

# TWO CONCEPTS OF CONSENT IN LOCKE'S POLITICAL THEORY

DANIEL M. LAYMAN

*Davidson College*

*Department of Philosophy*

*dalayman@ davidson.edu*

## ABSTRACT

Locke is famous for arguing—by most accounts unsuccessfully—both that many people have political obligations, and that political obligation depends on freely chosen, deliberate acts of individual consent. My aim here is not to resuscitate this feature of Locke's thought. Rather, it is to show how and why Locke develops another, largely unnoticed line of reasoning about political consent. According to this direction of thought, political consent is not a discrete act that precedes consensual political relationships, but rather a dimension of ongoing political activity in cooperation with others. Such consent, which I will call 'participatory consent,' matters not because political life is morally optional, but because it is a necessary condition of freedom from arbitrary power within political society. This alternative picture of political consent, though not without its difficulties, fares significantly better than the conception of political consent on which most Locke scholars have long focused.

## KEYWORDS

Locke, consent, freedom, general will, Rousseau

## 1. INTRODUCTION: LOCKE'S INFAMOUS CONSENT DOCTRINE

According to the received reading of Locke's doctrine of political consent, Locke presents consent as a deliberate act that constitutes an undertaking of obligation, and he requires political consent because (a) every person is a free, equal, and sovereign individual and (b) a free, equal, and sovereign individual cannot be subject to non-natural obligations

unless she elects to take them on.<sup>1</sup> It is not hard to find passages in Locke's text that support this consensus. For instance, Locke writes:

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*. The only way whereby any one divests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community... [.]<sup>2</sup>

At least since David Hume attacked the Whig social contract tradition, critics have observed that Locke's consent doctrine seems to face a damning dilemma.<sup>3</sup> On the one hand, Locke might insist that consent must be fully voluntary and informed in order to create political obligations. This would certainly accord with contemporary intuitions about what it takes for consent to bind us. But if Locke embraces this stringent standard, it would seem that almost no one has any political obligations, and that almost all public power is consequently mere "force without right."<sup>4</sup> After all, almost no one ever gets a meaningful opportunity to give consent capable of meeting such a standard. Most of us must live under the political

<sup>1</sup> See, for instance, A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 202-217. The received view is not without its detractors, however. John Dunn somewhat curiously suggests that according to Locke, consent is nothing more than behavioral acquiescence. I suspect that Dunn is moved by some of the considerations that lead me to the participatory reading of Locke on consent that I endorse later in this paper. See John Dunn, "Consent in the Political Theory of John Locke" in *Political Obligation in its Historical Context* (Cambridge: Cambridge University Press, 1980). Some scholars, such as Hannah Pitkin and, more recently, Shannon Hoff, have offered a reading of Locke as a hypothetical consent theorist. See Hannah Pitkin, "Obligation and Consent," *American Political Science Review* (December 1965; March 1966), 995-99 and Shannon Hoff, "Locke and the Nature of Political Authority," *Review of Politics* 77 (2014), 1-22. Although I reject the hypothetical consent reading, I will later agree with Hoff's suggestion that Lockean political consent "is registered not simply through individual expressions of consent but through the structures in which free individuals are housed" (Hoff, "Locke and the Nature of Political Authority," 22).

<sup>2</sup> II 95.

<sup>3</sup> David Hume, "Of the Original Contract" in *Political Essays* (Cambridge: Cambridge University Press, 1994), 186-201. Simmons suggests that Locke faces such a dilemma in his framing of what he calls the "standard critique" of Locke on consent. My statement of the problem is somewhat different, however. See Simmons, *On the Edge of Anarchy*, 199.

<sup>4</sup> II 232.

institutions of our birth or else face tremendous cost and hardship. On the other hand, Locke might lower the standards of consent in order to allow various constrained and ill-informed actions to count as bindingly consensual. This route would render the verdict that plenty of people have political obligations, but at the cost of casting a deep pall of implausibility over the whole theory. For how could “consent” that is not properly voluntary and informed create any obligations?

At different points in his text, Locke seems to grasp each horn of the dilemma. In some passages, Locke emphasizes deliberate, individual acts of consent as necessary for political legitimacy. For instance: “And thus [it is] *the consent of freemen, born under government*, which only *makes them members of it*, being given separately in their turns, as each comes to be of age.”<sup>5</sup> But in other passages, Locke endorses standards of consent that are extraordinarily permissive. For instance, in his quasi-historical treatment of the development of early societies, Locke informs us:

Thus ‘twas easie, and almost natural for Children, by a tacit, and scarce avoidable consent to make way for the *Father's Authority and Government...* [...] Thus the natural *Fathers of Families*, by an insensible change, became the *politick Monarchs* of them too.<sup>6</sup>

If we take Locke at his word here, political consent can be both “scarce avoidable” and “insensible” (that is, unnoticeable), and consequently neither voluntary nor informed.<sup>7</sup>

There can be little doubt that Locke ties himself in knots in these passages. However, he offers another, largely unnoticed line of reasoning about political consent. According to this direction of thought, political consent is not a discrete act that precedes consensual political relationships, but rather a dimension of ongoing political activity. Such consent, which I

<sup>5</sup> II 117.

