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Constitutions of No Authority: Spoonerian Reflections

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Introduction

The interpretation of law is a complex matter. In the UK, the desideratum in regard to statutory interpretation is for the Courts to discern the intention of Parliament. The House of Lords in *Maunsell v. Olins* ([1975] A.C. 373) approved a 'unified contextual approach' (a la Cross) which prioritises a contextually sensitive but literal reading of the words of the relevant Act. After *Pepper v. Hart* ([1993] AC 593), courts may (but are not obliged to) consult *Hansard* (the edited record of what has been said in Parliament, including votes, written ministerial statements and written answers to parliamentary questions) to assist them in discerning Parliamentary intent, a procedure previously not permitted. The proper interpretation of case law is notoriously difficult even though here there is no question of discerning legislative intent. When it comes to the specific question of constitutional interpretation the situation is no less complex. A lively debate on the appropriate method or methods of constitutional interpretation is taking place, particularly in those jurisdictions possessing a written document in which their Constitution is contained. In the Anglophone world, the locus of the most interesting and active debate lies in the United States.

There are two basic approaches to constitutional interpretation: *originalism*, which makes the intention of the drafters, the intention of the approvers, or the meaning of the text as it was understood or would have been understood by the drafters/approvers the criterion of interpretation; and *vitalism*, which prioritises the needs of contemporary society over any strict intentional or semantic textual construction. Typically vitalists, believing that original intent, meaning or understanding is either unobtainable or, if obtainable, cannot be allowed to constrain the hermeneutic practice of the courts, want a constitution to be construed as a living document.

Originalism comes in two basic varieties that are often conflated – original intent and original meaning (sometimes called original understanding). *Original intent* is not an easy position to defend (despite the norm of statutory interpretation being the discernment of the intention of Parliament) for the simple reason that it is difficult, if

not impossible, to comprehend what anyone's intent is even here and now, let alone what it was 70 or 200 years ago. When originalism is summarily dismissed it is usually original intent that is being rejected. *Original meaning* (or understanding), however, is a matter of historical investigation and is no more or no less difficult to ascertain than any other matter of historical investigation. Interpretations based upon this criterion may not be rationally coercive but they are rational. *Vitalism*, on the other hand, appears to undermine the very point of having a constitution in the first place, allowing constitutional interpretation to become a kind of rhapsodic free association only tangentially connected to the constitutional text, the purpose of which interpretation often appears to be rather to explain away the text than to explain it. (See Keith Whittington's devastating critique of theories of textual indeterminacy, such as deconstruction, structuralism, poststructuralism, reader-response theory, and hermeneutics, all of which are frequently [but mistakenly] taken to render all forms of originalism otiose. Whittington 1999)

These topics will not be pursued further here. (Interested readers could consult Casey 2004, 2005 and 2009 and their associated bibliographies.) My reason for bracketing these matters is simply that the whole debate on constitutional *interpretation*, fascinating as it may be, takes place under the umbrella of a prior assumption, namely, that constitutions, howsoever they may fall to be interpreted, are *authoritative*. Why should we believe this?

What are Constitutions? How do they come into being? Why are they authoritative?

A constitution is a document, or a set of documents, or, in the case of the United Kingdom, a mixture of legislation, case law, conventions and customs, that is considered to be the basic law of the state. The distinction between written and unwritten constitutions should not be exaggerated; as Hilaire Barnett notes, "Under all constitutions, not all of the rules will be written, and still less will they be collected within a single document." (Barnett 1998, 3) A constitution generally sets out the structure of the organs of government, orders their relationships to each other and to the citizens of the state, and may include a bill of rights or similarly functioning provisions, either integrally, or as a series of amendments or as an act of Parliament. (Parpworth 2000, 3)

Constitutions being what they are, how does a state come to acquire one? The answer varies depending upon the state. In the United Kingdom, the constitution is largely a creature of its eventful political history; the constitution of the United States of America is a product of a post-revolutionary constitutional convention (intended originally merely to revise the Articles of Confederation); whereas the Irish constitution is a creation of the executive branch of government, as approved by the Dáil (the Irish Parliament) and ratified by plebiscite (about which, more later).

