical and anarchical tenets."¹⁶

The term "anarchy" was apparently not confined to the political sphere for there was an early realization of the connection between religious freedom and liberty of conscience and political freedom. "Preaching before the House of Commons on 26th May 1647, Thomas Case denounced liberty of conscience as opening the floodgates of anarchy." In his sermon, "Spiritual Whoredom Discovered," Case said that if you publish liberty of conscience as one of the people's rights then

see . . . how long your civil peace will secure you when religion is destroyed. . . . For no doubt if this once be granted them . . . they may in good time come to know also—there be them that are instructing them even in these principles, too—that it is their birthright to be freed from the power of parliaments and . . . kings. . . . Liberty of conscience (falsely so called) may in time improve itself into liberty of estates and . . . houses and . . . wives, and in a word liberty of perdition of souls and bodies.¹⁷

This "anarchy of religious freedom" was noted by other contemporary writers. Henry Parker in 1644 in his *Liberty of Conscience: Or the Sole Means to Obtain Peace and Truth* noted that liberty for men to teach what they will, will result in many false doctrines and teachers. "Yet it were better that many false doctrines were published . . . then that one sound truth should be forcibly smothered or willfully concealed." This "complying with weak consciences or the tolerating of several opinions", as Parker termed it, was not any "sort of Libertinism," for it was the only means of arriving at truth.¹⁸

This was one of the main themes of the English radicals of the mid-seventeenth century: that liberty of conscience was one of the natural rights of man. There was nothing that the Levellers "held with more tenacity than liberty of conscience."¹⁹ Case was right in pointing out the anarchic implications of this doctrine, for the supporters of liberty of conscience realized that it was impossible to assert one's right of private judgment without upholding the same right for everyone else. In the religious sphere this meant that guaranteeing the liberty of the regenerate necessitated guaranteeing the liberty of all. This was one of the main contributions of Puritanism to the doctrine of general liberty.²⁰ These radicals also observed a direct connection between their churches and the civil state. Their entire doctrine of Christian liberty insisted upon the importance of

consent as opposed to conformity and called into question the end or reason of their social organizations. Richard Overton, for example, in *An Arrow Against All Tyrants*, written in 1646, noted:

For by natural birth all men are equal, . . . born to like propriety, liberty and freedom, and as we were delivered of God by the hand of nature into this world, every one with a natural innate freedom and propriety, . . . even so we are to live, every one equally . . . to enjoy his birthright and privilege, even all whereof God by nature hath made him free. . . . Every man by nature being a king, priest, prophet, in his own natural circuit and compass, whereof no second may partake but by deputation, commission, and free consent from him whose right and freedom it is.²¹

During the late sixteenth and seventeenth centuries, many radical religious sects employed the device of a church covenant. This was sometimes an implicit, but usually an explicit congregational agreement by which those voluntarily enrolling in a particular church pledged themselves to the faith. Familiarity with the idea of church covenant and with the principles it embodied "helped establish in the civil sphere the doctrine of the social contract and government by consent."²² The church in this view was a voluntary association of equals and undoubtedly furnished a model for the civil state. The church preserved the free form of community and enabled (or at least aided) it to influence by analogy the theory of the state. The Levellers brought to their conception of the state, their views about church organization. "If the Leveller emphasizes the contract on which the authority of just government depends and insists on the principle of consent, he has had in his church, experiences of a community organized on these very principles."²³

It was only a small step for the Levellers to conclude that if the voluntary church was the only true church, then the only true political organization was the voluntary state. They moved quite close to a voluntarist conception of the church, and a Leveller petition of March 1647 went so far as to urge "that tithes and all other enforced maintainences may be for ever abolished, and nothing in place thereof imposed, but that ministers may be paid only by those who voluntarily choose them, and contract with them for their labours."²⁴ By substituting "taxes" for "tithes" and "government officials" for "ministers," we can see how close these early religious dissenters were to espousing a truly voluntary state. Latter-day thinkers were left to question: If men's spiritual health could be left to the free reign of voluntary forces, why could not men's physical well-being be left to the free market? Clearly these early advocates of church-state segregation were in the vanguard of the libertarian tradition because they took one of the first steps necessary to separate the state from the rest of society. They did this by declaring themselves four-square for liberty of conscience and religious freedom, and government by consent.²⁵

The Levellers, by the principles of their religious thinking, were "thrown back wholly on the law of nature in the civil sphere."²⁶ They admitted no sovereignty anywhere except in the individual and "seriously accepted the possibility of any man refusing obedience to commands incompatible with his ideas of reason or justice. This may appear anarchic, but to them it was the ultimate guarantee of liberty."²⁷ The Leveller leaders, such as John Lilburne and Richard Overton, saw the English nation as having been reduced to the original law of nature as a result of the tyranny of Charles I and the usurpations of Oliver Cromwell. They proposed that a new political settlement be made in which all Englishmen would give their consent to the Agreement of the People. The Agreement was a written document, the forerunner of written "constitutions," which was to be superior to Parliament. The Levellers hoped that it would be unanimously accepted by members of the army and then be signed by the people at large at the first general election. It plainly illustrates the Levellers' premise that society could be constituted on an entirely voluntary basis.²⁸

The Putney Debates, which took place October 28–November 1, 1647, placed the Levellers against Cromwell, Ireton (his son-in-law and chief spokesman), and the other army grandes. The debates illustrate the radical nature of Leveller thought and their reliance on both consent and state-of-nature theory. Ireton declared that the Levellers could ground their demand for manhood suffrage only on some plea of natural rights as opposed to the historic rights held forth by the supporters of the fundamental English state. They did not deny the fact. When Ireton claimed that the Levellers would destroy all property, they confidently appealed to the law of nature to demonstrate that the right to property is guaranteed by the law of nature, and not, as Ireton maintained, merely by positive government laws. Clarke, one of the Leveller debaters, argued that the law of nature is the basis of all constitutions.

yet really properties are the foundation of constitutions, and not constitutions of property. For if so be there were no constitutions, yet the Law of Nature does give a principle for every man to have a property of what he has, or may have, which is not another man's. This natural right to property is the ground of 'meum' and 'tuum'²⁹

Furthermore it is the law of nature that teaches the individual his rights and attendant duties: the right and duty of self-preservation, the natural limits of obedience, and the right and duty of resistance to tyrannical rulers. It teaches him what are the ends of government; and it inculcates the basic principles of social life—the principles of natural justice and equity that dictate the political equality of all men within the state and that are also based upon the biblical maxim "to do unto others as you would have them do unto you."³⁰

The reliance of the Leveller debaters on a theory of government by consent is quite explicit at some places. In a classic and oft-cited statement Rainborough

affirmed his belief that "the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under."³¹ John Wildman, another Leveller leader, plainly responded to Ireton:

I conceive that's the undeniable maxim of government: that all government is in the free consent of the people. If so, then upon that account there is no person that is under a just government, or hath justly his own, unless he has by his own free consent be put under that government.³²

There is a very striking example—found in a letter attributed to Wildman, which was issued at the time of the Putney Debates—of the invective used by the opponents of the Levellers. In "A Call to All the Soldiers of the Army by the Free People of England" (October 29, 1647), Wildman warned the soldiers not to "take heed of the crafty politicians and subtle Machiavellians." If the soldiers did attend the meetings of the General Council of the army,

be ye not frighted by the word 'anarchy', unto a love of 'monarchy', which is but the gilded name for 'tyranny'; for anarchy had never been so much as once mentioned amongst you had it not been for that wicked end. 'Tis an old threadbare trick of the profane Court and doth amongst discreet men show plainly who is for the Court and against the liberties of the people, who, whensoever they positively insist for their just freedoms, are immediately flapped in the mouths with these most malignant reproaches:

