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JOHN SELDEN AND THE EARLY MODERN DEBATE
OVER THE FOUNDATIONS OF POLITICAL ORDER

The early 17th century witnessed an unprecedented intellectual crisis. Increasingly, long-accepted social, political and religious ideas were being doubted. Indeed, there was a widespread awareness that the whole Aristotelian-based system of knowledge, long professed in the European universities – the ‘schools’ – was collapsing. Various challenges to scholastic assumptions, from the neo-classicism of renaissance Italy, to the religious reformation in northern Europe, to the new advances in the natural sciences – had converged by the end of the 16th century into a fundamental, systemic predicament. Francis Bacon, Galileo Galilei and Rene Descartes were some of the more prominent among those who articulated the significance and extent of the crisis, and who attempted to offer a new “world system” of knowledge to replace the old one.

It was inevitable that this intellectual crisis would bear into the realm of political ideas. During the 16th century authors introduced new political ideas, like Machiavelli’s a-moral politics or Bodin’s indivisible sovereignty, which were incompatible with the established constitutionalist assumptions, associated with the social and political ideas of the scholastic system. By the early 17th century a number of writers were attempting to outline a new system of politics, one that could also take into account the new claims about the nature and scope of human knowledge¹.

1. Following Q. Skinner’s famous thesis from *The Foundations of Modern Political Thought* (1978), that the great struggle of the mid-16th century was over the constitutional structures which the major European states should take as their norms (the heart of the conflict in the French wars of religion and the Dutch revolt), R. Tuck argues that, inspired by the *raison d’État*, anti-constitutionalist literature, which flourished between 1580-1620, in the first half of the 17th century the internal-constitutionalist struggle was increasingly replaced by an attack on the very idea of constitutionalism and by attempts to replace it with an instrumental and modern politics. See R. Tuck, *Philosophy and Government 1572-1651*, 1993, p. xii-xiii. More generally on the subject see H.A. Lloyd, “Constitutionalism”, in J.H. Burns & M. Goldie (eds.), *The Cambridge History of political thought*

The extent of the crisis was such that its themes far exceeded the concerns of those engaged in intellectual pursuits only, but was very much present in the wider cultural scene, and not necessarily learned circles at that. An excellent example is William Shakespeare's *Henry V*, performed in London theatres several times in the first decades of the 17th century (and on 7 January 1605 at the royal court). The play includes scenes articulating such ideas as: The title to a crown being founded on the law of nature and of nations ("The borrow'd glories that by gift of heaven, By law of nature and of nations [be]'long, To him and to his heirs; namely, the crown" Act II scene 4); Diversity of purposes and activities combining into one common political consent ("For government, though high and low and lower, Put into parts, doth keep in one consent, Congreeing in a full and natural close, Like music." Act I scene 2); National identity as something distinct from political allegiance ("Of my nation! What ish my nation? ish a villain, and a bastard, and a knave, and a rascal? What ish my nation? Who talks of my nation?" Act II scene 2; and "You thought, because he could not speak English in the native garb, he could not therefore handle and English cudgel: you find it otherwise; and henceforth let a Welsh correction teach you a good English condition." Act V scene 1). However, perhaps most interesting for our purpose, is the idea of relationship between private conscience and public duty, especially as pertains to following the king's orders. When a disguised king Henry discusses with some soldiers the justice of the war they are serving in (Act IV scene 1), one of the soldiers answers him that they do not know about such things: "Ay, or more than we should seek after; for we know enough if we know we are the king's subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us." But as the disguised Henry points out, there is a danger in this of blurring the distinction between men's public duty to the king, and their private morality: "Every subject's duty is the king's; but every subject's soul is his own." Another one of the soldiers agrees: "'Tis certain, every man that dies ill, the ill upon his own head: the king is not to answer it"².

Some political thinkers of the late 16th and early 17th century, attempted to salvage central elements of political scholasticism, by integrating them with their own new theoretical structures. Such was the place of Natural law in the "Neo-scholastic" theory of Francisco Suarez, or of Roman law in the "Neo-civilian" theory of Alberico Gentili. However, a generation of political thinkers who came of age in the early decades of the 17th century, was the first to face the full extent of the old system's breakdown as well as the first to attempt

1450-1700, 1991, p. 254-297.

2. W. Shakespeare, *The Chronicle History of Henry the fifth* (printed 1600). And see below discussion in the section dealing with Filmer's ideas.

and propose comprehensively new systems alternative to it. Prominent in this generation were four near contemporaries (born within five years of each other): Hugo Grotius (1583-1645), John Selden (1584-1654), Sir Robert Filmer (1588-1653) and Tomas Hobbes (1588-1679). Although the remedies they proposed varied greatly, their efforts were directed at a shared challenge: proposing a system of law and politics that would overcome the crisis of the Universities' school of thought. Their attempts have laid down the framework for much of modern political thought to this day³.