So far, matters are relatively uncontroversial. However, the really important question about constitutions is not what they are or how states come to acquire them but why they are supposed to have the authority that most people appear to grant them. Is a constitution a contract subsisting between the citizens of the state; is it some other kind of non-contractual agreement; or is it something completely *sui generis*? The possibilities would seem to be these: either a constitution is (a) a binding agreement among a group of people to be governed in a particular way, or (b) it is binding but not the subject of an agreement. (The other two possibilities are that it is a non-binding agreement or a non-binding non-agreement – the latter is as close to being nothing as makes no difference, and the former, though possible, could hardly function as a fundamental law.) If it is a binding agreement, there are two sub-possibilities – either it is (a1) explicit or (a2) implicit.

Is a constitution a contract?

It is not unusual for constitution-makers to represent the objects of their constructive activities as compacts, covenants or contracts. The Massachusetts Constitution of 1780, in its Preamble, claims that “The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” (Handlin 1966, 441)

The paradigm of the binding agreement is the contract. The standard view of a contract is that the agreement which forms its substance requires a valid offer and a valid acceptance of that offer and, despite challenges, (from Lord Denning – who else?) this would still appear to be the received view. The agreement can either be bilateral (an exchange of promises), or unilateral (where the offeror alone makes a promise, the acceptance of which consists in someone’s doing what is set out in the

offer). An offer, to be valid, must be communicated. The communication may be in writing, in speech or in conduct, it must be definite and it must be distinguished from a mere invitation to treat. The acceptance of an offer, to be valid, must be made while the offer is still operative, must be made by the offeree (if bilateral), must match the terms of the offer and may be written, oral, or inferred from conduct. Of course, the acceptance must be communicated to the offeror.

In addition to its offer-acceptance structure, contracts in the Anglo-American legal tradition also require that there be something in the arrangements to indicate that the promisors intend to be bound by their agreement; so, for example, a properly constituted deed will be one such arrangement; if one were to believe Lord Denning promissory estoppel would be another, but, these special cases to one side, consideration is the standard 'badge of enforceability', where consideration is defined as "some right, interest, profit or benefit to one party" or "some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" [*Currie v. Misa* (1875) LR 10 Ex 153]

In general, the doctrine of privity dictates that only the parties to a contract can sue or be sued on a contract. There are exceptions to this in respect of the assignment of rights, in the matter of agency, in trusts and in multi-partite agreements, in some aspects of land law (restrictive covenants) as well as some statutory exceptions. Third parties can enforce a contractual provision of benefit to them where the contract expressly provides for third party benefit or where the contract is intended to provide third parties with legally enforceable rights. To the best of my knowledge, however, I know of no case where third parties (other than, say, principals in a principal-agent relationship) can be burdened by a contract to which they are not explicitly a party.

If the constitution is to be construed as a contract, we might well wonder what the offer is, what would constitute acceptance, who is/are the offerors, who is/are the offerees, what was the consideration and, finally, who is included in the privity of the contract?

(a1) *The Constitution as an explicit contract*

Despite these difficulties, there are some for whom a constitution can only be conceived of as a contract. Lysander Spooner (1808-1887), an American lawyer, entrepreneur, abolitionist and proto-libertarian, is one such. He has no doubt that the United States Constitution purports to be a contract. "It has no authority or obligation at all *unless as a contract between man and man.*" (Smith 1992, 77; emphasis added) He believes, in fact, that the only way to conceive of that Constitution in such a way that it would have legal effect is for it to be a contract of some kind. Although he believes that the US Constitution is a much better document than it is generally taken to be, he argues vigorously against its being acceptable or its being in fact accepted. Spooner's thesis is absolutely clear: "The Constitution has no inherent authority or obligation." (Smith 1992, 77)

If the United States Constitution is a contract, who are the parties to it? According to Spooner, the only possible candidates for these positions would be those people who were actually around when it was approved. Does that mean that all the people living in the USA eighty years before Spooner wrote are to be taken to be parties to the Constitution? No – only those people legally entitled and competent to make contracts among those alive at the time are in the running, but not even all of these were, in fact, parties to the Constitution for, as Spooner notes: "...we know, historically, that only a small portion even of the people then existing were consulted on the subject, or asked, or permitted to express either their consent or dissent in any formal manner." (Smith 1992, 77) Needless to say, women and blacks were excluded from the franchise and property qualifications excluded anywhere from one half to three quarters of the white male adults. Of the remaining small amount of potentially qualified voters, how many actually exercised their franchise?