'Oh, ye are for anarchy. Ye are against all governments. Ye are sectaries, seditious persons, troublers both of church and state, and so not worthy to live in a commonwealth. There shall be a speedy course taken both against you and such as you.'³³

This is obvious proof that "anarchy" was a term of aspersion, even in the mid-seventeenth century. What is also interesting to note is that by that time the term had found itself in common usage in the political realm. The circumstances of the day (the Ship Money Controversy of 1634–1638 and the political turmoil and revolution of the early 1640s) dictated that at least one political theorist would realize that the theory of proprietary justice that the Levellers and other political protestants were espousing would lead one to anarchism. Their fundamental position, insisting that property was a natural right of the individual and that each person was a self-owner, led directly to government by consent, civil and religious liberty, and ultimately to an incipient sort of individualist anarchism. Sir Robert Filmer, in his tract *Patriarcha*, composed sometime between 1635 and 1642, was the first to note this anarchist tendency in this radical thought.

Despite the fact that Filmer (1588–1653) is perhaps best known as the royalist against whom Locke directed his *Two Treatises*, his treatment of consent theory

has had a great deal to do with its development in English political thought.³⁴ He possessed an acute, critical mind and his chief biographer, Peter Laslett, has attributed "the destructive cast of his thought" to "his capacity for seeing straight through the arguments of others."³⁵ His was the strongest case ever made in his own century against consent theory, and when his collected political works were published in 1680, "three of the ablest minds on the Whig side had set to work to refute patriarchalism."³⁶ These were James Tyrell, Algernon Sidney, and John Locke, who were all as much concerned with his defense of royal absolutism as they were with his critique of government by consent. It was Filmer's primary contention that "stable governments could not be based on consent" because they would always be in danger of having that consent withdrawn.³⁷ "Filmer's critique included the recognition that free submission to government logically entailed the right of withdrawal through the same voluntary actions."³⁸ Therefore, Filmer saw consent theory as an open invitation leading to constant anarchy.

Filmer left no integrated corpus of thought, and many of his ideas are originally set forth in his *Patriarcha* and then repeated in his later tracts. However, his most mature and explicit criticism of the anarchist implications of consent theory are found in his treatise, *The Anarchy of a Limited or Mixed Monarchy* (1648), which was written as a rebuttal to Philip Hunton's 1643 work, *A Treatise of Monarchy*.³⁹ Filmer's main charge against Hunton was "that instead of a treatise of monarchy, he hath brought forth a treatise of anarchy."⁴⁰

In *Patriarcha* and in *The Anarchy*, Filmer argues that "by nature all mankind in the world makes but one people" who are all "born alike to an equal freedom from subjection".⁴¹ Since there are no natural political divisions in the world, Filmer concludes that "every man is at liberty to be of what kingdom he please." Therefore,

every petty company hath a right to make a kingdom by itself; and not only every city, but every village, and every family, nay, and ever particular man, a liberty to choose himself to be his own King if he please; and he were a madman that being by nature free, would choose any man but himself to be his own governor. Thus to avoid the having but of one King of the whole world, we shall run into a liberty of having as many Kings as there be men in the world, which upon the matter, is to have no King at all, but to leave all men to their natural liberty. . . .⁴²

Of course Filmer's point is that the right to secede from political society leads to anarchy and makes coercive political government an impossibility.⁴³ Filmer even went so far as to grant the seeming impossibility of all individuals having at one time agreed to their government. Even if this were so, Filmer demanded to know why this promise to abide by government could not be broken. Was a man prevented from withdrawing from a government once he had consented to it? "Who can say that such a man doth more than by right he may do?"⁴⁴ As Laslett observes, the right of any independent group of people "to set up their

own political society without reference to the rest of mankind" inevitably implies a "universal, world-wide anarchy".⁴⁵ If it ever be imagined, as the Levellers thought, that each person was a self-owner, free, independent, and equal with all other human beings, then it would prove an impossibility to introduce any kind of legitimate government into the world, at least without unanimous consent of all those affected.⁴⁶

Nonetheless, Filmer saw the world divided into numerous commonwealths. The defenders of these countries argued that they were legitimated by majority rule and tacit consent. But Filmer questioned if it was ever possible for the members of the entire world to assemble at one time and consent to its political subdivision. Notwithstanding this being an impossibility, Filmer further argued that majority rule could bind no one and that a majority of the earth's inhabitants (or even the majority of one country's citizens) could not justify political rule. "No one man, nor a multitude, can give away the natural right of another. . . . The acts of multitudes not entire are not binding to all, but only to such as consent unto them."⁴⁷

Thus, in a very Spooneresque fashion, Filmer called into question the validity of majority rule and representative government. He said that "it cannot be showed or proved that all those that have been absent from popular elections did ever give their voices to some of their fellows."⁴⁸ Therefore, those who do not participate in an election cannot legitimately be bound by its outcome. Nor could it be countered that the silence of those in opposition or the silence of those who did not vote could be construed as an acceptance of the election. The "tacit assent" of the whole commonwealth to every government is a plain political fact. Yet from that we cannot conclude "that every Prince that come to a crown, either by succession, conquest or usurpation, may be said to be" acceptable to the people.⁴⁹ The tacit consent doctrine argues too much. "To pretend that a major part, or the silent consent of any part, may be interpreted to bind the whole people, is both unreasonable and unnatural."⁵⁰

The supporters of consent theory argued that "the people" must consent to their government. This led such radicals as the Levellers to argue for universal manhood suffrage. Yet, as Filmer pointed out, what of women and children? Were they not "the people," too?⁵¹ Furthermore, Filmer was confounded by the question of how one generation of "the people" could bind future generations. "Mankind is like the sea, ever ebbing or flowing, every minute one is born another dies; those that are the people this minute, are not the people the next minute."⁵² If one person might be excluded, then the same reason that excludes that person might exclude many hundreds or thousands. Filmer, pushing consent theory to what he saw as a *reductio* posited that

if it be admitted, that the people are or ever were free by nature, and not to be governed, but by their own consent, it is most unjust to exclude any one man from his right in government; . . . for the whole people is a thing

so uncertain and changeable, that it alters every moment, so that it is necessary to ask of every infant so soon as it is born its consent to government, if you will ever have the consent of the whole people.⁵³

One of the most original and insightful of Filmer's commentaries occurs in his *Observations Concerning the Originall of Government* and is repeated in his "Preface" to *The Anarchy*. His point is that all government, by its very nature, is arbitrary, so it really makes no difference what form government takes.

We flatter ourselves if we hope ever to be governed without an arbitrary power. No: we mistake; the question is not whether there shall be an arbitrary power, whether one man or many? *There never was, nor ever can be any people governed without a power of making laws, and every power of making laws must be arbitrary.*⁵⁴

Thus Filmer totally rejects the idea of a lawful government; "he repudiates at one fell swoop the idea of a 'government of laws, not of men' and its historical but not logical concomitant, the belief that a popular government cannot be arbitrary" because it is based on the will of the people.⁵⁵ As Filmer logically points out, "if it be tyranny for one man to govern arbitrarily, why should it not be far greater tyranny for a multitude of men to govern . . . ? It would be further inquired how it is possible for any government at all to be in the world without an arbitrary power; it is not power except it be arbitrary. . . ."⁵⁶ Not only does Filmer emphasize that it is impossible to get away from the fact that government by its very nature is arbitrary, but he identifies the "law-making" features of government as the essence of its arbitrariness. In an argument foreshadowing Spooner's "Essay on Natural Law," Filmer identifies perhaps the most tyrannical feature of all governments: their claims to make laws for the people.