The claims I have outlined up to this point are not especially controversial. However, surprisingly enough, modern scholarship has not, on the whole, devoted significant efforts to exploring the connection between the philosophical epistemological crisis and the moral and political one. Although the existence of such multiple crises is widely accepted, and the phenomena are sometimes even connected, the treatment of the issue usually remains at a generalized level, or at most is approached at the level of a particular thinker, instead of addressing more comprehensively the connection between new political theories and the crisis of epistemology. The cause for this approach seems to be a widespread acceptance of the premise that the epistemological crisis was distinct from that of moral and political skepticism. This premise is best articulated in the works of R. Tuck, one of the most prominent scholars of ideas, who has had a crucial role in the reevaluation of the significance and impact of early modern political ideas on the history of political thought. Tuck argues that for early modern skeptics (like Montaigne and Charron), as well as for skeptics of the ancient world, "the force of their skepticism in ethical matters came simply from their apprehension of the truth of moral relativism". According to him "[i]t thus had a different basis from their skepticism in general epistemological matters, for that rested primarily upon the illusory character of sense experience". Tuck concedes that in both cases the

3. Grotius makes clear he regards his ideas as an attempt to break free from the framework of Aristoteleanism, which, he asserts, in the name of the great man had for some time "degenerated into Tyranny, so that Truth, for the Discovery of which *Aristotle* took so great Pains, is now oppressed by nothing more than the very Name of *Aristotle*". See Hugo Grotius, *Iure belli ac Pacis* (1625), prolegomena, sec. 43. Selden, criticizes the "Schooles" for the defective method by which they study "*Morall Philosophie, or Civill Learning*". See John Selden *Titles of Honor* (1631, 2nd edition), "Preface", not paginated. Filmer identifies the object of his work as the refuting of the widespread erroneous belief in a natural liberty of men, asserting that "[t]his tenet was first hatched in the schools". See Sir Robert Filmer, *Patriarcha* (1680), chapter 1 sec. 1. Hobbes explicitly and repeatedly accuses the "schoole-men" of spreading incomprehension and confusion through their frequent usage of "insignificant speech". See Thomas Hobbes, *Leviathan* (1651), part I chapter 1. More generally on the crisis of scholasticism and the response to it, see the whole of section IV, "The end of Aristoteleanism" in J.H. Burns & M. Goldie (eds.), *The Cambridge History of political thought 1450-1700*, p. 477-557.

problem was the lack of a criterion with which to distinguish true from false. But he asserts that

“[I]f a *criterion* had become available in the physical sciences, this would have been no remedy for the moral sciences, as no true account of the material world will necessarily resolve fundamental moral disagreements. There was thus an empirical basis to the skeptical doubt in the area of morality: it arose from an observation about the beliefs and practices to be found in different human societies, and not from any general considerations about the nature of ethical thinking”⁴.

However, I believe it can be shown that the connection between the epistemological and between the moral and political was regarded, at least by some of the prominent thinkers of this period, as far closer than Tuck suggests. I will try to show that all of the four thinkers this essay looks at, made the connection between a true account of the material world and the validity of their moral and political ideas. Indeed, I believe that to a great degree it is exactly the difference between their epistemological premises that accounts for the differences in their moral and political systems.

A good account of the early modern awareness to the different epistemological approaches that thinkers could adopt (and the consequences for their political theories), was articulated by one of the most important European scholars in the generation preceding to that we will be looking at, the Venetian Paolo Sarpi:

“There are four modes of philosophizing: the first with reason alone, the second with sense alone, the third with reason first and then sense, the fourth beginning with sense and ending with reason. The first is the worst, because from it we know what we would like to be, not what is. The third is bad because we many times distort what is into what we would like, rather than adjusting what we would like to what is. The second is true but crude, permitting us to know little and that rather of things than of their causes. The fourth is the best we can have in this miserable life”⁵.

Although I do not wish to claim any of the four thinkers we will look at followed exactly one of the modes described by Sarpi, I believe each of them

4. R. Tuck, “The ‘Modern’ theory of natural law”, in A. Pagden, *The languages of political theory in early modern Europe*, 1990, p. 109-110.

5. P. Sarpi, *Scritti filosofici e teologici*, 1951, Pensiero 146 - translated by W. Bowsma in his *Venice and the defense of Republican Liberty*, 1968, p. 519-520.

represents an approach that can indeed be broadly said to correspond to one of the modes. Moreover each of them followed the same mode in treating both epistemological as well as political problems, and did not separate the two. Thus my work on these four thinkers has led me to conclude that the two allegedly separate problems of epistemological and of moral uncertainty, were seen by them as connected, indeed to a great extent as one and the same thing: They all believed, that our understanding of how individuals know things, determines our views of their moral, social and political attributes and capabilities. I hope to show how, as a consequence, their moral, political and legal theories (with varying degrees of explicitness), were based on and followed from clear epistemological assumptions they made. This essay will try to trace the connection between their epistemological assumptions and the political theories they developed, rather than provide a comprehensive account of those theories. I will look at the ideas of Grotius, Hobbes and Filmer, with a special emphasis at the connection between their political thought and their epistemic approach. These thinkers, who all knew Selden's work, like him developed and put to paper their main political ideas, between 1620 and 1640 (although both Hobbes and Filmer, only had theirs printed in the 1640s and 1650s). These circumstances will allow us to put Selden's ideas into the context of the early modern debate on the foundations of the political order, and to better understand many of the issues he was addressing.