<sup>6</sup> II 75-76.

<sup>7</sup> Jeremy Waldron suggests that although people may not have been aware of the full political consequences and character of their consent to the authority of father kings, each act of such consent was nonetheless a discrete, informed, and intentional act. This reading, I think, severely strains Locke's text, especially since Locke claims that consent and change—and not just their full character and long-term consequences—where “scarce avoidable” and “insensible,” respectively. See Jeremy Waldron, “John Locke: Social Contract Versus Political Anthropology,” *Review of Politics* 59 (1989): 19.

will call ‘participatory consent,’ matters not because political life is morally optional, but because political society necessarily fails to secure freedom-preserving relationships if its members do not participate in it on consensual terms. This alternative picture of political consent, though not without its difficulties, fares significantly better than the conception of political consent on which most readers of Locke have long focused.

## 1. LOCKE’S VIEW OF POLITICAL FREEDOM

I mean to argue that Locke’s consent doctrine in its strongest form is meant to secure political freedom inside civil society rather than to guarantee that the transition to political society preserves individuals’ free choice. In order for this suggestion to make sense, we need to consider how Locke conceives of political freedom.<sup>8</sup>

Locke trumpets the importance of social freedom<sup>9</sup> at the very outset of the main text of the *Second Treatise*. Along with natural equality, it is one of the foundations of just political order:

TO understand Political Power right, and derive it from its Original, we must consider, what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.<sup>10</sup>

How exactly are we to understand this freedom? By far the most common interpretation is that a person enjoys social freedom to the extent that no one interferes with her capacity to enjoy her rights in accordance with her own choices.<sup>11</sup> John Simmons has offered the clearest and most

<sup>8</sup> Daniel Layman, “Sufficiency and Freedom in Locke’s Theory of Property,” *European Journal of Political Theory* (forthcoming 2017).

<sup>9</sup> I use the qualifier ‘social’ to distinguish the freedom under discussion here from freedom of action, which Locke discusses in the *Essay Concerning Human Understanding* at Book II, Chapter XXI.

<sup>10</sup> II 4.

<sup>11</sup> This reading has been standard at least since Isaiah Berlin, who in his famous “Two Concepts of Liberty” classed Locke, along with almost all other British liberals, as theorists of “negative liberty” from interference, which Berlin contrasts with “positive liberty” to authentic self-development. See Isaiah Berlin, “Two Concepts of Liberty” in his collection *Liberty* (New York: Oxford University Press, 2002).

sophisticated version of this standard reading of Locke's conception of social freedom. According to Simmons, freedom of this sort can be understood as a kind of grand composite right, which he calls the right of self-government:

The composite right is what Locke calls the "right of freedom to his person" (II 90) and what I will hereafter refer to as the *right of self-government*. It includes the right to our duty (our equal mandatory rights), the right to pursue our nonobligatory ends (our equal optional rights), and the powers to make special rights.<sup>12</sup>

There can be no doubt that Simmons's reconstruction is onto something; Locke clearly does think that freedom of action within the scope of rights is a necessary condition of social freedom. Nevertheless, Simmons's framing is incomplete. For according to Locke, full social freedom is *non-dominated* self-government. In order to be politically free by Locke's standards, a person must have the power not just to enjoy all of her rights, but also to do so without depending on any other person's arbitrary power. As we saw in II 4, Locke is not content to define social freedom in terms of the capacity to act as one sees fit within the scope of rights and duties, opting instead to qualify this dimension of freedom with "without...depending upon the Will of any other Man." Furthermore, at the outset of his discussion of slavery, he writes:

THE *Natural Liberty* of Man is to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule. The *Liberty of Man, in Society*, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what that Legislative shall enact, according to the Trust put in it.<sup>13</sup>

Moreover, he adds a little later: "*Freedom* from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's preservation, that

<sup>12</sup> John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 85

<sup>13</sup> II 22.

he cannot part with it, but by what forfeits his Preservation and Life together.”<sup>14</sup>

The necessary connection between the absence of arbitrary power and social liberty as Locke understands it also finds support in the *First Treatise*. Locke asserts there that if Sir Robert Filmer’s doctrine of absolute monarchy by divine right is true, everyone who is not a divinely appointed overlord is necessarily and irremediably unfree, regardless of what kinds of laws such monarchs might pass or how much license for unrestricted choice they might grant. If Filmer is right, Locke argues, “Life and Thralldom we enter’d together, and can never be quit of the one, till we part with the other.”<sup>15</sup> If it were possible to achieve freedom through non-interference alone, this claim would be straightforwardly false. After all, an absolute monarch can elect to be permissive just as he can elect to be restrictive. I suggest, then, that Locke’s view is that in order to be socially free, a person must (1) be a moral agent, endowed with the moral freedom to guide her action according to law who (2) possesses the space of action to act as she sees fit within the scope of her rights and duties (3) without depending on the arbitrary will of any other person.