Finally, Filmer presents us with one last argument demonstrating the anarchist implications of consent theory. Filmer found no constitutional solution to the problem of anarchy; for even a limited government or "mixed monarchy," as he termed it, was a contradiction in terms. Sovereignty must reside either in the people or in their monarch. It cannot be shared by both. Thus Hunton in his essay on monarchy caught himself "in a plain dilemma":

If the King be judge, then he is no limited monarch; if the people be judge, then he is no monarch at all. So farewell limited monarchy, nay farewell all government, if there be no judge.⁵⁷

If every man's conscience is the arbiter of the fundamental controversies, if the appeal must be to the community at large to settle disputes with the monarch, then as Filmer concluded, "The wit of man cannot say more for anarchy."⁵⁸ In Filmer's opinion, the end result of this would be "utter confusion and anarchy."⁵⁹

This review of Filmer's arguments demonstrates why his political tracts have an importance far surpassing the mere fact that Locke wrote in rebuttal to his *Patriarcha*. Filmer questioned the principle essential to all accounts of political obligation other than his own, the principle of consent.⁶⁰ Perhaps, it could be argued that Locke realized Filmer's uncanny and unerring ways of pushing consent arguments to their radical anarchist conclusions required their own answer. But the fact remains that Locke's effort seem to have gone for naught.

Locke presented us with a mixed bag of answers in *The Two Treatises of Government*. One of the problems he had in his mind was the problem of the legitimacy of political communities, both past and present. How was it that many, many centuries ago, and while still in a state of nature, men came to form political institutions? And what, if any, bearing did their actions have on contemporary governments? In Locke's writings the purpose of political authority was to protect life, liberty, and property of the citizenry. So long as these protections were offered by an agency that drew its authority from the consent of the people and did not degenerate into absolutism, political obligation appears to have been complete, according to Locke's thinking.⁶¹

"To Locke there was no question 'That the beginning of Politick Society depends upon the consent of the Individuals, to joyn into and make one Society', and he believed that reason and history clearly showed that 'the Governments of the World, that were begun in Peace, . . . were made by the Consent of the People.'"⁶² Locke distinguished two sorts of consent "which subject an individual to the laws of a legitimate political society."⁶³ For Locke, the question of how one becomes a member of a state, and why one is obliged to obey it were separate questions. His use of the concepts of tacit and explicit consent helped illustrate this. Membership was limited to those who had expressly consented. "Express consent demands the making of some overt sign of agreement by the consenting party to the legitimacy of the social structure which he himself intends to be taken as a promise to obey the rules in the future. An oath of allegiance taken to a king is an obvious example. . . ."⁶⁴ Nonmembers, but residents in the geographic area over which the state exercised jurisdiction, incurred their obligations by giving tacit consent. "Tacit consent is incurred," according to Locke, "by anyone who voluntarily takes advantage of the resources of the country."⁶⁵ One's physical presence in the country's territory is a sufficient condition for being held in this way to have consented tacitly.⁶⁶

One of Locke's basic premises, to which he reverts frequently throughout *The Second Treatise*, is that "Every Man being, as has been shewed, naturally free, and nothing being able to put him into subjection to any Earthly Power, but only his own Consent. . . ." Therefore, Locke wishes to inquire what "it is to be considered . . . shall be understood to be a sufficient Declaration of a Man's Consent, to make him subject to the Laws of any Government"? Locke answers:

No body doubts but an express consent, of any Man, entering into any society, makes him a perfect member of that society, a subject of that Government. The difficulty is, what ought to be looked upon as a tacit Consent, and how far it bind, ie, how far any one shall be looked on to have consented and thereby submitted to government, where he has made no expressions of it at all. And to this I say that every Man that hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it; whether this possession be of land to him and his heirs forever, or a lodging only for a week, or whether it be barely travelling freely over the highways and in effect it reaches as far as the very being of anyone within the territories of that government.⁶⁷

Locke clearly recognizes that exclusive territorial sovereignty is one of the characteristics of government. Everyone living within a given geographic area is subject to the jurisdiction of that area's government. Locke indirectly realizes that the alternative to this would be anarchy, for he writes, "For it would be a direct contradiction, for any one, to enter into Society with others . . . And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government."⁶⁸ Therefore Locke concludes that when one unites "his Person" to any commonwealth, "by the same he unites his Possessions, . . . and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth. . . ."⁶⁹

If we are to assign any meaning to Locke's doctrine of consent, it is clear that people must have the opportunity to consent or not consent as they please. The only provision for not consenting in Locke's treatise is emigration from the commonwealth. This is Locke's escape from tyranny, for if people "are not permitted to emigrate, they can hardly be said to have consented." Emigration is a logical necessity within the framework of Locke's theory of consent, because without it, the whole theory loses its viability.⁷⁰ What Locke says is this: "The Obligation any one is under, by Virtue of such enjoyment, to submit to the government, begins and ends with the Enjoyment; so that whenever the Owner, who has given nothing but such a tacit consent to the Government, will . . . quit the said Possession, he is at liberty to go and incorporate himself into any other commonwealth," or to begin another one.⁷¹ Thus, emigration should be a right every person should enjoy at every moment, unless he has committed himself to the commonwealth forever.⁷²

Unfortunately for Locke's theory, his recognition of the right to emigration and to shed one's citizenship was not even recognized in his own day. Locke writes as though no persons born in the English commonwealth, or of English parents abroad, acquire their citizenship until they consent to become members of the Commonwealth, "as each comes to Age."⁷³ He claims that it is the practice of governments, "as well as by the Law of right Reason, that a Child is born

a subject of no Country or Government," particularly in the case of English parents bearing a child in France.⁷⁴

The truth of the matter is that governmental practice and the common law of allegiance had already developed to such a point in Locke's time that no child born within England, of parents who were subject to its jurisdiction, had any choice in the matter of what citizenship it acquired. They were considered to be English subjects by birth, by the mere fact of being born within the realm. Nor were English subjects permitted to shed their English citizenship at will, without the permission of the King. "The fundamental principle of the common law with regard to English nationality was birth within allegiance . . . and at common law it was firmly established that no citizen or subject possessed the power of throwing off his allegiance without the sovereign's consent."⁷⁵ Even "those born abroad of English parents, share the status of English subjects." One's status as a subject is ordinarily indelible and cannot be shed at will.⁷⁶ This was what it meant to be an English citizen throughout the seventeenth century. These interpretations had been confirmed by Calvin's Case in 1609, so surely Locke should have been aware that his theories did not meet the common law decisions. Emigration at Locke's time did not ordinarily permit the shedding of citizenship.⁷⁷

We should not be surprised that Locke's doctrine of tacit consent cannot be taken seriously. It was not good scholarship, even in his own day, nor did it really provide a logically consistent response to the problem of political obligation. It was no more than a saving hypothesis "brought in to meet the difficulty that in fact men do not expressly declare their consent to the regime under which they live. All that (really) remains of Locke's teaching is that legitimate governments are those that secure the voluntary obedience of their subjects."⁷⁸