Spooner examines the opening lines of the US Constitution and asks who are the 'We' in "We, the people of the United States...." (Smith 1992, 65) He replies that it can only mean individuals, acting freely and voluntarily. Such authority as the document has, it has only between those who actually consented and no one else. He invites us to imagine another, rather less grandiose, agreement, in which we might say, "We, the people of Philadelphia, agree to maintain a school...for ourselves and our children." Such an agreement would, of course, be binding only on those who actually agreed, and any attempt to compel those who had not consented to contribute to the maintenance of the school would be a form of extortion. References

to posterity cannot be taken to imply that there was any intention or any acknowledgement of a right or power to bind posterity.

According to Spooner, those who actually consented to the Constitution, whatever their number may have been, only bound themselves and no others. Still further, even those who explicitly consented did not bind themselves for ever, for no time element is mentioned in the document so that, for Spooner, this makes it merely an association during pleasure, even between the original consenting parties. Since the original parties to the purported contract that is the Constitution were no longer alive in 1870 when Spooner was writing, he believes it follows that “... *the Constitution, so far as it was their contract, died with them.* They had no power or right to make it obligatory upon their children. It is not only plainly impossible, in the nature of things, that they *could* bind their posterity, but they did not even attempt to bind them.” (Smith 1992, 77) If posterity were not bound by those who established the Constitution, have they somehow bound themselves? Clearly, they could bind themselves by explicit ratification but, failing that, are there any other ways in which they might do so?

Spooner’s reflections arise in the context of a consideration of the United States Constitution, a document that for some readers will be both geographically and historically remote. Before turning to consider the possibility that a constitution might be either an implicit contract or not an agreement at all, I would like to turn to a brief consideration of the circumstances surrounding the coming into being of the Irish Constitution, *Bunreacht na hÉireann*.

The preamble to *Bunreacht na hÉireann* reads: “We, the people of Eire...Do hereby adopt, enact, and give to ourselves this Constitution.” (*Bunreacht na hÉireann*, ‘Preamble’. In Irish, the first official language of the State this reads: “Ar mbeith dúinne, muintir na hÉireann...Atáimid leis seo ag gabháil an Bhunreachta seo chugainn, agus á achtú agus á thíolacadh dúinn féin.”) We can raise two questions on this statement: (1) what action was being performed in this adoption, enactment and self-giving of the Constitution; and (2) who, precisely, was performing this action. Let us take the second question first:

The answer to this question would appear to be, the people of Eire. All of them? Not exactly. In the plebiscite of 1 July 1937 1, 346, 207 people voted; given a total eligible electorate of 1, 775, 055, that amounted to a voting percentage of 76%. Of those who voted, the votes of no less than 134, 157 were spoilt, almost 10%! 685, 105 voted in favour (51% of those who voted; 39% of the total electorate); 526, 945 voted against (39% of those who voted, 30% of the total electorate). Those who voted against, those whose votes were spoiled, and those who refrained from voting altogether came to 1,089, 950 – 61%. Only 39% of all the eligible electors actually voted in favour of the measure; 30% of the electorate rejected it. So, the preamble should perhaps be amended to read, “We, 39% of the eligible electorate of the people of Eire, etc” which doesn’t quite have the resonance of the original.