## 2. ROUSSEAU’S SOCIAL CONTRACT

A helpful way to approach to Locke’s understanding of political liberty—that is, social freedom from arbitrary power within a political community—is through Rousseau’s doctrine of freedom through the general will. This claim may raise some eyebrows, as Locke and Rousseau hardly have a reputation for complementing one another. Nevertheless, I believe that Locke’s more successful conception of political consent charts a course very similar to the one Rousseau would trace nearly a century later. Once we have seen this, we will be in a position to appreciate Locke’s consent doctrine in its best form.

Rousseau frames the central problem of political philosophy as follows:<sup>16</sup>

<sup>14</sup> II 23.

<sup>15</sup> I 4.

<sup>16</sup> My reading of Rousseau on the social contract is influenced by Frederick Neuhouser’s approach to Rousseau’s text, although I do depart from his reconstruction at some points.

Find a form of association which defends and protects with all common forces the person and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before.<sup>17</sup>

Rousseau here lists two goals that an adequate normative theory of political association must meet. In addition to the familiar goal of securing the “person and goods of each associate,” the state must allow each person to “remain as free as before” by “obey(ing) himself alone.” Why is it necessary for people within the state to remain as free as they were before, and why does this freedom amount to obeying only oneself? The answer to both of these questions is to be found in Rousseau’s conception of freedom from domination. A free person, Rousseau explains in *Emile*, is someone who “does his own will.”<sup>18</sup> But this statement, Rousseau elsewhere makes clear, is insufficient. In order to be meaningfully free, a person must do her own will without depending on anyone else’s arbitrary power. And so Rousseau tells us that “freedom consists...in not being subject to the will of others.”<sup>19</sup> Someone subject to another’s power might possess freedom of action to a considerable extent, but she cannot be a free person. Indeed, such a person’s position might be morally indistinguishable from that of a slave with a lazy or indifferent master. In order to be free, a person must be free from domination, and in order to be free from domination, she must both (a) not be subject to another person’s will and (b) control herself and her options through her own will.

With these conditions in place, we can beneficially turn to Rousseau’s proposed solution to the central problem, which is the social contract. Rousseau explains:

In giving himself to all, each person gives himself to no one. And since there is no associate over whom he does not acquire the same right as he would grant others over himself, he gains the equivalent for

See his “Freedom, Dependence, and the General Will,” *The Philosophical Review* 102 (1993), 363-395.

<sup>17</sup> Rousseau, *Basic Political Writings*, 148.

<sup>18</sup> Quoted in Neuhouser, “Freedom, Dependence, and the General Will,” 380.

<sup>19</sup> Quoted in Neuhouser, “Freedom, Dependence, and the General Will,” 380.

everything he loses, along with a greater amount of force to preserve what he has.<sup>20</sup>

The key to making sense of these bold claims is the general will, which Rousseau takes to be the upshot of the social contract. He writes:

Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole.<sup>21</sup>

Rousseau's point in these passages is that the social contract solves the central problem because it secures each person while meeting the necessary conditions of individual freedom from domination. It meets the necessary conditions of individual freedom from domination because everyone gives up her individual will completely to the general will, at least insofar as public life is concerned. Since each person entrusts the general will to act on her behalf, obeying the general will amounts to obeying one's own will. And since everyone else does the same, there is no possibility of depending on any other person's individual will. Freedom, then, requires each individual to self-legislate through the public will of the community, which creates omnilateral dependence on itself while removing unilateral of one private will on another. Moreover, the social contract *just is* the relationship individuals stand in to one another when they are mutually engaged in public action through the general will.

We may, I think, usefully label the general variety of individual consent on which Rousseau relies as *participatory consent*. Participatory consent stands in contrast to what we may call *elective consent*, with which we are more familiar in contemporary ethics, not to mention in traditional readings of Locke. On the model of elective consent, an activity or undertaking is rendered consensual by a discrete act of consent, an act that is logically, and usually temporally, prior to the consensual character of the activity or undertaking at hand. For instance, a surgery is consensual in the relevant sense only if the patient first performs an act of consent. But is entirely possible for an act to be fully consensual in character without being preceded by a distinct act of consent. David Hume provides a helpful

<sup>20</sup> Rousseau, *Basic Political Writings*, 148.

<sup>21</sup> Rousseau, *Basic Political Writings*, 148.

example of such an act in his case of two men rowing a boat together.<sup>22</sup> It can make sense to say that their rowing is consensual—or something they genuinely do together—even if they never discuss their plans or perform acts of consent distinct from the rowing itself. That is, each man's act of rowing in cooperation with the other constitutes participatory consent to the project.<sup>23</sup> By Rousseau's lights, the social contract must be consensual in the participatory sense that individuals must undertake together to secure their mutual freedom and safety through the practice of reasoning together from the public perspective. If someone were brought into the territory of a civil society by force, she might be subject to the power of the community. But as long as the community related to her as a foreign power, she would not act through the general will and so would not achieve her freedom through it.

