

Chapter 6

The Obligation to Obey Legislation and Its Radical Limits

Men being, ... 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.

...

[T]he *municipal laws* of countries ... are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted.

...

The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, *legislators* as well as others.

John Locke (1689/1980), *Second Treatise of Government*: §95, §12, §135.

In this chapter, I address Locke's view about why individuals are obligated to abide by the legislation that is enacted by government as long as those enactments accord with the purpose that Locke sets forth for governments, *viz.*, to better articulate and enforce their rights of life, liberty, and property.

One of the four or five major themes most commonly associated with Locke's political doctrine is the claim that each individual's obligation to obey the legislation of the government under which he lives rests on that individual's consent. A government's authority to impose its statutes on its subjects must derive from the consent of the governed. Locke tells us that "[m]en being ... by nature, all free, equal, and independent, no one can be put out of this estate, and subject to the political power of another, without his own consent" (*ST* §95).

Similarly, since every person is naturally free, nothing can “put him into subjection to any earthly power but only his own consent” (*ST* § 119). Locke is especially eager to maintain that sons cannot be bound by the consent of their fathers: “a child is born a subject of no country or government ... there is no tie upon him by his father’s being a subject of this kingdom; nor is he bound up by any compact of his ancestors” (*ST* §118).

In this chapter’s section on the *Consent Explanation*, I contend that Locke’s explanation of how everyone dwelling within a given government’s territory tacitly consents to obey that government’s legislation is deeply problematic. However, in this chapter’s section on the *Natural Obligation Explanation*, I show that Locke does not need to appeal to consent (or to territoriality) to explain the obligation of subjects to obey enacted legislation that serves the proper purpose of government. If enacted legislation secures people’s natural rights to life, liberty, and property by more clearly delineating these rights and more reliably protecting them, each individual’s natural obligation to respect the rights of others explains each individual’s obligation to abide by that legislation. In this chapter’s concluding paragraphs, I consider whether Locke can rely upon the Natural Obligation Explanation to vindicate an obligation to abide by tax legislation. This is the *Taxation Complication*.

The Consent Explanation

Of course, Locke does not think that every government arises through the consent of all of its subjects. He is, after all, eager to point out that lots of regimes arise through violent usurpation or conquest; and he holds that, for this reason, those regimes have no valid authority to rule. However, Locke does assert that, if a government has genuine authority, it acquires that authority from the actual and voluntary consent of all of its subjects. Locke also maintains that this governmental authority cannot extend to the infringement of anyone’s rights because no individual can through her consent convey to the commonwealth the right to infringe anyone’s rights (*ST* §23).

Yet, we must ask, does any government ever have the actual and voluntary consent of all of its subjects? Locke defended and served the government that was established in Great Britain after the Glorious Revolution of 1688. But, did that government really have the actual and voluntary consent of all those it governed? After all, the typical subject of the regime of William and Mary was never presented with, and never actually and voluntarily put his (or her!)

signature on, a clearly drafted contract to join political society or to abide by the statutes enacted by the legislature of that political society. We should expect that Locke is going to have to engage in some fancy and precarious footwork in his attempt to show that all regimes that he believes to have genuine authority derive their authority from the consent of their subjects.

Locke begins his attempt to show that through their individual consent all subjects of a well-ordered commonwealth are obligated to abide by its legislation by distinguishing between “express” consent and “tacit” consent (*ST* §119). Express consent involves explicit, self-conscious, and publicly observable agreement with, for example, written contracts, witnesses, and signatures, while tacit consent turns on less easily identified common understandings, expectations, and informal signals. When consent theorists appeal to tacit consent there is always a danger that the bare fact that someone has not expressly consented will be taken as evidence that this individual has tacitly consented.

Locke acknowledges that relatively few subjects have given their express consent to become part of political society or to obey the enactments of the government to which they are subject. If all individuals within a given nation are to count as consenters, most will have to have tacitly consented. Most people will have to have done something that counts as consent even though it does not much look, smell, or sound like consent.

Indeed, Locke asserts that merely being in the territory of a given government constitutes tacit consent to obey the legislation of that government:

[E]very man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his *tacit consent*, ... whether this his possession be of land, to him and his heirs for ever, or lodging only for a week; or whether it be barely travelling freely on the highway; in effect, it reaches as far as the very being of any one within the territories of that government. (*ST* §119)

How can this be? How can a person merely being “within the territories of [a] government” obligate that person to obey the laws of that government? And why say that this obligation arises from that person’s tacit consent? Notice that, if we accept Locke’s claim that simply being within the territory of a government constitutes tacit consent to it, it seems that every government that has

ever existed has had the consent of every one within its territory. However, this runs contrary to Locke's own view that many governments do not have the consent of many of their subjects and, for that reason, do not have the authority that they claim to have.