Well, what was the legal status of this plebiscite, in the context of the (presumably) valid prior constitution? This is what Hogan & Whyte have to say

By securing the adopting of the draft Constitution at a popular plebiscite which was expressed to ‘enact’ it, while confining the Dáil to the role of merely ‘approving’ the draft before it was submitted to plebiscite, he [de Valera] bypassed the Constitution of 1922 and made irrelevant, for the future, the question whether its validity depended on the act of the Irish constituent assembly (which kept it shackled by the Treaty) or on that of the United Kingdom Parliament.... Naturally, it was arguable, whether one stood on either an Irish or a United Kingdom *Grundnorm* of 1922, that the new Constitution of 1937, not having been enacted according to the mode of amendment prescribed by its predecessor, and not having respected the limits which at any rate the Irish courts saw as restraining that amending power, was invalid.... The whole proceeding amounted to a break in legal continuity, to a supplanting of one *Grundnorm* (albeit a disputed one) by another, and thus, legally speaking, to a revolution. (Hogan & Whyte 1994, 2-3; Hogan & Whyte 2003, 51-52)

But even if the plebiscite were validly operative under the previous constitutional order, the same question of the source of its validity could be applied to that earlier constitutional order. And if it, in turn, were the product of a yet earlier constitutional order, the same question would arise and so on and so on until one arrives at a justifiable emergence of a constitutional order from a non-constitutionally ordered stage.

And that returns us to the first question: what action was being performed in this supposed adoption, enactment and self-giving of a Constitution? By adopting, enacting and giving to themselves this document, just what were (39% of the eligible

voters of) the people of Éire doing? Who were they doing it for or to? Did they purport to bind themselves to the provisions of this document? For how long were they to be bound? And what of the 30% who specifically rejected this document, and those whose votes were spoiled, and those who did not vote, and those not eligible to vote, and those not yet born – are they to be bound by this document? If so, why? Clearly they have given no formal assent to this document – their agreement to it has not been explicitly given nor, in some cases, has it even been sought.

(a2) The Constitution as an implicit contract

If we adopt the contractual perspective, everything hinges on the presence of consent or agreement and since no evidence of actual consent is forthcoming from the current citizens the claim that the constitution is authoritative has to rest on some notion of implicit consent. The means by which such implicit consent is made manifest are commonly taken to be – voting in elections and the payment of taxes.

Before going any further, it should be noted that one might, of course, form a contract by one's conduct. So, for example, in the setting of a restaurant, were one to order a meal and consume it, one would then be obliged to pay; the lack of an explicit agreement would not excuse one from one's obligations. One might imagine a visitor from an alien culture innocently failing to realise this cultural and legal norm with ensuing comical complications, comical at least to an audience if not the unfortunate alien. However, whatever may be the case in the relatively trivial and transient contractual situations engendered by the purchase of food in a restaurant and such like, one cannot form contracts in respect of significant assets, such as automobiles or houses, in the same casual existential manner. This being so, how much more then is explicit reflection and explicit adoption and explicit consent required in the matter of a constitution, given that it purports to be the fundamental law by which one is to be bound.

Let us examine the claim that voting in a political system implies *de facto* consent to that system by looking at what Spooner writes:

...without his consent have ever been asked, a man finds himself environed by a government that he cannot resist; a government that forces him to pay money, render service, and forego the exercise of many of his natural rights, under peril of weighty punishments. He sees, too, that other men practise this tyranny over him by the use of the ballot. He sees further that, if he will but use the ballot himself, he has some chance of relieving himself from this tyranny of

others, by subjecting them to his own. In short, he finds himself, without his consent, so situated that, if he use the ballot he may become a master; if he does not use, he must become a slave. And he has no other alternative than these two. In self-defence, he attempts the former. His case is analogous to that of a man who has been forced into battle, where he must either kill others, or be killed himself. Because, to save his own life in battle, a man attempts to take the life of his opponents, it is not to be inferred that the battle is one of his own choosing. Neither in contests with the ballot – which is a mere substitute for a bullet – because, as his only chance of self-preservation, a man uses a ballot, is it to be inferred that the contest is one into which he voluntarily entered... (Smith 1992, 67)

Only if the act of voting is truly voluntary could a person be said to support the Constitution under which he votes. But for many people it is not voluntary; it is a necessity or a matter of self-defence. Some vote to have some (small) say in the disposition of the money that is taken from them in taxes. Were such taxation not to occur, they perhaps would not have any inclination to vote." To take a man's property without/ his consent, and then to infer his consent because he attempts, by voting, to prevent that property being used to his injury, is a very insufficient proof of his consent to support the Constitution." (Smith 1992, 81-82)