It is important to emphasize that the distinction between elective consent and participatory consent is distinct from the more familiar distinction between tacit consent and express consent.<sup>24</sup> On most versions of the express consent/tacit consent distinction, both express consent and tacit consent are varieties of what I am calling elective consent. While express consent occurs when a person undertakes an obligation or grants a permission through some explicit, often linguistic expression of her intention to do so, tacit consent occurs when a person undertakes an obligation or grants a permission by performing some other sort of action

<sup>22</sup> Hume writes:

Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. See David Hume, *A Treatise of Human Nature*, ed. David Norton and Mary Norton (New York: Oxford University Press, 2000), 315.

<sup>23</sup> An anonymous referee points out that there is a different, anti-Rousseauian direction in which Locke might have taken the insight that people can undertake tasks together without performing discrete acts of consent beforehand, namely that of spontaneous order. Classical liberals would later argue that we can avoid social-contractarian problems by appealing instead to the order-generating powers of markets and their prices, which allow people to coordinate without engaging in any kind of deliberate collective action. Although Locke engages prices and markets elsewhere, he does not appear to have been interested in a spontaneous order solution to the problems of consent under discussion here. For an excellent treatment of spontaneous order, see Mark Pennington, *Robust Political Economy* (Cheltenham: Edward Elgar, 2011). For an example of Locke's thoughts on markets and prices, see his "Venditio" in *Locke: Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), 339-343.

<sup>24</sup> Locke's most extensive discussion of express and tacit consent appears at II 119-122.

which, under the circumstances, constitutes undertaking an obligation or granting consent. For instance, I might expressly consent to pay for a meal by uttering a promise or signing a contract, but I might also tacitly consent to do so by sitting down at a restaurant table. In both cases, however, an act of consent temporally and logically precedes the consensual action. Participatory consent, by contrast, is consent that is a dimension or aspect of a consensual action itself, not an act, whether express or tacit, that precedes it.

### 3. LOCKE ON FREEDOM THROUGH THE GENERAL WILL

I am about to argue that Locke, like Rousseau, believes that people can enjoy political freedom by governing themselves through a public will. First, though, I want to recognize two ways in which Locke and Rousseau part ways. First, we have observed that according to Rousseau, freedom from arbitrary power, which is the freedom worth having, is not merely protected by the state, but also conceptually inextricable from a relationship to others within the state. Locke, by contrast, holds that freedom from arbitrary power is possible wherever there is law, and he insists that law is not solely—or indeed even primarily—a political institution.<sup>25</sup> This is because, like natural lawyers before him, Locke asserts that human beings are naturally subject to and accountable within a natural legal framework promulgated through reason and issued by God. Thus, there can be apolitical states of affairs in which persons nonetheless enjoy full freedom. This difference is important, but it is less deep than it might seem at first blush. For it amounts less to a disagreement about the nature of freedom or its relationship to structured communities than it does to a dispute about the existence conditions of such communities. Whereas Rousseau sees no possibility of such a community apart from human artifice, Locke takes the natural moral community under God to be the moral community *par excellence*, the standard to which political communities should aspire.

<sup>25</sup> Locke writes of the relationship between positive law and natural law:

The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to enforce their observation. Thus the Law of Nature stands as Eternal Rule to all Men, *Legislators* as well as others. (II 135).

The second contrast I have in mind is that while Rousseau (at least in some frames of mind) follows Hobbes in insisting that persons transfer *all* of their rights to the political community,<sup>26</sup> Locke holds that persons transfer only those rights that pertain to the proper purpose of civil society, which is the protection of property broadly construed to include “life, liberty, and estate.”<sup>27</sup> Although I cannot pursue the matter at great length here, I believe that this difference also stems from Rousseau’s disagreement with Locke over the moral character of the state of nature. Whereas Locke holds that the natural law generates robustly moral rights, Rousseau holds that a person’s natural “right” is nothing more than a pre-moral “right to everything that tempts him and that he can acquire.”<sup>28</sup> Since natural right is, by Rousseau’s lights, utterly unconnected with any system that might restrain domination or institute moral order, it is understandable that in order to achieve moral freedom in the state, we must give up that right entirely. Conversely, it makes sense for Locke to hold that naturally structured moral rights are compatible with, and can even provide the foundation for, conventional restructuring within civil society.