INTERACTIONS

Before turning to the ideas of each of the four thinkers, it is useful to have a brief look at the degree of mutual acquaintance between them, showing the extent to which they were all addressing similar themes and ideas. There certainly was a level of interaction between these thinkers, social as well as intellectual: They often moved in similar circles (Filmer and Selden in the Inns of Court of 1620s London; Grotius and Hobbes in the intellectual circle around Marin Mersenne of 1640s Paris), and several of them read and commented on each others' works, either in private or in public. Grotius was the first among them to gain recognition for his work, especially his *Jure belli ac pacis*, which we know each of his three contemporaries to have read carefully. The same is true for Selden's *Mare clausum* and *Jure naturali*, as well as for Hobbes' *De cive*. Filmer on the other hand, as far as is known was not read by the other three (though both Selden and Hobbes could in theory have done so, in the early 1650s), but he did write and comment extensively on the others' works (less on Selden than the other two).

In April 1643 Grotius mentioned in a letter to his brother that he had seen Hobbes' *De Cive*, and found that he could not approve of the "foundations"

upon which its arguments rest, like that “by nature there is war between all men”, although he does approve of what it says “on behalf of kings”, explicitly connecting it with the King’s cause in England⁶. Interestingly, Filmer, opened his 1652 pamphlet *Observations concerning the originall of government, upon Mr Hobbs Leviathan, Mr Milton against Salmasius, H. Grotius De Jure Belli* with something not unlike Grotius’ comment:

“With no small content I read Mr. Hobbes’s book *De Cive*, and his *Leviathan*, about the rights of sovereignty, which no man, that I know, hath so amply and judiciously handled: I consent with him about the rights of exercising government, but I cannot agree to his means of acquiring it. It may seem strange I should praise his building, and yet mislike his foundation; but so it is, his *Jus Naturae*, and his *Regnum Institutivum*, will not down with me: they appear full of contradiction and impossibilities; a few short notes upon them, I here offer, wishing he would consider whether his building would not stand firmer on the principles of *Regnum Patrimoniale*”.

Thus we find both Grotius and Filmer agreeing with Hobbes’ argument about the absolute power of the sovereign ruler of the polity (*De cive*, Part II chapter 6 sec. 20), while disagreeing on its foundations – Grotius disagreed about the character of the state of nature, Filmer about the polity and sovereignty being founded on consent. At the time this was not a merely theoretical argument, for, as Grotius indicated, it touched directly upon the actual conflict that was unfolding in England between King and Parliament – a conflict in which these three important thinkers evidently sided with the former. Not incidentally we find John Selden (who definitely owned Hobbes’ *De cive* by 1643), on the opposite side of the dispute, siding, albeit reluctantly, with the parliamentary side. This position was not a mere expedient, born out of opportunistic calculation, but an outcome of the fundamental divergence between the purpose of Selden’s political thought and that of his three contemporaries. While for Grotius, Filmer and Hobbes constitutionalism was dead, and thus an alternative framework for politics, centering on the will of the sovereign, was now needed, Selden remained a life-long defender of constitutionalism, and especially of its English version. When all efforts to divert an armed conflict had failed, Selden justified his reluctant siding with the Parliamentary side in this conflict, by his assessment that with one had the slightly better constitutional justification. During the civil war he continued to be prominent in the small group in the commons that was forever trying to find a settlement that would be acceptable to the parties in the conflict; in late 1648 when Selden and his allies had apparently succeeded

6. Quoted in R. Tuck, *Philosophy and Government 1572-1651*, p. 200.

in persuading a majority of MPs to pursue a negotiated settlement, they were finally “purged” from parliament by the army. Selden’s political career had ended, England had entered a path leading to the execution of the king and to military dictatorship⁷.

GROTIUS

As we shall see below, the characteristics of Hugo Grotius’ system as well as the comprehensiveness that he attempted to impart to it, demonstrate his intention to present an alternative to the scholastic system. He admits as much explicitly, when he makes clear his ideas should be understood as an attempt to break free from the framework of scholastic Aristotelianism, which, he asserts, in the name of that great man had for some time “degenerated into Tyranny, so that Truth, for the Discovery of which *Aristotle* took so great Pains, is now oppressed by nothing more than the very Name of *Aristotle*”⁸.

Grotius’ political theory, as presented in his *Jure belli*, proposes that the comprehensive system of correct rules for individual, political and international action (what he calls, Natural Law), can be derived from a small number of simple principles, with both the identification of the principles and the manner of their implementation, are performed by the individual’s rational capacity⁹.