On the related matter of taxation as an indication of tacit consent, Spooner writes:

No attempt or pretence, that was ever carried into practical operation amongst civilized men – unless possibly the pretence of a "Divine Right," on the part of some to govern and enslave others – embodied so much shameless absurdity, falsehood, impudence, robbery, usurpation, tyranny, and villainy of every kind, as the attempt or pretence of establishing a government by consent, and getting the actual consent of only so many as may be necessary to keep the rest in subjection by force. Such a government is a/ mere conspiracy of the strong against the weak. It no more rests on consent than does the worst government on earth. What substitute for their consent is offered to the weaker party, whose rights are thus annihilated, struck out of existence, by the stronger? Only this: Their consent is presumed!...As well might the highwayman pretend to justify himself by presuming that the traveller consents to part with his money. As well might the assassin justify himself by simply presuming that his victim consents to part with his life. As well might the holder of chattel slaves attempt to justify himself by presuming that they consent to his authority, and to the whips and the robbery which he practises upon them. The presumption is simply a presumption that the weaker party consent to be slaves. (Smith 1992, 75-76)

Taxes, being compulsory, provide no evidence that taxpayers support the constitution. Spooner compares the tax collector unfavourably to a highwayman!

The highwayman takes solely upon himself the responsibility, danger, and crime of his own act. He does not pretend that he has any rightful claim to your

money, or that he intends to use it for your own benefit. He does not pretend to be anything but a robber. He has not acquired impudence enough to profess to be merely a 'protector,' and that he takes men's money against their will, merely to enable him to 'protect' those infatuated travellers, who feel perfectly able to protect themselves, or do not appreciate his peculiar system of protection. He is too sensible a man to make such professions as these. Furthermore, having taken your money, he leaves you, as you wish him to. He does not persist in following you on the road, against your will; assuming to be your rightful 'sovereign,' on account of the 'protection' he affords you. He does not keep 'protecting' you, by commanding you to bow down and serve him; by requiring you to do this; and forbidding you to do that; by robbing you of more money as often as he finds it for his interest or pleasure to do so; and by branding you as a rebel, traitor, and an enemy to your country, and shooting you down without mercy, if you dispute his authority, or resist his demands. He is too much of a gentleman to be guilty of such imposture, and insults, and villainies as these. (Smith 1992, 85)

Spoooner concludes with the even more radical claim that not only does the Constitution not bind anyone now but that it never did bind anyone. He makes much of the fact that no one signed the document and that the general principle of law and reason is that a written instrument does not bind until and unless it is signed. He instances the formalisation of wills and deeds and the requirement that they be signed, sealed, witnessed and acknowledged. He then says,

And yet we have what purports, or professes, or is claimed, to be a contract—the Constitution—made eighty years ago, by men who are now all dead, and who never had any power to bind us, but which (it is claimed) has nevertheless bound three generations of men, consisting of many millions, and which (it is claimed) will be binding upon all the millions that are to come; but which nobody ever signed, sealed, delivered, witnessed, or acknowledged; and which few persons, compared with the whole number that are claimed to be bound by it, have ever read, or even seen, or ever will read, or see. And of those who ever have read it, or ever will read it, scarcely any two, perhaps no two, have ever agreed, or ever will agree, as to what it means. (Smith 1992, 91)

Spoooner concludes that, despite its pretensions, the US Constitution is not a contract, that it binds nobody and never did bind anybody, and that those who claim to act by its authority are in fact acting without authority. There is nothing to stop anyone who thinks the Constitution to be worthwhile actually signing it and agreeing with others who do likewise that they will make laws for each other within its remit, allowing non-signers to live in peace. Appearances to the contrary notwithstanding, Spoooner believes that the government of the USA does not in fact rest upon any consent of the people of the USA; on the contrary, "the only visible, tangible, responsible government that exists, is that of a few individuals only, who act in concert, and call themselves by the several/ names of senators, representatives,

presidents, judges, marshals, treasurers, collectors, generals, colonels, captains, &c, &c." (Smith 1992, 98-99)

(b) The Constitution not a contract

Of course, some would dispute Spooner's presumption that the Constitution, to have legal effect, must be construed as a contract. Perhaps it is not a contract but is nonetheless, binding and thus authoritative.