With these preliminaries complete, let us turn to Locke’s conception of freedom, the general will, and the relationship between these and consent. We observed earlier that, according to Locke, a free person must be free from arbitrary power. If government, which has massive power to interfere in the actions and options of its people, is to avoid being a source of domination, it must somehow be accountable to the people and their judgments, and those who hold power must be liable to lose it in the event

<sup>26</sup> In setting out his notion of the social contract, Rousseau states that each person’s alienation of her natural powers must be “without reservation” (*Basic Political Writings*, 148). But in his later chapter on the limits of sovereign power, Rousseau writes: “We grant that each person alienates, by social compact, only that portion of his power, his goods, and liberty whose use is of consequence to the community” (*Basic Political Writings*, 157). However, he appends the following: “But we must also grant that only the sovereign (i.e. the general will) is the judge of what is of consequence” (*Basic Political Writings*, 157). Perhaps Rousseau’s idea is that all rights and powers are transferred either directly to the sovereign or placed at the discretion of the sovereign for taking as it sees fit, and that both of these together constitute the total alienation of natural rights and powers.

<sup>27</sup> II 123.

<sup>28</sup> Rousseau, *Basic Political Writings*, 151.

that they breach their trust.<sup>29</sup> But in any political society beyond the most threadbare of minimal states, the legislative power cannot be responsive to each individual's understanding of what constitutes her "liberty and property" and how these ought to be protected. The legislative must act univocally, creating a single system of law that applies equally to everyone, while individuals are guaranteed to disagree about what this law should be like. There is simply no possibility of a political society in which the government is responsive to each individual's understanding of her interests. Locke makes this point with some panache:

If we add the variety of Opinions, and contrary 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.<sup>30</sup>

Governments' inevitable inability to accommodate themselves to each person's understanding of her interests might strike many as little more than a disappointing reality of political life. But Locke insists that political power is objectionably arbitrary unless those who wield it are institutionally accountable to the governed. How can officials be at once accountable to me and unaccountable for doing what I judge to be appropriate?

It is perhaps tempting to seize upon the problem just outlined as evidence that Locke endorses some version of the minimal state. Someone might reason that since the legislative (and indeed the government in general) must be accountable to each of the people, and since the people will never agree on very much, a Lockean government must not be empowered to do much beyond securing private economic transactions and warding off foreign aggression. On this understanding, Locke's state would be little different from Robert Nozick's night watch state.<sup>31</sup> However, a short review of Locke's thoughts about the proper activities of the government will suffice to falsify this hypothesis. According to Locke, the functions of a just government include, but are not limited to, providing material support

<sup>29</sup> See e.g. II 222.

<sup>30</sup> II 98.

<sup>31</sup> Nozick professes (dubiously, I believe) to be a follower of Locke. See Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 9.

for the poor,<sup>32</sup> instituting and funding schemes of education,<sup>33</sup> and managing job training programs.<sup>34</sup> Consequently, a minimal state solution to the problem of government accountability to individuals is not on the table, at least not for Locke.

What, then, can Locke say? How can the legislative do its job without dominating those it is bound to serve? The answer is a little-appreciated, but enormously important, feature of his political system that leads very nearly down the road we have already walked with Rousseau. According to Locke, the legislative is accountable to each member of the polity not by being accountable to each of their wills per se, but rather by being accountable to a collective, general will in which the wills of all find representation. Locke sets out his notion of a general, public will in some detail, describing it as the "soul" of the commonwealth that constitutes its union.

‘Tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is *the Soul that gives Form, Life, and Unity*, to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion: And therefore when the *Legislative* is broken, or

<sup>32</sup> Locke writes in his recommendations for reforming Great Britain's Elizabethan poor laws, which he composed in 1697 in his capacity as Commissioner of the Board of Trade under William and Mary: "Everyone must have meat, drink, cloathing, and firing. So much goes out of the stock of the kingdom, whether they work or no." See Locke's "An Essay on the Poor Law" in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), 189.

<sup>33</sup> In Locke's fragment entitled "Labour," he suggests that even common workers should spend no less than three hours per day on educational pursuits, and he blames the "governments of the world" for failing to bring about such a state of affairs:

Let the gentleman and scholar employ nine of the twelve [active hours in a day] on his mind in thought and reading and the other three in some honest labour. And the man of manual labour nine in work and three in knowledge. By which all mankind might be supplied with what the real necessities and conveniency of life demand in greater plenty than they have now and be delivered from that horrid ignorance and brutality to which the bulk of them is now everywhere given up. If it be not so it is owing to the carelessness and negligence of the governments of the world... [.] (Locke, *Political Essays*, 328).

<sup>34</sup> According to Locke in his *Essay on the Poor Law*, the state should require artisans to take on indigent apprentices as a strategy for combating cycles of poverty. See Locke, *Political Essays*, 192.

*dissolved*, Dissolution and Death follows: for the *Essence and Union of the Society* consisting in having one Will, the Legislative, when once established by the Majority, has the declaring, and as it were keeping of that Will. The *Constitution of the Legislative* is the first and fundamental Act of Society, whereby provision is made for the *continuation of their union* [...] by the Consent and Appointment of the People.<sup>35</sup>

It is worth pausing over two striking features of this passage. The first is that Locke claims quite explicitly that the members of a civil society act through a public, artificial will that is distinct both from any individual will and from any aggregation of individual wills. The public will is neither your will nor my will, nor is it, in an additive sense, simply the will of everyone taken together. Rather, it is the will of a distinct, artificial being that acts on behalf of the individual members of the community. Second, people come to be represented by the general will inasmuch as they take part in the collective act of constituting the political community. This is the act of submitting one's individual judgment to public judgment through the will of the community. In this way, Locke endorses a tight circle of concepts: consent, constitution, civil society, public will. Individuals consent to political society, which amounts to constituting the civil society as a collective agent with a public will that is authorized to act and judge on behalf of the individuals who partake in the constitution. This public power of action and judgment is the legislative power. For two people to share membership in a civil society is nothing other than for each of them to be authoritatively represented by the public will that each helps to constitute through her consent.