Although Grotius postulates an “impelling desire for society” as a fundamental factor of human motivation (there is also a desire for self-preservation, but not restricted to humans only) he makes sure to subject this impulse too to the rule of reason, by asserting that “human intelligence”, which draws out its meaning, is the source of the law¹⁰. The individual derives the law from nature by his exercise of rational “judgment”, and by that law has also the right to carry out his judgment. Since there are practical difficulties with the implementation of natural law and

7. See R. Tuck, “Grotius and Selden”, in J.H. Burns & M. Goldie (eds.), *The Cambridge History of political thought 1450-1700*, p. 528-529, and G. Burgess, *The Politics of the Ancient Constitution*, 1992, p. 95.

8. H. Grotius (Trans by F.W. Kelsey), *Jure belli ac pacis*, 1925, prolegomena sec. 43

9. The five principles of natural law identified by Grotius are: “the Abstaining from that which is another’s, and the Restitution of what we have of another’s, or of the Profit we have made by it, the Obligation of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men”. See H. Grotius, *Jure belli ac pacis*, prolegomena sec. 8.

10. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 7-8.

judgment, men “consent” to associate into political societies, and these political societies in their turn consent to associate into the “society of states” – however the foundations for the identification of natural law and the legitimacy of carrying out its judgment always remain in individual reason¹¹.

The role of the individual’s rational faculty is so fundamental for Grotius, that he regards it as not only the source of discerning and implementing law, but also as the basis for obligation. That is, the individual’s realization of the law and of the necessity of human cooperation, is supposed to make him accept its authority as well as the authority of the political society and its magistrates, created to implement its judgments¹².

The exclusivity of rational understanding and its judgment as the sole source of obligation is so important for Grotius, that he denies the legitimacy of any other possible sources of obligation by explicitly stressing that the judgment of reason must not “be corrupted either by Fear, or the Allurements of present Pleasure, nor be carried away violently by blind Passion. And whatsoever is contrary to such a Judgment is likewise understood to be contrary to Natural Right, that is, the Laws of our Nature.” It is in this context that Grotius’ notorious statement, proposing his theory would hold true even if one would grant “that there is no God, or that he takes no Care of human Affairs”, becomes clear – for otherwise his theory of law and obligation would become contingent on the individual’s belief, and thus annul the universal scope upon which it is founded¹³.

For Grotius’ theory of obligation to function, the rulings of rational judgment that it advocates must be as inevitable and self-evident as mathematical rules, and indeed he explicitly makes the analogy between the two: “For I profess truly, that as Mathematicians consider Figures abstracted from Bodies, so I, in treating of Right, have withdrawn my Mind from all particular Facts”¹⁴. By identifying his theory of law and obligation, with mathematical truths requiring no outside validation, Grotius attempts to make it so independent and self-contained that it is insulated not only from objections that might arise to the existence of a providential deity, but even from the possibility of divine intervention: “the Law

11. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 8-9, 16.

12. Grotius argues that since it is necessary among men that “there be some method of obligating themselves one to another”, and no other “natural method” could be imagined between independent reasonable beings other than “pacts”, that is contracts, “the bodies of municipal [that is, political] law have arisen”. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 15.

13. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 9-11.

14. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 59. See also sec. 31.

of Nature is so unalterable, that God himself cannot change it. For tho' the Power of God be infinite, yet we may say, that there are some Things to which this infinite Power does not extend, because they cannot be expressed by Propositions that contain any Sense, but manifestly imply a Contradiction. For Instance then, as God himself cannot effect, that twice two should not be four[.]”¹⁵.

Grotius is aware that his claim for the truth of his theory being self-evident, might be cast into doubt by the pointing out that the rational faculty upon which he erects his whole theoretical system does not seem to be so much in display among men, as one would hope. His answer is to argue that indeed there are men who do not display the full powers of right reason, but that should not bother us too much, for the minds whose reasoning is “more subtle and abstract” can prove what the law of nature is “*à priori*, that is, by Arguments drawn from the very Nature of the Thing”, but the less reasonable, “more popular” minds can be brought to comprehend it eventually, “*à posteriori*, that is, by Reasons taken from something external.” Grotius is confident that the unchangeable law of nature can be discerned by all men “who are of a right and sound Mind”, and we should not be bothered too much with those who are unable to do so, for they evidently are men of “weak and disturbed Judgments [.]”¹⁶.

To sum up, Grotius’ attempts to replace the scholastic approach to morality and politics with a new mathematical-like theory, based upon the capability of the individual, by use of his reason, to identify natural law, judge its applicability in particular cases, and execute its verdict. Moreover he supposes the same reasoning faculty provides a sufficient basis for obligation. Plainly, his theory is founded upon the epistemological presupposition that by adequately exerting their faculty to reason, men can know the world around them sufficiently; and that this faculty endows them with such a degree of understanding, that they are capable to rightly judge and execute the verdict of the law of nature – including cases involving moral issues, and even up to the taking of another man’s life. Indeed, this personal faculty of individuals is to a great extent the basis for the creation of the political community. Because of the obvious problematic aspects of a man judging in his own case, the community is created by the selecting of magistrates capable of judging, and by the transferring of the right of punishing enjoyed by every individual in the state of nature, to the community and its agents.