Despite the problems with Locke's doctrine of consent, "his commitment to what he called consent is unassailable."⁷⁹ There is no question as to what he wrote; the only question is, Did he really mean what he said? "But I moreover affirm, that all Men are naturally in that State [the state of nature] and remain so, till by their own Consents they make themselves member of some Political Society. . . ."⁸⁰ And again, "Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of Another, without his own Consent."⁸¹

Yet at the same time, Locke was familiar with the thrust of Filmer's *reductio*s and saw where his own doctrine was leading him. As Locke put it, "For if the consent of the majority shall not in reason, be received, as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such a consent is next impossible ever to be had. . . . Such a Constitution as this would make the mighty Leviathan of a shorter duration, than the feeblest Creatures; and not let it outlast the day it was born in. . . ."⁸² Locke clearly realized that his own theory of consent, strictly interpreted, would lead to anarchy. His only way out was to make "con-

sent" include an agreement to abide by majority rule. "Whosoever . . . united into a Community, must be understood to give up all the power . . . to the majority of the Community. . . ." ⁸³

Locke's outlook on property also wrestled with the problem of consent. "The Supream Power cannot take from any Man any part of His Property without his own consent." ⁸⁴ Could one's property be taken from him against his will, as when taxes are levied and collected? Locke answered this problem in the following manner. He realized that the right to collect funds coercively was one of the most important needs of a government: "Tis true, Governments cannot be supported without great Charge, and tis fit every one who enjoys his share of the Protection, should pay out of his Estate in proportion for the maintenance of it. But still it must be with his own Consent, i.e., the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them." ⁸⁵

It is plain that *The Two Treatises* is open to at least two readings: Locke, the individualist, whose consent theory leads to a radical libertarianism; and Locke, the conservative, who was attempting to justify the English political institutions of his time. It was not so long after the appearance of *The Two Treatise* in 1689 that Locke's ideas were used to justify the radical position. "The transposition of Locke's doctrine" to other political settings "did indeed have subversive implications," for within a decade of the book's appearance, its author and his ideas were used to support the rights of the Irish parliament and Irish people. ⁸⁶ William Molyneux (1656–1698) was an Irish friend and correspondent of Locke's, who represented Dublin University in the Irish parliament. During the late 1690s he was concerned with the effect of the recent legislation of the English parliament on the wollen and linen industries in Ireland. This and his correspondence with Locke led him in 1698 to publish "The Case of Ireland's Being Bound by Acts of Parliament in England Stated." His basic purpose was to prove the legislative independence of the Irish parliament, and in doing this, he resorted to Locke's treatise as a justification for his position. "Molyneux used the book and named Locke as its author at a time when Locke refused to acknowledge it even in private, and without asking his permission." ⁸⁷ The book created a stir in the English House of Commons, and a committee was appointed to investigate it for suspicions of treason. The committee "unanimously resolved 'that the said book was of dangerous consequence to the crown and parliament of England.'" ⁸⁸ History has it that Molyneux's book was ordered to be burned by the common hangman. ⁸⁹

What was it that made Molyneux's book such a threat? Quite simply it was his insistence on a literal interpretation of Locke's consent theory. His critics realized that it led straight toward anarchy. The heart of Molyneux's argument sounds remarkably Lockean and anarchist. He wrote:

I shall venture to assert, that the Right of being subject *only* to such laws, to which Men give their 'own' Consent, is so 'inherent' in 'all' Mankind,

and founded on such 'immutable' Laws of Nature and Reason, that 'tis not to be aliened, or given up by any Body of Men whatever. . . . I have no other Notion of 'Slavery'; but being bound by Law, to which I do not consent.⁹⁰

Molyneux clearly understood the relationship between property rights and consent. "Consent is a necessary condition for the transfer of title. To use or dispose of another person's property without his consent is the fundamental act of injustice."⁹¹ According to Molyneux:

The Obligation of all Laws have the same Foundation, if 'One' Law may be imposed 'without Consent', any 'Other' Law whatever, may be imposed on us 'without our Consent'. This will naturally introduce 'Taxing us without our Consent'; and this as necessarily destroys our 'Property'. I have no other Notion of 'Property', but a 'Power of Disposing my Goods as I please', and not as another shall Command: Whatever another may 'Rightfully' take from me 'without my Consent', I have certainly no 'Property' in. To 'Tax' me without Consent, is little better, if at all, than 'downright Robbing me'.⁹²

Molyneux was probably the first to explicitly relate these main elements of proprietary justice. Clearly there was no difference between taxation and robbery, if consent was unnecessary in the former case. Perhaps Molyneux would not have applied his theory in typical anarchist fashion to delegitimize all government (for he was arguing for an all-Irish parliament, which in all likelihood would itself have powers of taxation). Nonetheless, his ideas and reputation did survive his own death and were repeatedly "taken up with each burst of Irish national sentiment throughout the century, by Swift, Charles Lucas, by Garran and Pollock, even eventually by Wolf Tone."⁹³

Other than Molyneux's claims for the Lockean theory of consent, its application to the colonial relationships within the British empire remained unexamined for the most part until the 1760s. Most theorists, applying Locke's doctrine of tacit consent, saw no incongruity between the legislative sovereignty of the English parliament and the conventional theory of Whig politics, which in turn was largely premised on *The Two Treatises*. The opponents of Molyneux in 1698 based their argument on the idea that emigration removed the right of direct representation in the English parliament. This eliminated the requirement for the emigrés' explicit consent to the acts of the parliament in England.⁹⁴

Throughout the eighteenth century, Locke's idea of emigration and the idea of tacitly consenting to one's government by maintaining residence within the geographic area of its jurisdiction were ridiculed as an unsound theory. Indeed Adam Smith in his *Lectures on Justice, Police, Revenue, and Arms* (circa 1763) argued that most people under the dominion of a government cannot be said to give consent to that government, in the sense that they would consent to a contract. "To say that by staying in a country a man agrees to a contract of obedience to government is just the same with carrying a man into a ship and after he is

at a distance from land to tell him that by being in the ship he has contracted to obey the master."⁹⁵ David Hume, fifteen years earlier, asserted in his essay "Of the Original Contract" that it was ridiculous to claim "that political connexions are founded altogether on voluntary consent or mutual promise." ("The magistrate would soon imprison you as seditious for loosening the ties of obedience, if your friends did not before shut you up as delirious for advancing such absurdities.")⁹⁶

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.⁹⁷

Hume concluded that if tacit consent and the obligation of obedience, which it entails, reached all the inhabitants of a territory, then the most outrageous tyrant could be said to govern with the consent of his subjects.⁹⁸ "If consent could be watered down like this, it would lose all value as a guarantee of individual liberty."⁹⁹

Perhaps the most interesting of the eighteenth century Lockean commentators was Josiah Tucker, who in *A Treatise Concerning Civil Government* (1781) "opined that Locke neglected to carry the consent doctrine to its logical end—i.e., anarchism."¹⁰⁰ Tucker (1713–1799) was a British clergyman with great interest in economic and political matters. He was an avid pamphleteer and polemicist. As matters were coming to the point of rebellion in the North American colonies, Tucker wrote of the American revolutionists as the "most ungrateful, ungovernable, and rebellious people" he had ever known.¹⁰¹ He claimed that the Americans were virtually represented in parliament and "he never doubted the right to tax them."¹⁰² Nevertheless, he took the unpopular stand, even before the outbreak of the revolution, that the American colonies should be allowed their independence. Their forceful inclusion in the British empire would only lead to both political and economic disruption for Britain herself and was therefore to be avoided.