Locke, then, joins Rousseau in judging that civil society is fundamentally a legislative union of individual wills through a collective will that represents each person. We saw earlier that the ultimate point of this picture in Rousseau is for each person to attain morally significant freedom from domination even while being subject to public authority, which can secure persons and property. I believe that Locke's view is similar; the ultimate moral point of legislative union is to secure people and property in a way that does not compromise individual freedom from domination. Legislative union achieves this goal by making it possible for individuals to

<sup>35</sup> II 212.

set the terms of government power through the public will, and an individual can only become part of a legislative union through her own consensual activity. This is how consent enters the picture; as in Rousseau, consent *to* civil society matters inasmuch as it facilitates non-domination, and so freedom, *within* civil society.

To see how this model of consent operates in Locke, let us begin with a striking set of passages from Locke's treatment of conquest. Locke vociferously denies that conquest *per se* can ever result in political authority. He writes:

Many have mistaken the force of Arms for the Consent of the People; and reckon Conquest as one of the Originals of Government. But *Conquest* is as far from setting up any Government, as demolishing an House is from building a new one.<sup>36</sup>

Given that this is Locke's view, one might expect him to deny that conquering peoples can ever come to have political authority over groups they have conquered. But in fact, he allows that they can come to have such authority if their government takes on a form that affords the conquered full participatory standing:

No Government can have a right to obedience from a people who have not freely consented to it; which they can never be supposed to do, till either they are put in a full state of liberty to chuse their Government and Governors, or at least till they have such standing Laws, to which they have by themselves or their Representatives given their free consent, and also till they are allowed their due property, which is so to be Proprietors of what they have, that no body can take away any part of it without their own consent, without which, Men under any Government are not in the state of Free-men, but are direct Slaves under the Force of War.<sup>37</sup>

Locke's claim here is starkly at odds with the traditional reading of Locke on political consent. Locke states here that if people cannot choose their governors, it is sufficient for their freedom within a political society, and so for legitimate power relations within that political society, if they are

<sup>36</sup> II 175,

<sup>37</sup> II 192.

fully incorporated into a legal structure that (1) allows them to have a say about the content of the law, either directly or through representatives, and (2) affords them full standing as proprietors. It does not matter, Locke says, that they have never enjoyed any real choice as to whether they will be subject to the institutions within which they find themselves. To the contrary, what matters is their standing relative to the personal wills of those in charge.

Let us now reintroduce the distinction between elective consent and participatory consent we observed earlier in connection with Rousseau. While elective consent is an action distinct from a consensual action or event that renders it consensual, participatory consent is a dimension or characteristic of an action that renders it consensual as it is performed. Locke claims that when a conquering government changes its frame so that members of the conquering group enjoy full representation and standing as proprietors, we may safely consider those individuals consenting members of one civil society along with members of the conquering group. But this cannot be because members of the conquered people performed acts of elective consent. Coming to live under and participate in a new frame of government simply does not constitute an elective act. What we see here is consent, not as opting in, but as a characteristic of an activity undertaken with others.

What, though, is the special characteristic of life under a newly reframed, representative government that allows us to consider that life consensual in a way that makes a moral difference? To be sure, Locke describes the newly consensually government as representative, and this alone renders it participatory in some sense. But why should this be morally significant? Locke's answer, I think, is that when people come to live as equals within a representative, proprietary regime, they come to be represented by the general will. And as we saw earlier, this in turn means that government power is answerable to them, which allows that same power to control some of their choices without subjecting them to arbitrary power. Once more, the same theme rings true; consent matters to the extent that it facilitates freedom inside civil society. And what is needed for freedom inside civil society is participatory consent, not elective consent.

#### 4. PARTICIPATION AND REPRESENTATION: AN OBJECTION

I have argued that although Locke sometimes talks (unsuccessfully) in terms of elective consent to civil power, he offers a lesser known, and more successful, participatory account of political consent, which positions him as an ancestor of later continental republicanism. However, some might object that in his discussion of the forms government may take, Locke does not require legitimate government to be participatory to anything like an extent that would satisfy a contemporary democrat. Indeed, he allows monarchy—including even hereditary monarchy—as a morally acceptable form of government. He writes:

THE majority having, as has been shew'd, upon Mens first uniting into society, the whole power of the Community, naturally in them, may employ all that power in making Laws for the Community from time to time, and Executing those Laws by Officers of their own appointing; and then the *Form* of the government is a perfect *Democracy*: Or else may put the power of making Laws into the hands of a few select Men, and their Heirs or Successors; and then it is an *Oligarchy*: Or else into the hands of one Man, and then it is a *Monarchy*: If to him and his Heirs, it is an *Hereditary Monarchy*.<sup>38</sup>

If early members of a political community may permanently transfer the naturally majoritarian legislative power to a line of monarchs, how can the participatory consent story work? After all, it would seem that political participation constituted by representation within law, to which Locke refers so clearly in II 192, requires more than simply inheriting a hierarchical power structure.