With this avowed supremacy of *a priori* reason, what role is there then, if at all, to non-rational factors like experience or tradition, in Grotius’ system?

15. H. Grotius, *Jure belli ac pacis*, book I sec. 10:5.

16. H. Grotius, *Jure belli ac pacis*, book I sec. 12:1-2.

Ultimately, very little, it appears. Grotius certainly supports the use of such instruments as “tradition” or various practical proofs to support belief in the existence of providence; and of “expediency” as “reinforcement” for the political law based on individual rational consent¹⁷. But in all cases, as in his use of *a posteriori* arguments to convince “weak” minds, Grotius views the use of *a priori* rational arguments as the true epistemological and political basis for human understanding and obligation, with anything outside it a only lending support to the rational foundation (thus following the third of Sarpi’s modes, with reason first and then sense).

HOBBS

Of all the thinkers treated here, Thomas Hobbes articulated the most systematic and explicit theory of knowledge, on which he based his political thought¹⁸. Moreover, his system can be most directly connected with the new epistemological claims of his period: it appears that it was in the second half of the 1630s, influenced by acquaintance with the ideas of Galileo and Descartes, that Hobbes became interested in philosophical subjects and especially in the new epistemology, and went on to organize his ideas in a tripartite scheme dealing with body (physics and metaphysics), man (epistemology), and citizen (politics). By late 1640 Hobbes had left England for France, fearing that the newly assembled English parliament might penalize the author of the ideas articulated in manuscript copies of his *De cive* that were then circulating, describing the political consequences of his epistemological principles¹⁹.

17. H. Grotius, *Jure belli ac pacis*, prolegomena sec. 11, 16-17.

18. Hobbes was undoubtedly aided in the production of his systematic theory of body, man and politics, by the fact that he was almost constantly employed by three successive generations of the Cavendish family, which made him something quite similar to what would today be a tenured academic – and a bachelor at that. Meanwhile, his contemporaries discussed here had to navigate their intellectual activity between economic uncertainty, marriage, and political involvement that landed each of them in jail for some period. Their epistemological assumptions have to be identified from comments scattered through their works. For the sake of equity, I have adopted here the same approach to Hobbes, excerpting his ideas on the subject from his political works.

19. See Noel Malcolm’s entry for Thomas Hobbes in *The Oxford Dictionary of National Biography* – internet edition (accessed 15 May 2010). In Paris Hobbes joined the group around Marin Mersenne, and wrote a critique of Descartes’ *Meditations on First Philosophy* (printed third among the “Objections” appended with “Replies” from Descartes, in the 1641 edition). An additional set of remarks by Hobbes on other works by Descartes succeeded only in ending all correspondence between the two.

Hobbes' hostility to scholasticism is one of the most conspicuous features of his work, and in *Leviathan* he attacks, again and again, "the Philosophy-schooles, through all the Universities of Christendome, grounded upon certain Texts of Aristotle" (most often for what he describes as "insignificant Speech")²⁰. His theory, based on an explicitly materialist, sense-based epistemology, he regarded as an alternative to scholastic ideas, that could also overcome what he saw as the failings and the contradictions of theories (like Grotius') based on *a priori* rational reasoning:

"Concerning the thoughts of man, I will consider them first singly, and afterwards in train or dependence upon one another. Singly, they are every one a representation or appearance of some quality, or other accident of a body without us, which is commonly called an object. Which object worketh on the eyes, ears, and other parts of man's body, and by diversity of working produceth diversity of appearances. The original of them all is that which we call sense, (for there is no conception in a man's mind which hath not at first, totally or by parts, been begotten upon the organs of sense). The rest are derived from that original"²¹.

The defining features of Hobbes' political theory were already present in his *De cive*, (published 1642, which both Grotius and Selden owned), although both the theory and its epistemological basis are more fully articulated in *Leviathan*, (1651), which Filmer read and commented on, and which was presented to Selden by Hobbes – this apparently occasioning the latter two's personal acquaintance. Hobbes' theory starts with a pre-political individual whose mind and understanding are defined by his sense experience. Some of the defining features ascribed to this individual are similar to those attributed to him by Grotius, for he is interested in self-preservation, and he is able to reason. However Hobbes' individual not only seems to totally lack the sociable impulse, but in fact his apprehension for his life, pushes him in the direction opposite to sociability: he is suspicious and fearful of others²². More than this, whereas Grotius thought the rational faculty clearly paramount in men, Hobbes sees it as quite uncertain, often overwhelmed by passions, and especially prone to distortion by more or less imagined fears for self-preservation. Thus while Grotius' law of nature is

20. Th. Hobbes, *Leviathan*, part I chapter 1. Among the terms he employs to rebuke the ideas of the "Schoole-men" are "Madnesse" and "Absurdity". See also Th. Hobbes, *Leviathan*, part I chapter 8.