Edmund Burke offers us a different account of the foundations of political order, one that is, in essence, non-contractual. His account begins, perhaps perversely, with the claim that "Society is indeed a contract" which might seem to undermine my statement that his account is non-contractual, but Burke's idea of the social contract is a very special one. Ordinary contracts, what Burke calls "subordinate contracts for objects of mere occasional interest" concern themselves with such low matters as a "partnership agreement in a trade of pepper and coffee, calico, or tobacco" but the contract which concerns the very foundation of the state is not of this order. This contract, which has now, inexplicably, become a partnership,

is to be looked on with other reverence, because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. (Turner 2002, 82-83)

And because the objects of this contract/partnership cannot, it seems be achieved immediately, nor even in a few generations, it turns out to subsist not only between one living being and another but also between the living, the dead and the unborn.

It seems that this political partnership (which has once again been re-termed a contract) is a species of transcendent entity, of which particular political partnerships are mere local habitations:

Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place. (Turner 2002, 82-83)

The primeval and eternal partnership/contract (now become a compact) is, it appears, sanctioned by an inviolable oath, though what the wording of this oath is, who takes it and when it has been or is to be taken, is mysteriously left unspecified.

This partnership/contract/compact has the further interesting characteristic that it is “not subject to the will of those who by an obligation above them, and infinitely superior, are bound to submit their will to that law.” The eternal and primeval contract/partnership/compact/law (it has now become a law) demands the submission of our wills. One may not, except under some kind of (unspecified) necessity that is not chosen but rather thrust upon one, refuse to submit to this contract/partnership/compact/law:

The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity that is not chosen but chooses, a necessity paramount to deliberation, that admits no discussion and demands no evidence, which alone can justify a resort to anarchy. (Turner 2002, 82-83)

A voluntary and rational rejection of the transcendent, eternal and primeval contract/partnership/compact/law would, according to Burke, have devastating consequences. That way, it seems, madness lies:

But if that which is only submission to necessity should be made the object of choice, the law is broken, nature is disobeyed, and the rebellious are outlawed, cast forth, and exiled from this world of reason, and order, and peace, and virtue, and fruitful penitence, into the antagonist world of madness, discord, vice, confusion, and unavailing sorrow. (Turner 2002, 82-83)

It is interesting to note that, some fifteen years before he wrote these words, Burke was somewhat less pessimistic about the consequences of a rejection of the transcendent political order on which he was to wax so eloquent: “A new, strange, unexpected face of things appeared. Anarchy is found tolerable. A vast province has now subsisted, and subsisted in a considerable degree of health and vigour, for near a twelvemonth, without governor, without public council, without judges, without executive magistrates.” (Burke 1854-56, 464-471)

It has hard not to be carried away on the floodtide of Burke’s eloquence, an eloquence he honed, no doubt, in Trinity College’s debating circles in a tradition not yet atrophied. To appreciate the passage properly requires it to be read as a unit and not piecemeal as I have presented it. To subject it to such rude analysis as I have done might seem to be taking a spade to a soufflé (as someone once remarked about a critic of the writings of P. G. Wodehouse). Frank Turner remarks “An unrestrained

passion infuses his pages and drives his argument, while an ornate, distant, unfamiliar rhetoric interferes with the persuasiveness of his presentation – in fact, it almost blocks our access to it. Burke’s pulsating emotion and the rhetorical vehemence of his assault on the political violence in France press the reader to take refuge in the very rationality he denounces.” (Turner 2002, xiv-xv) On the other hand, Conor Cruise O’Brien plays down the criticism of rhetorical excess: “There is, in reality, very little rhetoric, quantitatively speaking...Most of the book...is made up of plain, cogent argument.” (Turner 2002, 219)