Despite the fact that he refused to support the subjugation of the colonies by force, the appeal of the Americans to Locke's right of revolution "filled him with anxious forebodings."¹⁰³ As early as 1775, he declared that "Locke's principles of government, if carried out as the Americans construed them, would destroy every government on earth."¹⁰⁴ In 1778 he circulated a manuscript, "The Notions of Mr. Locke and His Followers . . . Considered and Examined," which he later used in the preparation of his major work, *A Treatise Concerning Civil Government* (published 1781). To Tucker, the phrase "consent of the governed" was simply one "loaded with dynamite."¹⁰⁵ He assailed the Lockean first for thinking that their form of government by consent was the only true government

and then for not living up to their very own principles. He viciously pointed out that the American revolutionaries, who claimed liberty for themselves, refused to liberate their slaves or extend the franchise to include unpropertied men or women. In proving that the adherents of Locke pushed his principles to a *reductio ad absurdum*, Tucker quoted Molyneux, and other late eighteenth century supporters of Locke, such as Joseph Priestly and Richard Price. Tucker referred to Sir Robert Filmer, but only in a derogatory way.¹⁰⁶

Tucker was fully aware of all the implications to be drawn from the Lockean system, and it was those implications, more than anything else, that made him fearful of its advocacy. He clearly saw the integral relationship between taxes, government, and slavery. Tucker claimed that the declarations of the Lockeans ultimately reduced themselves to the pronouncement "that the very Essence of Slavery doth consist in being governed by Laws, to which the Governed have not previously consented."¹⁰⁷ And he realized that if governments were to exist at all then "we must submit to Taxes" (which he clearly comprehended were compulsory levies and not voluntary contributions) because there was no other way of supporting them.¹⁰⁸

But say the Lockians, Taxes are the Free-Gift of the People:—Nay, they are the Free-Gift of each Individual among the People: "For even the Supreme Power (the Legislature) cannot (lawfully or justly) take from any Man any Part of his Property without his own Consent." This is Mr. Locke's own Declaration. And Mr. Molyneux corroborates it by another still stronger, viz. "To tax me without my Consent is little better, if at all, than down-right robbing me." In short all the Lockians hold one and the same Language on this Head: And therefore you must take their favourite Maxim for granted, or you will incur their high Displeasure: "You are an Advocate for Despotism, if you do not acquiesce in this Maxim: You attempt to defend what is down-right Robbery."¹⁰⁹

Tucker viewed the Lockean system and the American revolution that it spawned as a "universal Demolisher of all Civil Governments, but not the builder of any."¹¹⁰ The root of the American rebellion was to be found in the premise that "the imposing of Laws on them of any Kind, whether good or bad in themselves, and whether for the Purposes of Taxation, or for other Purposes, without their own Consent, is . . . a most intolerable Grievance! a Robbery! and an Usurpation on the unalienable Rights of Mankind."¹¹¹

In short, the brave American were resolved not to be Slaves; but Slaves, it seems, they must have been (according to the Lockian Idea) had they acknowledged the Right of the Mother Country, even in a single Instance, to make Laws to bind them without their Consent:—I say, even in a single Instance; for the Lockian Mode of Reasoning is, that there is no Difference between being vested with discretionary Power, and with a despotic Power. "Inasmuch as, if a Government has any Right to rule me without my Consent

in some Cases, it has a Right to rule me in every Case; consequently it has a Right to levy every Kind of Tax, good or bad, reasonable or exorbitant upon me, and to inflict all Sorts of Punishments whatever."¹¹²

Tucker's concept of government depended on the idea of quasi-contract or trust, on the obligation of subject and king to perform their implied duties. Reason, common sense, and the known laws of the land all coincided to reinforce the reciprocal duties of subject and governor in a manner unacceptable to those who rejected the tacit consent doctrine. One of Tucker's insightful observations was that the objection of those who rested their arguments on "explicit consent" (as opposed to the recognition of a quasi-contract or tacit consent) was that their real objections were not so much against the law themselves or the manner in which they were administered, but rather against the "Right, Title, or Authority to make, or to execute any Laws at all, be they in themselves good or bad."¹¹³ The sole question between Tucker and his Lockean opponents was "Whether That Government is to be justly deemed an Usurpation, which is not founded on express mutual Compact of all the Parties interested therein, or belonging thereunto?"¹¹⁴ Anarchists who took the Lockean notions to their logical finality were not concerned with the goodness or badness of governmental laws, but rather with the ultimate title or authority of governments themselves to legislate *any* laws at all. As Tucker puts it, "For the sole Point here to be determined, is simply this.—Had the Makers of such a Law any Right to make it, according to the Lockian Ideas of Right and Wrong?"¹¹⁵

To the anarchist, a man is a slave who is required to submit even to the best of laws or the mildest government that ever existed.¹¹⁶ Coercion is still coercion regardless of how mildly it is administered. A man is free who submits to no one or no group of people, except as he himself has consented to it. "So the great Good of political Liberty, and the intolerable Evil of political Slavery, are according to this blessed Doctrine, resolved at last into the single Words—*Consent, or Not Consent*. . . ."¹¹⁷ Although Tucker did not defend the anarchist conclusions of the Lockean principles, he was logician enough to see where they led. It was this power of mind that gives him, the nonlibertarian, a place in the libertarian history of the consent doctrine.

The radical abolitionists of the mid-nineteenth century incorporated the ideas of explicit consent into their attacks on slavery. Not only was slavery a violation of the slave's self-ownership rights, but it was obvious that people were forced into, and retained in, slavery against their will. Being held in bondage was a coercive situation, not one consented to by the slave. Being bound to pay taxes or support a coercive government was almost as evil as being made a slave. As Tucker pointed out, one of the earliest conclusions of the Lockeans, such as Molyneux, was that there was no other notion of slavery but being bound to a law to which one did not consent.

There are two interesting examples made of the idea of consent by well-known antislavery radicals in the 1840s. Henry David Thoreau, as early as 1840, was protesting the assumption that his parents' membership in a church congregation automatically made him a member. (Much like the assumption that if one's parents are English, one's allegiance and citizenship are automatically British.) "In Thoreau's day, the church taxed each member of its congregation, and the taxes were billed and collected by the town officials."¹¹⁸ The First Parish Church (Unitarian) of Concord "taxed" Thoreau in 1840, but he refused to pay. The tax was finally disallowed when at the request of some of the selectmen, Thoreau agreed to present them with the following statement: "Know all men by these presents, that I, Henry Thoreau, do not wish to be regarded as a member of any incorporated society which I have not joined." Thoreau adds that "if I had known how to name them, I should then have signed off in detail from all the societies which I never signed on to; but I did not know where to find a complete list."¹¹⁹ One honestly wonders whether Thoreau ever considered himself as joining the Commonwealth of Massachusetts?