21. Th. Hobbes, *Leviathan*, part I chapter 1.

22. Hobbes explicitly says that: "It may seem strange to some man, that has not well weighted these things; that Nature should thus dissociate, and render men apt to invade and destroy each other" – an obviously anti-Grotian comment if there ever was one. See Th. Hobbes, *Leviathan*, part I chapter 13.

a comprehensive system of layer upon layer of rules, rationally harmonizing a number of principles and interests, Hobbes' law of nature consists of one lone preoccupation: "[T]he *Law of Nature*, that I may define it, is the Dictate of right Reason, conversant about those things which are either to be done, or omitted for the constant preservation of Life, and Members, as much as in us lyes"²³.

How then, from such unpromising premises are men supposed to enter political society and to develop an obligation to it? Hobbes concedes that since all his precepts of nature "are derived by a certain artifice from the single dictate of Reason advising us to look to the preservation, and safeguard of our selves", it is plausible that the deduction of these laws would be so difficult that "it is not to be expected they will be vulgarly known, and therefore neither will they prove obliging". His answer to this problem is that all men, be they never so rude and unlearned, can be expected to understand one simple rule: "That when he doubts, whether what he is now doing to another, may be done by the Law of Nature, or not, he conceive himselfe to be in that others stead"²⁴.

Having established to his satisfaction an effective if crude mechanism for identifying the law of nature, Hobbes goes on to describe an equally minimalist principle justifying the creation of political society and men's obligation to it:

"[V]ery often the same man at diverse times, praises, and dispraises the same thing. Whilst thus they doe, necessary it is there should be discord, and strife: They are therefore so long in the state of War, as by reason of the diversity of the present appetites, they mete Good and Evill by diverse measures. All men easily acknowledge this state, as long as they are in it, to be evill, and by consequence that Peace is good"²⁵.

In other words, men seek peace because they fear for their self-preservation, and are willing to transfer their absolute natural rights to political society and to be bound to it, as the price for maintaining (internal) peace. What causes men to seek and find each other, what brings them together, what rules them and binds them, is always and only one thing: "Feare of some evill consequence upon the

23. Th. Hobbes, *De cive*, chapter 2 sec. 1.

24. Th. Hobbes, *De cive*, chapter 3 sec. 26. A similar point is made in the *Leviathan*, where he asserts that the "similitude of the thoughts, and Passions of one man, to the thoughts and Passions of another" so that he who truly looks into himself "shall thereby read and know, what are the thoughts, and Passions of all other men, upon the like occasion." See Th. Hobbes, *Leviathan*, part I Introduction.

25. Th. Hobbes, *De cive*, chapter 3 sec. 31.

rupture.” More than this, Hobbes even goes so far as arguing that fear and anxiety from what the future might hold, are the “Natural seed of *Religion*”. Predictably, like Grotius, Hobbes takes care to protest, too much, but not very convincingly, of his theory’s adherence to theism in general and to Christianity in particular. In truth Hobbes’ system has neither the necessity nor the place for a deity or for providence. It is only fear for one’s physical life and welfare, both in the immediate and in the more general sense that is the real origin, the preserver and the end of Hobbes’ political society²⁶.

Thus, while Grotius’ rationalist epistemology produces a political society based throughout on rational consent – including grounds for obligation so exclusively rational that make him regard any judgment of reason “corrupted” by fear or passion as “contrary to Natural Right, that is, the Laws of our Nature” – Hobbes’ unabashedly materialist epistemology, produces the very opposite premises for political society, where fear is the very core of community and obligation.

It is for this very reason that while Hobbes regards society as founded upon a contract of mutual self-preservation between all individuals, political authority itself is not based on a contract, but on the unconditional handing-over of supreme power to the ruling authority (be it an individual or a council) – since the essence of political authority remains the ability to have the unfettered coercive power that instills fear in any who would consider opposing it.

Hobbes, in attempting to create an epistemology based on sense only, and a political theory following from it, finds that since it is all dependent on the body as repository of the senses, then the beginning and end of such a sense-oriented approach, is necessarily the fear of physical destruction (thus following the second of Sarpi’s modes, with sense alone)²⁷.

26. Th. Hobbes, *Leviathan*, part I chapters 12 and 14. Hobbes fear for the fate of one’s soul as the natural basis for religion, has some similarity to the sense of equity which in Selden’s theory brings men to believe in providence and to keep their obligations – but for Selden this sense is about hope (for justice and a good future) at least as much as about fear. Since fear is the only source of obligation, Hobbes would have even promises extracted under duress to be generally obliging, for they are simply a particular instance of the fear which motivates all of men’s obligations. See Th. Hobbes, *De cive*, chapter 2 sec. 16.