Whatever the merits of the claim and counter-claim in the context of Burke’s *Essay* as a whole, the passage just considered is not a page from a novel nor yet a stanza of a poem nor a leader in *The Irish Times* but is, presumably, a serious and rational attempt to reject mundane contractarianism as the root of the legitimacy of the political order. Shorn of its rhetoric, however, it appears to be entirely devoid of argument, amounting to a bare assertion that there is a great primeval eternal contract (in Burke’s very special sense of that term) that demands our obedience. Where this contract came from, what its terms are, precisely why we are bound by it – none of these issues is explicitly articulated. Nor is it easy to see how Burke reconciles such sentiments with his commitment to Whiggery with its apotheosis of the so-called Glorious Revolution of 1688 which, ironically, justified itself by charging James II with breaking the original contract between king and people! (cf. Turner 2002, 24) The best that can be said for this passage is that it contains a tacit pragmatic appeal to much the same fear that one finds at the root of Hobbes’s *Leviathan*, namely, that without the state chaos ensues. There is a deep irony in this, given that it would be harder to find two thinkers more diametrically opposed to one other than Burke and Hobbes and that “What Burke deplored in his particular characterization of the policies of the new French Government was their embodiment of the absolutist state about which Hobbes had theorized.” [Turner 2002, xxv]

What is, perhaps, defensible in Burke’s thought, to a certain extent, is his reminder to us that human beings are not disembodied rational beings but are fleshly creatures of experience, custom, habit, historical precedent and religion, and that there is a perpetual danger that a concern with abstract rights runs the risk of dissolving those prior and necessary human roots that perform the constitutive role for man in his social identity that memory does for his psychological identity. Also, to his eternal

credit, Burke was forthright in his condemnation of the contempt for property evidenced in the land confiscations and fiscal depredations of the revolutionary French government, believing that such contempt for property could not but extend to persons as well. “Burke... understood one’s own personhood and body to be a mode of property and thus considered that what had begun as confiscation of church lands could end in the deprivation of citizens’ lives by the revolutionary state.” [Turner 2002, xxxiii]

If the fundamental political order is not a function of contract, understand in the ordinary, mundane, non-Burkean sense of that term, is Burke’s ‘grand primeval contract’ then to be understood as a matter of status? The *locus classicus* for the distinction between relations predicated upon status and upon contract is Sir Henry Maine’s *Ancient Law*. There he writes:

All the forms of *Status* taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ *Status*, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*. (Maine 1906, chapter 5, paragraph 128)

Of course there are status relationships operative in our lives, which are simply given to us and are not a matter of choice. The primary locus of such status relationship is the family – it needs no ghost come from the grave to tell us that we can choose our friends but not our family – and while there may be some conceptions of the family that are more extensive than others, it is a fundamental mistake to portray the ideal political order as a family writ large, not that its being a fundamental mistake has prevented its being frequently attempted. In Confucian thought, for example, politics is explicitly conceived of in terms of an extension of family relations from the natural family to society at large and one does not have to travel all the way to China to find other instances of the same. But political relations are not family relations writ large, not, that is, unless you want to return to the age of peonage and serfdom. The problem with Burke’s position, then, is that if it is to have any plausibility at all, it can have such only by confusing the civil order, with its multifarious forms of status relationships, with the political order.

And if political relations are not family relations writ large, neither can they be constructed on organic models. We are all familiar (from Plato, from St Paul) with efforts to understand the political order in biological terms so that we may speak of the 'body politic' and, within that metaphor, attempt to elucidate political relations in terms of the relationships of body parts to each other. It is easy enough to see that the 'body politic' is a figure of speech, an image, and not to be taken literally. It is, perhaps, more difficult to resist the identification of the civil and the political orders, since both are forms of social organisation. But status relationships are one thing, contractual relationships quite another. There have been times when the two may have run the risk of being conflated, as for example, in the Catholic conception of marriage, which regards it as a status relationship that is nonetheless entered via contract. (For an orthodox Catholic, to speak of 'my ex-wife' is as linguistically odd as it would be to speak of 'my ex-brother') However, such a conception of status-via-contract does not, in the end, conflate the two conditions but simply makes one the condition of entry upon another.