Thoreau's friend and confidant Charles Lane, in his series of letters published in 1843 on "A Voluntary Political Government," made a number of interesting comments about the meaning of citizenship. In a discussion of consent, Lane points out that the preamble to the state constitution of Massachusetts reads: "The body politic is formed by a voluntary association of individuals." If this be the true case, Lane argues, then his advocacy of "voluntary political government" entails a principle already embraced by the Commonwealth of Massachusetts in her very own constitution. As Lane explains,

All, therefore, on behalf of which I am asserting may be summed up as the restoration of the primary constitutional principle. I give no strained or unusual value to the word "voluntary" on this occasion. Either it means choice, or it means nothing at all. If it does not assert the free voluntariness of every individual who comes into "the body politic" it signifies nothing; or at least nothing which common sense can lay hold of. If the voluntariness is to be confined to those who have the power, and they are to be at liberty to force every one into the association, then I must esteem this word "voluntary" to be a solemn mockery; and the sooner it is erased, and the term "forced" put in its stead, the sooner the words of the Constitution harmonize with the idea of its framers, and be at one with the very practice of its supporters.¹²⁰

The nineteenth century thinker who, perhaps more than any other, elaborated on the significance and implications of government by consent was Lysander Spooner. Spooner (1808-1887) was a constitutional lawyer, abolitionist, and freethinker who became progressively more radical as he grew older. In an appendix to his *Essay on Trial by Jury*, published in 1852, Spooner noted (much like Molyneux and others) that it was a principle of the common law that no persons could be taxed without their personal consent. To Spooner, even before he saw the governmental carnage and atrocities of the Civil War, "taxation without

consent" was "as plainly robbery" whether it was enforced by one man against millions, or enforced by millions against one man who did not consent. "Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act" could ever alter the fact that property was being forcefully taken from at least one person against his will. Spooner defended the principle of "no taxation without consent" in the following manner:

If the government can take a man's money without his consent there is no limit to the additional tyranny it may practice upon him. . . . It is therefore a first principle, a very 'sine qua non' of political freedom, that a man can be taxed only by his personal consent. . . . Government have no more right, in nature or reason to 'assume' a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent where no actual consent is given, makes the taking none the less robbery. If it did, the highwayman has the same right to assume a man's consent to part with his purse, that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption, on the part of the government, for taking a man's property without his consent. The government's pretence of protecting him, as an equivalent for the taxation affords no justification.¹²¹

After the Civil War, Spooner wrote a series of pamphlets called *No Treason*. According to Spooner in these essays, governments and nations, if they can be said to rightfully exist at all, can exist only by consent, and this means: "the separate individual consent of every man who is required to contribute, either by taxation or personal service, to the support of the government. . . . Either the separate individual consent of every man who is required to aid, in any way, in supporting the government is necessary, or the consent of no one is necessary."¹²²

In *No Treason*, No. 2, Spooner argued that "either 'taxation without consent is robbery' or it is not. If it is not, then any number of men who choose, may at any time associate; call themselves a government, assume absolute authority over all weaker than themselves; plunder them at will; and kill them if they resist. If, on the other hand, 'taxation without consent is robbery,' it necessarily follows that every man who has not consented to be taxed, has the same natural right to defend his property against a taxgatherer, that he has to defend it against a highwayman."¹²³

In his final pamphlet of this series, *No Treason*, No. 6, "The Constitution of No Authority," Spooner broke new ground by demolishing the theory of tacit consent. Spooner argued that merely living in a certain geographic area under control of a government, or voting in government elections, in no way implied one's consent to the government of that territory. Elections mean nothing; for

Spooner showed that a majority of people never vote, and of those who do, the number supporting the elected candidates is so small (as a percentage of the population) as to be ludicrous. "Elections are secret; therefore, you cannot call representatives legal agents, since they do not know specifically whom they do represent." Therefore, having voted in an election in no formal way demonstrates that one consented to anything. "On the question of the Constitution itself, no vote ever had been taken, and as a legal contract the Constitution has no validity."¹²⁴ According to Spooner,

the Constitution was never signed, nor agreed to, by anybody, as a contract, and therefore never bound anybody, and is now binding upon nobody; and is, moreover, such a one as no people can ever hereafter be expected to consent to, except as they may be forced to do so at the point of the bayonet.¹²⁵

The anarchistic implications of all this should be quite clear. The state has no right to raise any taxes except as they are "voluntary" contributions or "contractual" obligations for services rendered.¹²⁶ In fact the historical origin of taxation demonstrates its relationship to the idea of consent. At least some forms of taxation "were matters of voluntary grant," but "their history is bound up with the gradual growth of the right of the majority to bind the individual." During the reign of Henry III (1227-1258), an example is cited of a nobleman claiming immunity from a tax "on the ground that he as an individual had not consented to its levy."¹²⁷ As another commentator has pointed out, "consent no longer effectively safeguards the sanctity of private property if it ceases to be personal and individual." Yet the very growth of such expressions as "no taxation without representation" tended to purposefully obscure this important point. Once the parliamentary practice became accepted by which "electors appointed representatives, or proxies, to give consent in their name," the sense of individual consent to taxation "inevitably lost ground."¹²⁸

In its extreme form the doctrine of consent signifies that a man is bound only by what he consents to. If individual consent is the only rightful source of power, the question must be raised why "even a single objector should be coerced, possibly against his own conscience."¹²⁹ This "anarchial principle" has always been embraced by radical libertarians, and certainly no one belabored the point more than did Spooner.¹³⁰ As one of the major contributors to the development of the proprietary theory of justice in the libertarian tradition, one of Spooner's greatest achievements was "to demolish the tacit consent doctrine, particularly as it applied to the U.S. Constitution. Spooner's natural rights theory, combined with his refusal to recognize the surrender of rights through tacit consent, brings out the radical anarchism latent in the Lockean tradition."¹³¹

Certainly one critical element of the proprietary theory of justice was the view that one's just property titles could not be rightfully alienated without one's consent. That is what it meant to own property or exercise dominion over one's own. This was noted by some of the predecessors of the Levellers, as well as

by the Levellers and other seventeenth century political thinkers. Two years after Ponet's treatise appeared, Christopher Goodman published his *Superior Powers* in 1558, in which he embraced natural rights, "declaring that men 'may lawfully claim' their liberty 'as their own possessions,' and concluding that 'if they suffer this right to be taken from them,' they are letting themselves be robbed no less than if they let their rulers remove any of their other goods."¹³² A century later, Richard Baxter, an English clergyman, reiterated the same point: "Propriety is naturally antecedent to government. . . . Every man is born with propriety in his own members, and nature gives him a propriety in . . . [the] just acquisitions of his industry. Therefore no rule can justly deprive men of their propriety, unless it be . . . by their own consent. . . . And men's lives and liberties are the chief parts of their propriety."¹³³ The radicalism of consent doctrine was twinedged. No one could be obliged to obey a government to which he or she did not consent; but even more significantly, no one could be bound to contribute their "lives" or "properties" to such a government either. The necessity of having voluntary consent to taxation or conscription makes government an impossibility.