27. See discussion in R. Tuck, *Philosophy and Government 1572-1651*, p. xvii.

FILMER

For more than 300 years, (and thanks in no small part to John Locke's famous distortion of his views), Sir Robert Filmer was caricatured as an unsophisticated and narrow proponent of absurd political ideas. In recent decades this depiction of his thought has begun to be replaced by a more accurate representation, one that incidentally also accounts for the need of important thinkers like Locke and Algernon Sidney, to devote significant efforts to refuting Filmer's ideas. In truth Sir Robert was a serious thinker, who possessed unusual critical abilities and did not shirk from thoughtfully challenging even the most widely accepted political assumptions. He displays an ability to discuss foundational issues of political thought lucidly and to sharply expose basic fallacies in arguments he opposes – especially those pertaining to natural rights, consent and social contract theories²⁸.

Filmer's belief that his ideas directly oppose the scholastic outlook emerges in the very opening paragraph of his most important work, *Patriarcha*, where he describes the origin of the outlook he was set against, as the widespread belief in an original absolute self-sovereignty and freedom of individuals. He then goes on to explain that:

“This tenet was first hatched in the schools, and hath been fostered by all succeeding Papists for good divinity. The divines, also, of the Reformed Churches have entertained it, and the common people everywhere tenderly embrace it as being most plausible to flesh and blood, for that it prodigally distributes a portion of liberty to the meanest of the multitude, who magnify liberty as if the height of human felicity were only to be found in it, never remembering that the desire of liberty was the first cause of the fall of Adam”.

Filmer regards this idea as absurd as well as false, and as such conducive to theoretical confusion and political instability. Those who adopt it, he believes, condemn themselves to perpetual unrest and unsettled authority. As evidence of the success of this pernicious idea, he points to the fact that even his contemporaries who wrote tracts upholding the rights of kings, usually conceded an original natural freedom – as was indeed the case even with Hobbes²⁹.

28. C. Cuttica, *Adam...the father of all flesh: An intellectual history of Sir Robert Filmer (1588-1653) and his works in Seventeenth-century European political thought*, PhD Thesis, European University Institute, 2007, p. 44-46.

29. R. Filmer, *Patriarcha*, chapter 1 sec. 1. See above in this essay, the quote from the opening of Filmer's *Observations Concerning the Originall of Government* (1652), criticizing the “foundation” of

Only relatively recently (in 1989) it was established that an early version of *Patriarcha* (published posthumously in 1680) had been denied permission for publication in early 1632, thus establishing the circumstances of the text's composition to around the late 1620s and early 1630s, and specifically to the public debate surrounding the 1629 petition of right and the subsequent attempt of Charles I to rule without Parliament. The issue is important, for it points to the context and the object of the work's composition³⁰. Although all of Filmer's later political works rely to a great extent on the theoretical framework of *Patriarcha*, he employed these works to address ideas by other thinkers as different as Aristotle, Bodin and Philip Hunton. Particularly relevant for our purpose is his *Observations concerning the Original of Government upon Mr Hobbes's Leviathan, Mr Milton against Salmasius, and H. Grotius' De jure belli ac pacis* (1652). The work, treating the political writings that Filmer regarded as most influential in England at that time, also touches on Selden's ideas, and presents a serious critique of many of the fundamental political assumptions of Sir Robert's opponents.

Perhaps the most important aspect, certainly the least understood, of Filmer's theory, is that it stands on a firm and coherent epistemological approach. This approach combines an absolute metaphysical certainty, with an extreme skepticism about men's knowledge of the physical world. That is, Sir Robert argues that men can achieve an absolute knowledge of metaphysical truth, while at the same time being utterly unable to attain any certain knowledge about truth in the physical world surrounding them – certainly so in things concerning political issues. Filmer achieves this unusual combination by taking some traditional Christian notions their most extreme, if seldom acknowledged, conclusions. He takes the idea of the fall of man making redemption possible only through Christ, directly into the realm of political ideas, to make the material world into one of utter confusion, deception and sin – thus refuting the possibility of individuals ever achieving by their own devices any certain knowledge about it. But, having set up these premises, unexceptional in Christian terms, he then goes on a path of his own. Instead of arguing for the role of faith or of the church in guiding men in the fallen world, he sets up as the cardinal Christian and human virtue, indeed for him pretty close to the only virtue – the absolute obedience to authority.

Hobbes theory in natural liberty, while agreeing with its conclusions about the "rights of sovereignty." See also discussion in G. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England*, 1975, p. 37-38, p. 41-42.

30. On the time and context of composition see C. Cuttica, *Adam...the father of all flesh: An intellectual history of Sir Robert Filmer (1588-1653) and his works in Seventeenth-century European political thought*, p. 166-168.