I believe that Locke is, at least to some extent, in a genuine bind here. He simply fails adequately to appreciate the republican consequences of the participatory conception of consent he develops in his text. However, this failure is not complete, as Locke makes some very significant moves that should lead us to wonder how seriously we ought to take his acceptance of monarchic government. The first of these I would like to consider is Locke's requirement that taxation must be consensual, at least through representatives if not directly. According to Locke, the power to tax or

<sup>38</sup> II 132.

otherwise alter private property must always remain with the majority of the people, even under a monarchy:

‘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 his 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: for if any one shall claim a *Power to lay* and levy *Taxes* on the People, by his own Authority, and without such consent of the People, he thereby invades the *Fundamental Law of Property*, and subverts the end of Government.<sup>39</sup>

The power to levy taxes is among the most fundamental of public powers; after all, any government must fund itself in order to act. If the people, acting as a majoritarian body, can refuse the government the funds it desires, the people have the majoritarian power to stop the government—monarchic or otherwise—in its tracks. This is as true with respect to a monarchic government as it is with respect to any other. Thus, only the most strictly constitutional and accountable of monarchies, which tax and spend with the consent of the people or else not at all, could meet Locke’s standards of legitimacy.

Some might respond that I have oversold the significance of Locke’s insistence upon representative taxation. For if property is the gateway to popular control, isn’t it limited to an elite, propertied segment of society? This objection is closely related to C.B. MacPherson’s famous charge that according to Locke, only individuals above a property threshold count as full members of civil society, the purpose of which is to protect their property and which must accordingly provide them with a say about whether and how their property is taken. According to MacPherson, Locke is committed to the view that “the laboring class, being without estate, are subject to, but not full members of, civil society.”<sup>40</sup>

It is certainly true that in Locke’s Great Britain, men (and voters were, alas, only men) had to meet fairly significant property requirements in order to vote. Consequently, although it would be reductive to overlook the

<sup>39</sup> II 140.

<sup>40</sup> C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Toronto: Oxford, 2011), 248.

political participation of the lower classes, that participation was limited to various forms of social agitation and was, strictly speaking, never under color of law. Indeed, retailers, artisans, yeomen, and husbandmen were largely excluded from the vote.<sup>41</sup> Nevertheless, it is important to note that if we take Locke at his word, his remarks about property and representation both undercut MacPherson's picture of Lockean class society and constitute a radical challenge to the British suffrage statutes of his day. For Locke claims quite explicitly that at least representative consent is required in order for the government to legitimately take *any* amount of property, not just property over a certain threshold, and he nowhere suggests that votes concerning taxation should be weighted at all, much less in relation to the size of one's estate. Now, although retailers, husbandmen and the like did not typically possess large estates of any sort and almost never owned much land, they did hold property in their personal effects and, due to the slow death of feudal institutions, much of what they produced through their labor. If we take Locke's plain statements seriously, we must conclude that governments must either afford such persons due representation or else leave their property untouched.

Furthermore, Locke's text lends support to even more radical republican reforms concerning women and the poor, although it is not entirely clear that he grasped the full extent of this support. It does so in two ways. First, Locke consistently classes "estate"—or real and personal property—as just one dimension of a person's "property," which includes all of one's natural rights, sometimes referred to generically as "life, liberty, and estate."<sup>42</sup> Nowhere does Locke suggest that estate is somehow a privileged member of this group, and he leaves no doubt that the purpose of civil society is to protect all of them together. If this is so, it is very difficult to see why representative consent should be necessary in order for government to permissibly tax estates but unnecessary in order for governments to alter other rights.

The second way in which Locke's stated commitments push him in a radical direction is this: if Locke means what he says, there is no reason to

<sup>41</sup> Derek Hirst, *The Representative of the People? Voters and Voting in England Under the Early Stuarts* (Cambridge: Cambridge University Press, 1975), 3.