Locke understands that he needs to justify his assertion that merely being within the territory of a government constitutes tacit consent to obey the legislation of that government. Here is Locke's justification:

[E]very man, when he at first incorporates himself into any commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the community, those possessions, which he has, or shall acquire, that do not already belong to any other government. ... [His possessions become] subject to the government and dominion of that commonwealth, as long as it hath being. Whoever therefore, from thenceforth, by inheritance, purchase, permission, or otherways, *enjoys any part of the land*, so annexed to, and under the government *of that commonwealth*, must take it with the condition it is under; that is, of submitting to the government of the common-wealth ... (ST §120)

According to Locke, by some point in the distant past every landowner within the area controlled by a given commonwealth will have incorporated himself into that commonwealth and, in doing so, will have submitted all his land "to the government and dominion" of that commonwealth. The totality of that land is now the territory of that government over which it has jurisdiction. Since all the land is now the territory of the commonwealth, the commonwealth now has the right to set conditions on anyone's presence within its territory. And the basic condition that it sets is that its legislative enactments be obeyed.

From a Lockean perspective, there are many problems with this picture. Would Lockean inhabitants of the state of nature, who are deeply concerned about the preservation of their property, really annex and submit their property to the commonwealth? Can individual property owners create such governmental jurisdiction over their lands without radically undermining their property rights? Within this account of consent, Locke presumes that governmental action to better secure everyone's property rights in land requires that all land be under the jurisdiction of the commonwealth. That is the only reason that he gives for thinking that owners of land would all annex and submit their

property to the commonwealth (*ST* §120). However, all landowners have to do to better secure their property rights is to establish a common agent who will be charged with more effectively exercising their rights to protect their property and to impose restitution and punishment on rights violators. There is no need for the landowners to annex or submit their land to the commonwealth in order to establish a commonwealth that acts as such an agent. There is no need for the common agent for the protection of their rights to have territorial jurisdiction over their property.

Nevertheless, let us suppose that a commonwealth established by individuals who exit the state of nature will have acquired jurisdictional rights over the totality of the land owned by those individuals. Would this be a basis for holding that anyone who now dwells within that territory will become obligated to obey that commonwealth's legislation *through her tacit consent*? I think the answer is, no. If we assume that the commonwealth has jurisdiction over the territory that it controls, Bea's dwelling within that territory may obligate her to obey its government. But tacit consent by Bea would play no role in an explanation of that obligation. Let me explain why.

First consider a case that involves Abe's jurisdiction over his own home. Abe invites Bea to spend the evening in his residence. Bea arrives and, to Abe's surprise, she immediately removes all her clothing. This makes Abe uncomfortable, perhaps because he is expecting soon to be nominated for the US Supreme Court. Abe tells Bea that, since the home is his property, he gets to set the conditions under which she may continue her visit and the condition that he sets is that she put her clothing back on. Abe's being the owner of the house justifies Abe imposing this condition on Bea. Abe's setting of that condition is what obligates Bea to put her clothes back on if she stays. Bea's staying involves her *acceding* to Abe's condition. But Abe's imposing that condition on her does not at all depend upon her consenting to that condition or her consenting to Abe's having authority to set the conditions under which people can stay in his house. Bea's consent has nothing to do with it.

Similarly, if in virtue of its (supposed) territorial rights a commonwealth sets a condition on anyone being within its territory (for example, the condition of obeying its statutes), the setting of that condition is justified by the territorial rights. It is not justified by people consenting to that condition. The (supposed) jurisdiction of the government over that territory does all the work. Since consent has nothing to do with the creation of the obligation of people

who remain in the territory to obey the government’s legislation, Locke’s stance here is an *abandonment* of his thesis that the obligation to obey a well-ordered commonwealth’s legislation derives from the consent of the subjects!

Here is another indication of Locke’s abandonment of the view that each person’s obligation to obey legislation derives from his own consent. Suppose that we were to accept Locke’s claim that our ancestors have created a jurisdiction for the government that justifies the government’s setting conditions for inhabiting in its territory. We would then be accepting—contrary to Locke’s own conviction—that we are “bound up” by a compact made by our ancestors (*ST* § 118). We would be accepting that our being bound does not depend upon our consent.