Radical political philosophy since the seventeenth century has been characterized to a large extent by these forms of "voluntaryism," "by an emphasis on the assent of individuals as the standard of political legitimacy."¹³⁴ This review of consent theory in the libertarian tradition has sought to demonstrate that the individualist and voluntarist character of the consent doctrine would actually "deprive every existing polity of its legitimacy."¹³⁵ Its most perceptive critics, such as Sir Robert Filmer and Josiah Tucker, clearly saw this, and their critiques of consent theory were largely premised on this realization. Both Filmer and Tucker believed that the supporters of consent were "either internally inconsistent or disastrous in their prospective practical implications. Either their positions must be instances of remarkable stupidity or they must be held in bad faith. If they mean what they say, their beliefs would imply anarchy."¹³⁶ They charged their opponents "with either evading the question or adopting theories that logically destroyed the moral authority of government. . . ."¹³⁷ Other thinkers who embraced Lockean ideas were often not aware of the ultimate implications that could be deduced from their initial premises. There is no question but that "consent implies voluntariness and the association of almost every individual with the government which has control over him is clearly involuntary."¹³⁸ So for nearly three centuries now, the most perceptive political theorists have perceived that there is a large, unbridgeable chasm between the idea of consent and government. There is simply no way to cross that bridge, for inevitably to contend that government rests on consent is to begin the descent on the slippery slope to anarchism.¹³⁹

NOTES

1. A. S. P. Woodhouse, ed., *Puritanism and Liberty* (Chicago: University of Chicago Press, 1951), p. 59 of The Putney Debates.

2. George H. Smith, "William Wollaston on Property Rights," *Journal of Libertarian Studies* 2 (1978):217-24, at 224.
3. *Ibid.*
4. Winthrop S. Hudson, *John Ponet* (Chicago: University of Chicago Press, 1942). Note that this volume also includes a photographic reprint of Ponet's work (*A Shorte Treatise of Politike Power; And of the True Obedience Which Subiectes Owe to Kynges and Other Civile Governours, With an Exhortacion to All True Naturall Englishemen, 1556*). References to Ponet refer to this photographic reprint. See Ponet, *A Shorte Treatise*, title page and pp. 21, 35, 47, 79, 98.
5. Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 2 (Cambridge: Cambridge University Press, 1978), pp. 223, 320.
6. Hudson, *op. cit.*, p. 144, and Ponet, *op. cit.*, p. 88.
7. Hudson, *op. cit.*, p. 137, and Ponet, *op. cit.*, pp. 26-28.
8. Ponet, *op. cit.*, p. 107.
9. Hudson, *op. cit.*, p. 158.
10. Skinner, *op. cit.*, p. 343.
11. Hudson, *op. cit.*, p. 160.
12. *Ibid.*, p. 210.
13. *Ibid.*, p. 216, citing Charles Francis Adams, ed., *The Works of John Adams*, Vol. 6 (Boston: Charles C. Little and James Brown, 1851), p. 4.
14. *The Oxford English Dictionary*, Vol. 1 (Oxford: At The Clarendon Press, 1933), see "anarchical," "anarchism," and "anarchy," pp. 307-8.
15. Gordon Schochet, *Patriarchalism in Political Thought* (New York: Basic Books, 1975), p. 107.
16. *The Oxford English Dictionary*, *op. cit.*, p. 307.
17. Woodhouse, *op. cit.*, Introduction, p. 51.
18. William Haller, ed., *Tracts on Liberty in the Puritan Revolution*, Vol. 3 (New York: Columbia University Press, 1934), p. 172, which is p. 56 of Parker's text.
19. Woodhouse, *op. cit.*, Introduction, p. 33.
20. *Ibid.*, pp. 53, 65-68.
21. *Ibid.*, p. 69, which is pp. 3-4 of Overton's text.
22. *Ibid.*, p. 75.
23. *Ibid.*, pp. 72, 75, 85-86.
24. *Ibid.*, p. 322, Sec. 8, "Leveller Principles," citing from the Levellers' "Large Petition."
25. Carl Watner, ed., *A Voluntary Political Government: Letters from Charles Lane* (St. Paul: Michael E. Coughlin, 1982), p. 33.
26. Woodhouse, *op. cit.*, Introduction, p. 87.
27. Carl Watner, "'Come What, Come Will!' Richard Overton, Libertarian Leveller," *Journal of Libertarian Studies* 4 (1980): 405-32, at 406, citing Perez Zagorin, *A History of Political Thought in the English Revolution* (London: Routledge and Kegan Paul, 1954), p. 41.
28. *Ibid.*, p. 408, citing H. N. Brailsford, *The Levellers and the English Revolution* (London: Cresset Press, 1961), p. 264.
29. Woodhouse, *op. cit.*, The Putney Debates, p. 75.
30. Watner, *op. cit.*, p. 409, citing Woodhouse, *op. cit.*, Introduction, p. 91.
31. Woodhouse, *op. cit.*, The Putney Debates, p. 53.
32. *Ibid.*, p. 66. Note, however, that Wildman was arguing for a representative government with an expanded franchise, and not for anarchism.
33. Woodhouse, *op. cit.*, Documents Relating to the Putney Debate, p. 440.
34. James Daly, *Sir Robert Filmer and English Political Thought* (Toronto: University of Toronto Press, 1979), p. 83.
35. John W. Robbins, "The Political Thought of Sir Robert Filmer" (Ph.D. dissertation, Johns Hopkins University, 1973), p. 17; and Peter Laslett, "Sir Robert Filmer," *William and Mary Quarterly* 5 (1948, 3rd series):521-46, at p. 546.
36. Daley, *op. cit.*, p. 86; and Peter Laslett ed., *"Patriarcha" and Other Political Works of Sir Robert Filmer* (Oxford: Basic Blackwell, 1949), p. 36.
37. Daley, *op. cit.*, p. 89.
38. Schochet, *op. cit.*, p. 129.

39. J. W. Allen, "Sir Robert Filmer," in F. J. C. Hearnshaw, *The Social and Political Ideas of Some English Thinkers of the Augustan Age* (London: George G. Harap & Co., 1928), pp. 27-46, at 28.
40. Laslett, ed., *Works*, p. 294. All references to Filmer's works are to those appearing in the Laslett edition and will be cited as Laslett, ed., *Works*.
41. *Ibid.*, p. 285.
42. *Ibid.*, p. 286.
43. *Ibid.*, p. 81.
44. Allen, op. cit., p. 36.
45. From Laslett's "Introduction" in Laslett, ed., *Works*, cit., p. 16.
46. Schochet, op. cit., p. 123.
47. Laslett, ed., *Works*, p. 82.
48. *Ibid.*
49. *Ibid.*
50. *Ibid.*, p. 225.
51. *Ibid.*, p. 287.
52. *Ibid.*
53. *Ibid.*, p. 211.
54. *Ibid.*, p. 277. Emphasis added.
55. Robbins, op. cit., p. 170.
56. Laslett, ed., *Works*, p. 254.
57. *Ibid.*, p. 259.
58. *Ibid.*, p. 300.
59. *Ibid.*, p. 297.
60. From Laslett's Introduction, *Works*, p. 31.
61. Schochet, op. cit., p. 260.
62. *Ibid.*, p. 261, citing Locke's *Second Treatise*, sections 117 and also sections 95, 112, 119-121, 192, 197, 198. Note all references to Locke's *Second Treatise* will refer to Peter Laslett, ed., *Two Treatises of Government* (Cambridge: At the University Press, 1960). Citations will not be by page number but rather to sections. Hence, Laslett, ed., *Locke*, II, 117 refers to section 117 of the *Second Treatise*.
63. John Dunn, *The Political Thought of John Locke* (Cambridge: At the University Press, 1969), p. 131.
64. *Ibid.*, p. 133.
65. *Ibid.*, p. 131.
66. Gordon J. Schochet, ed., *Life, Liberty, and Property: Essays on Locke's Political Ideas* (Belmont, Calif.: Wadsworth Publishing Co., 1971), p. 8. Schochet in his Introduction makes the point that Locke distinguished between expressly consenting to membership in political society and mere presence, or tacit consent.
67. Laslett, ed., *Locke*, II, 119.
68. *Ibid.*, II, 120.
69. *Ibid.*
70. Dunn, op. cit., p. 140.
71. Laslett, ed., *Locke*, II, 121.
72. Dunn, op. cit., p. 133, citing Laslett, ed., *Locke*, II, 115, 116, and 121. This borders on a problem Filmer raised, which is how a person can commit himself to citizenship for life. Is it possible that once express consent is given, it can never be withdrawn?
73. Laslett, ed., *Locke*, II, 117.
74. *Ibid.*, II, 118.
75. *Corpus Juris*, Vol. 11 (New York: American Law Book Co., 1917), pp. 783 and 787 under reference "Citizens."
76. Dunn, op. cit., p. 137 citing Sir William Holdsworth, *A History of English Law*, Vol. 9, 3rd ed. (London: Methuen & Co., 1944), pp. 84, 86.
77. Even today, governments jealously guard the right of emigration and are concerned about the related loss of tax revenues that emigration entails. For example, the United States Internal Revenue Code, Sections 877 and 2107, did (and may still) provide that anyone who renounced