<sup>42</sup> E.g. II 123.

exclude women from public representation.<sup>43</sup> Unlike most of his contemporaries, Locke resolutely refuses to assert that there is any fundamental morally significant difference between men and women, and he denies that men are naturally suited to dominion over women. Women may own property no less fully and properly than men, and they can enjoy full standing as parties to contracts. Locke writes:

But the Husband and Wife, though they have but one common Concern, yet having different understandings, will unavoidably sometimes have different wills too; it therefore being necessary that the last Determination, *i.e.* the Rule, should be placed somewhere, it naturally falls to the Man's share, as the abler and the stronger. But this reaching but to the things of their common Interest and Property, leaves the Wife in the full and free possession of what by Contract is her peculiar Right, and gives the Husband no more power over her Life, than she has over his; the *Power of the Husband* being so far from that of an absolute monarch, that the *Wife* has, in many cases, a Liberty to *separate* from him; where natural Right, or their Contract allows it.<sup>44</sup>

Apart from Locke's rather desperate appeal to the need for a decisive voice to resolve conflicts within marriage, this passage presents a strikingly egalitarian picture of gender relations. Together with the complete absence of any reference to gender anywhere in his framings of natural property rights or natural freedom, we must conclude that women are no less endowed with property—always in the broad sense of rights and sometimes also in the narrow sense of estate—than are men. And if this is the case, everything Locke says or implies about representation in relation to property should apply with equal force regardless of gender.

## 5. CONCLUSION: THE LEGACY OF LOCKE'S CONSENT DOCTRINE

<sup>43</sup> For a comprehensive (and excellent) treatment of the moral and political implications of Locke's remarks on gender relations, see Jeremy Waldron's chapter, "Adam and Eve," in his *God, Locke, and Equality* (Cambridge: Cambridge University Press, 2002), 21-43. See also Susanne Sreedhar and Julie Walsh, "Locke, the Law of Nature, and Polygamy," *Journal of the American Philosophical Association* 2 (2016): 106-107.

<sup>44</sup> II 82.

The doctrine of political consent that is (not without some justification) traditionally attributed to Locke is a failure; it cannot establish the legitimacy of political authority, even on its own terms. This is because persons almost never have the opportunity to undertake discrete acts constituting the assumption of political obligation under circumstances that might plausibly allow such acts to be binding. However, I argued that there is a different, little-noticed line of reasoning about consent running through Locke's texts, one that puts Locke in much closer contact with the later continental contract tradition represented by Rousseau than most have supposed. This account has two notable features, one concerning the nature of consent in relation to consensual action, and one concerning the justification of the consent requirement. With respect to the nature of consent, Locke denies that consent to participate in and be bound by public norms is distinct from the act of participating in institutions governed by those norms; the act of consent is a dimension of the action it renders consensual. I called this sort of consent *participatory consent* in contrast with *elective consent*, which is an act of consent that takes place separately from the action it renders consensual. With respect to the purpose of consent, Locke holds that consent matters not because it protects freedom of choice *outside* political society, but rather because it facilitates the right structure of power relations *within* political society. In particular, participatory consent makes it possible for people to be represented by the general will, through which government officials can be accountable to each individual and, consequently, hold power over them without subjecting them to arbitrary power.

Although the line of thought about consent and its significance I have drawn from Locke's texts is considerably more promising than the traditional consent doctrine, it too faces serious difficulties. One of these, which I have already noted, is that Locke's statements about permissible structures, or "frames," of government secure too little in the way of representative participation to make it entirely plausible that Lockean citizens share in a general will through which government can be accountable to each inasmuch as it is accountable to all. Another difficulty, which afflicts Rousseau no less than Locke, is that it is far from obvious how to make sense of a will that is at once public and representative of each

individual, whether ontologically or merely normatively.<sup>45</sup> Even if we were to satisfactorily resolve who may participate in public institutions so as to meet Locke's (or Rousseau's) standards for representation through the general will, that strategy may not be able to resolve the problem of government accountability to individuals.

The problems just canvassed are serious, to be sure. However, my reconstruction of Locke on political consent does allow his position to emerge as an important philosophical ancestor of contemporary democratic control theories of legitimacy, especially those that construe legitimacy in terms of the absence of arbitrary power. Philip Pettit, for instance, has recently (and influentially) argued that government power can be compatible with each citizen's social freedom from arbitrary power so long as each individual has equal standing to participate equally in effective institutions of public contestation.<sup>46</sup> This is not the place to assess Pettit's position or positions similar to it, and they no doubt face difficulties of their own. The note on which I would like to conclude, though, is that far from being simply a failure driven by an ill-fated obsession with individual choice about whether to submit to government, Locke's thinking about consent, flawed and incomplete though it may be, is, at least in its best moments, firmly within tradition of legitimacy-through-participation that is still very much alive.<sup>47</sup>

<sup>45</sup> It is hard not to have at least some sympathy with Pettit's brusque dismissal of general will approaches: "such a participatory ideal is not feasible in the modern world, and in any case the prospect of each being subject to the will of all is scarcely attractive." See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997), 81.

<sup>46</sup> Philip Pettit, *On the People's Terms* (Cambridge: Cambridge University Press, 2012).

<sup>47</sup> Thanks to Bernard Boxill, Thomas E. Hill Jr., Alan Nelson, and Gerald Postema for helpful comments on an earlier draft. Thanks also to Antonio Allegra for his editorial guidance, and to two anonymous referees for their reviews.