So, then, for Spooner, constitutions purport, but fail, to be contracts; for Burke, they are instantiations of something much grander, lying beyond the reach of human choice, more a matter of status than any ordinary mundane contract could possibly be. If status and contract are the only two possibilities that can ground the legitimacy of the fundamental political order – and it is difficult to see what other possibilities there can be – and if neither of these is tenable, then the constitutional order hovers several feet off the ground, without visible means of support, like the smile of the Cheshire cat.

Jefferson, Madison and Hume

Lest the arguments of Spooner seem idiosyncratic, perhaps even perverse, it might be well to remind ourselves of the thoughts of one of the founding Fathers of the USA. In a letter to James Madison, Thomas Jefferson wrote as follows:

...it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it. As they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. *The constitution and the laws of their predecessors are extinguished then in their natural course with those who gave them being...* (Boyd 1950 [Jefferson 1789]; emphasis added)

To assist in the comprehension of his argument, Jefferson came up with an ingenious thought-experiment. He imagined the earth populated by generations of men, all of the same age, that die together, just at the moment that the next generation attain maturity. "...let us suppose a whole generation of men to be born on the same day, to attain mature age on the same day, and to die on the same day, leaving a succeeding generation in the moment of attaining their mature age all together" One discrete generation would then follow another, with no overlap. He invited Madison to consider and respond to his arguments.

The substance of the first part of Madison's response is to rehearse the inconveniences that would result if Jefferson's radical doctrine were to obtain, which considerations, while undeniable, are not relevant to the conceptual point at issue. In the end, however, Madison comes to rely on that old perennial of political philosophy, namely, implicit or tacit consent. "I find no relief from these consequences, but in the received doctrine that a tacit consent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears....May it not be questioned whether it be possible to exclude wholly the idea of tacit consent, without subverting the foundation of civil Society?" (Hutchinson 1962-77 [Madison 1790]) Madison is correct in thinking that without such tacit consent, political society might well be subverted, but we have not reason to think that civil society would likewise fail, unless we make the classic mistake of conflating the civil and the political orders.

Writing some 30 years before Jefferson, David Hume appears to have anticipated his thought-experiment. "Did one generation of men go off the stage at once and another succeed, as is the case with silkworms and butterflies, the new race, if they had sense enough to choose their government, which surely is never the case with men, might voluntarily and by general consent establish their own form of civil polity *without any regard to the laws of precedents which prevailed among their ancestors.*" (Hume 1826, 521; Emphasis added) So far as for Jefferson. Hume then points out that such a discrete succession of generations is not, of course, what happens in our experience and so, given the necessarily intermingling of the generations, if government is to be stable, conformity to established constitutions is required. "But as human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary in order to preserve stability in government that the new brood should

conform themselves to the established constitution and nearly follow the path which their fathers, treading in the footsteps of theirs, had marked out to them.”

(Hume 1826, 521)

Hume is effectively a realist in political matters, holding to the *de facto* existence of governments and emphasising the impracticality of any notion of consent as the ground of constitutional order. He has no illusions about the origin of governments in any voluntary compact holding that when we examine the establishment of governments via revolution, what we discover is violence, not contract. While he accepts that consent would be, if it could be obtained, the best foundation of government, he believes that such consent would require men both to refrain from aggression and always to be aware of their own interests; but such non-aggression and such self-knowledge is, he believes, not natural to man. “Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally in usurpation or conquest or both, without any pretense of a fair consent or voluntary subjection of the people.” (Hume 1826, 515) While Hume accepts that consent is, of all the foundations of government, the “best and most sacred” he believes, given human nature, that it is practically unattainable. In the end, Hume comes to much the same conclusion as Burke, but without subscribing to Burke’s dubiously metaphysical commitment to a “great primeval contract of eternal society”.

Of the three possibilities considered – that a constitution is an explicit agreement, an implicit agreement, or not an agreement at all – I would argue that only the third possibility is in any way plausible. If the contract story is a fiction, as I believe it is, and if one rejects as groundless the Burkean metaphysics, as I believe one must, then, unless there is some other theoretical possibility not yet canvassed which will supply us with a rational foundation for constitutions, one is left with constitutions of no authority.

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