U.S. citizenship with the purpose of tax avoidance would still be responsible for paying taxes to the U.S. government for ten years after such renunciation. As one commentator put it: "The United States government deems citizenship a privilege to be matched by the burden of taxation." Lloyd Shefsky and Lee Barbkoff, "Taxation and Emigration," *Tax Haven Review* 2 (1975):10.

78. P. H. Partridge, *Consent and Consensus* (New York: Praeger, 1971), p. 22.
79. Schochet, op. cit., p. 261.
80. Laslett, ed., *Locke*, II, 16.
81. Ibid., II, 95.
82. Ibid., II, 98.
83. Ibid., II, 99.
84. Ibid., II, 138.
85. Ibid., II, 140.
86. John Dunn, *Political Obligation in Its Historical Context* (Cambridge: Cambridge University Press, 1980), p. 68.
87. Ibid. Dunn at footnote 35, p. 314, cites from Molyneux's correspondence with Locke: "How justly they can bind us without our consent and representatives, I leave the author of the *Two Treatises of Government* to consider."
88. *The Dictionary of National Biography*, vol. 13 (London: Oxford University Press, 1967-1968), p. 587.
89. Ibid., which claims that this is a false belief. See H. F. Kearney, "The Political Background to English Mercantilism 1695-1700," *Economic History Review* 2 (1958-1959, 2nd series) at p. 491 for the statement that the book was condemned to be burned.
90. Robert Livingston Schuyler, ed., *Josiah Tucker: A Selection from His Economic and Political Writings* (New York: Columbia University Press, 1931), pp. 416-17. Tucker in *A Treatise Concerning Civil Government* (London: T. Caldwell, 1781) cites this and the next passage as being from pp. 113 and 169 of Molyneux's book. For reprint of these passages, see also Carl Watner, "The Proprietary Theory of Justice in the Libertarian Tradition," *Journal of Libertarian Studies* 6 (1982):289-316, at 301-2.
91. Smith, op. cit., p. 222.
92. Schuyler, op. cit., p. 416.
93. Dunn, *Political Obligation*, pp. 68-69.
94. Ibid., p. 69.
95. Herbert W. Schneider, ed., *Adam Smith's Moral and Political Philosophy* (New York: Hafner Publishing Co., 1948), p. 289, from Adam Smith's "Lectures on Justice, Police, Revenue, and Arms," Part I, Division I, Section I.
96. Henry Aiken, ed., *Hume's Moral and Political Philosophy* (New York: Hafner Publishing Co., 1948), p. 359, from David Hume's essay "Of The Original Contract."
97. Ibid., p. 363.
98. Ibid., p. 365.
99. J. W. Gough, *The Social Contract*, 2nd ed. (Oxford: At the Clarendon Press, 1957), p. 139.
100. George Smith, op. cit., p. 224.
101. Schuyler, ed., op. cit., p. 35, citing p. 435.
102. Ibid., p. 35.
103. Ibid., p. 41.
104. Ibid., citing p. 378.
105. Ibid., p. 41.
106. Apparently Josiah Tucker did not want to be associated with Filmer as a defender of the divine right of kings. Undoubtedly Tucker wanted to be free of any claim that his argument and that of Filmer were similar. For the one reference by Tucker to Filmer, see *ibid.*, pp. 450-52.
107. Ibid., p. 452.
108. J. W. Gough, *John Locke's Political Philosophy* (Oxford: At the Clarendon Press, 1951), p. 90. Locke would probably have been prepared to "allow taxation to be levied by decision of a majority," but this is as far as he would have gone. "He would have required strictly individual consent to justify any other kind of interference with private property."

109. Schuyler, ed., op. cit., p. 444.
110. Ibid., p. 459.
111. Ibid., p. 460.
112. Ibid.
113. Ibid., p. 479.
114. Ibid., p. 412.
115. Ibid., p. 452.
116. Ibid., p. 480.
117. Ibid.
118. Walter Harding, ed., *The Variorum Civil Disobedience by Henry David Thoreau* (New York: Twayne Publishers, 1967), p. 61.
119. Ibid., p. 45, from "The Essay on Civil Disobedience."
120. Carl Watner, ed., *A Voluntary Political Government*, pp. 40, 83.
121. Charles Shively, ed., *The Collected Works of Lysander Spooner* (Weston, Mass.: M & S Press, 1971), from "An Essay on Trial by Jury" (1852) in *The Collected Works*, vol. 2, pp. 222-23.
122. Spooner, *No Treason*, No. 1 (1867), in Ibid., vol. 1, pp. 10-11.
123. Spooner, *No Treason*, No. 2 (1867), in Ibid., vol. 1, p. 13.
124. Charles Shively, Introduction to Lysander Spooner, *No Treason*, No. 6, "The Constitution of No Authority" (1870), in Ibid., vol. 1, p. 3.
125. Spooner, *No Treason*, No. 6, in Ibid., vol. 1, p. 59.
126. Dunn, *Political Obligation*, op. cit., p. 43.
127. A. F. Pollard, *The Evolution of Parliament* (New York: Longman's, Green & Co., 1920), p. 143.
128. Gough, *Locke's Political Philosophy*, op. cit., p. 49.
129. Ibid., p. 58.
130. Ibid.
131. Watner, "Proprietary Theory," op. cit., p. 304, citing George Smith, op. cit., p. 224.
132. Quentin Skinner, op. cit., Vol II, p. 320.
133. Richard Schlatter, *Richard Baxter and Puritan Politics* (New Brunswick: Rutgers University Press, 1957), p. 39, citing from Baxter's *Second Part of the Nonconformists Plea for Peace* (1680), pp. 54-55.
134. Patrick Riley, "How Coherent is the Social Contract Tradition?" *Journal of the History of Ideas* 34 (1973):543-62, at 543. His reference however is to the term "voluntarism," not voluntarism.
135. Dunn, *Political Obligation*, op. cit., p. 48.
136. Ibid., p. 63.
137. J. W. Allen, op. cit., p. 42.
138. C. W. Cassinelli, "The 'Consent' of the Governed", *Western Political Quarterly* 12 (1959):391-409, at 398.
139. Watner, "Proprietary Theory," op. cit., p. 303, referring to this as a point made by George Smith.