The Natural Obligation Explanation

For Locke, the “great end” that justifies the creation of political societies and their political-legal institutions is “the enjoyment of [men’s] properties in peace and safety” (*ST* §134). The property of individuals—that is, their rights to life, liberty, and estate—are not themselves the product of political society or the actions of its legislature. The governing purpose of political society and its political-legal institutions is to enhance people’s peaceful enjoyment of rights that do not owe their basic moral force to the will of political society, the legislature, or the monarch.

Early in the *Second Treatise*, Locke declares that “... the municipal [*i.e.*, legislatively enacted] laws of countries ... are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted” (*ST* §12). Enacted legislation is needed because people’s natural rights have to be more finely specified, so that each can have more confidence that there is a reciprocal understanding of where her rights end and the rights of others begin. (And, there is also a need for the reliable application and enforcement of these more finely tuned, reciprocally understood, specifications.)

To avoid [the] inconveniences, which disorder men’s property in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have *standing rules* to bound it, by which every one may know what is his. (*ST* §136)

...

[M]en would not quit the freedom of the state of nature for, and tie themselves up under [government], were it not to preserve their lives, liberties, and fortunes, and by *stated rules* of right and property to secure their peace and quiet. (*ST* §137)

“[S]*tanding rules*” are needed to bound—not to create—people’s property so that “every one may know what is his”; “*stated rules*” are needed to preserve—not create—people’s lives, liberties, and fortunes.

The commonwealth may regulate property in the sense of *regularizing* it, that is, clarifying where the boundaries lie between one person’s rights and another’s, how those boundaries are to be detected, and how encroachments across these boundaries are to be handled. However, the power to regularize in this sense is not the power to take all or any of the property (life, liberty, or estate) of any subject. Regularization through enacted legislation must itself be founded on and regulated by the law of nature (*ST* §12).

According to the Natural Obligation Explanation, the process by which legislation arises—specifically, whether it arises through consent or not—is not crucial to a government’s authority to rule. Rather, what is crucial is the substance of the legislation, that is, whether or not it protects the natural rights of those subject to it as those rights are refined by legislation and implemented through judicial and executive action. What explains a subject’s obligation to abide by enacted legislation is its conformity to the law of nature, which retains its moral force over everyone including legislators: “The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to inforce their observation. Thus the law of nature stands as an eternal rule to all men, *legislators* as well as others” (*ST* §135).

In the state of nature each individual is obligated to abide by the demands of others that she respect the rights of others and submit to their enforcement of their rights. No individual need consent to be subject to this obligation. The Natural Obligation Explanation of each individual’s obligation to abide by enacted legislation within a well-ordered commonwealth is that this obligation is simply a more finely tuned and more effectively enforceable form of that individual’s state-of-nature obligation. That is why individuals need not consent to be subject to that legislation. Of course, according to this line of thought, subjects are obligated only to abide by legislation that accords with

and draws closer the law of nature (*ST* §135). If this is a plausible explanation for each individual's obligation to obey legislation that better articulates and secures people's rights, then Locke turns out not to need consent to underwrite that obligation. But does Locke still need consent to underwrite an obligation to abide by legislation that imposes taxes?

The Taxation Complication

Locke believes that a government that protects people's rights to life, liberty, and estate has the right to impose taxes on its subjects to cover the costs of providing that protection (*ST* §140). Can a Natural Obligation Explanation be offered for an obligation to obey legislation that requires subjects to pay for the protection that a commonwealth provides to them? Within the Lockean framework, the answer has to be "no". For, there is no natural obligation to pay for a benefit that has been provided to one if one has not contracted to pay for it. If, in the state of nature, Cici benevolently steps in to thwart Dee's attempt to rob Bea and then presents Bea with a bill for her services, Bea will not have an enforceable obligation to pay that bill. Indeed, Cici's forcible extraction of payment from Bea will be a violation of Bea's rights.

Similarly, for any subject to be obligated to obey a government's demand that she pay for protection rendered by that government it is necessary that this subject have consented to that taxation (at least by authorizing her representatives to enact such taxation). The government's extraction of payment from that subject will be a violation of her rights unless she has consented to make payments to the government in exchange for that protection. However, if we reject appeals to tacit consent of the sort that Locke proposes, we have to conclude that each individual must expressly consent to the taxation imposed upon her for her to be obligated to comply with that taxation. Moreover, that consent must not be made under duress (*ST* §186). It seems that, for a subject to be obligated to obey tax legislation, she must have expressly and voluntarily agreed to the enactment of such legislation.

Yet, has any government ever had the express and voluntary consent of each of its subjects for the taxes imposed on them? Is it possible that any government ever will have such voluntary consent to the charges it imposes on its subjects?