Obedience to paternal authority, of course, and to other duly established authorities too, but first and foremost obedience to the king and his delegates, is for him the only epistemological tool that men are capable of adequately mastering. That this very issue, of personal moral responsibility versus obedience to royal authority, was present in early 17th century public discourse is easily illustrated by a quote, already referred to at the beginning of this essay, from Shakespeare's Henry V (Act IV scene 1), where a soldier directly asserts that obedience to the king's orders wipes away any moral transgression by the one following the order: "for we know enough if we know we are the king's subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us." In the play, King Henry dissents from this view, and upholds personal moral responsibility. But the quote clearly shows that the argument that would be used by Filmer was regarded as cogent enough to require an answer.

Taken to its logical conclusion, such an approach means that obedience takes precedence, indeed is superior to all other obligations. This is exactly Filmer's view, so that obedience to political authority becomes for him coterminous with obedience to the law of God, and as such takes precedence even over obedience to the teachings of the church or to one's conscience. As he says explicitly (*Patriarcha*, chapter 3 section 7):

"Here is a fit place to examine a question which some have moved, whether it be a sin for a subject to disobey the king if he command [sic] anything contrary to his laws? For satisfaction in this point we must resolve that not only in human laws, but even in divine, a thing may be commanded contrary to law, and yet obedience to such a command is necessary. The sanctifying of the Sabbath is a divine law; yet if a master command his servant not to go to church upon a Sabbath Day, the best divines teach us that the servant must obey this command, though it may be sinful and unlawful in the master; because the servant hath no authority or liberty to examine and judge whether his master sin or no in so commanding; for there may be a just cause for a master to keep his servant from church, as appears Luke xiv. 5. Yet it is not fit to tie the master to acquaint his servant with his secret counsels or present necessity; and in such cases the servant's not going to church becomes the sin of the master, and not of the servant. The like may be said of the king's commanding a man to serve him in the wars: he may not examine whether the war be just or unjust, but must obey, since he hath no commission to judge of the titles of kingdoms or causes of war; nor hath any subject power to condemn his king for breach of his own laws".

While the idea of human fallibility being redeemed only by faith was by no means uncommon, as it undergirds to some degree or other all Christian political

and social thought, it is hard to find any thinker that is willing to go as far as Filmer in justifying such extreme obedience at any cost. Indeed, as Filmer explicitly acknowledged, the early late 16th and early 17th century witnessed a steep increase in writings, penned by thinkers of both Catholic and Protestant persuasions, justifying political disobedience in the name of Christian faith. One is hard-pressed to find precedents to Filmer's theory of absolute obedience, for even in those Christian texts urging political obedience, like Romans XIII, or Luther's pamphlets of 1525 *Against the Rioting Peasants* and *An Open Letter on the Harsh Book Against the Peasants*, such an extreme form of obedience is at most implied³¹.

Obviously, Filmer's political idea of absolute obedience directly stems from his epistemological claim that men have not the faculty to judge the decisions of their superiors, and especially the king's. Even leading men, in title or office, whatever their wisdom, have in his view no authority at all to doubt the monarch's decisions. Thus it is the king alone has the authority and responsibility to wield political power. Indeed, in Filmer's theory even the king himself lacks the faculty to truly discern God's inscrutable intentions, and at best can only hope that his intentions and actions are sanctioned by divine will. The king certainly has a somewhat better grasp of the affairs of state than other individuals, but the only essential difference between king and subject is one of responsibility, not of knowledge or understanding. By the nature of his office, the king enjoys from God an absolute authority over his subjects, and responsibility for their material and spiritual welfare – a responsibility about which he will have to answer to God. However, this authority and responsibility are inherent only in the power of the monarchical office, not in the qualities, the right or other characteristics of the one possessing the office. This idea is most evident when Filmer comes to justify the mere possession of power as the one and only criterion for judging the legitimacy of a ruler³².

Two serious problems follow directly from Filmer's theory of absolute obedience. The first arises because though Filmer claims his approach stems from natural sources of political power, his writing assume that the ruler is a virtuous

31. R. Filmer, *Patriarcha*, chapter 3 sec. 7. On the affinity of Filmer's theory with Lutheranism see L. Ward, *The politics of liberty in England and revolutionary America*, 2004, p. 28-29. See also C. Cuttica, *Adam...the father of all flesh: An intellectual history of Sir Robert Filmer (1588-1653) and his works in Seventeenth-century European political thought*, p. 74-75.

32. R. Filmer, *Patriarcha*, chapter 1 sec. 6, and see discussion in C. Cuttica, *Adam...the father of all flesh: An intellectual history of Sir Robert Filmer (1588-1653) and his works in Seventeenth-century European political thought*, p. 74-75, p. 258-259.

(or at least nominal) Christian. What if the ruler holds heretical views or if he is simply not a Christian at all? In this case absolute obedience, born to ensure the subject follows the truth of the Christian Gospel, may become the instrument destroying that very truth. The second problem emerges in periods of political instability, when power is disputed and obedience is demanded from the subject by more than one claimant. In such a case complete passivity is not an option since every action or inaction becomes a potential for disobedience, and the individual is left in an inescapable theoretical quandary – as indeed happened to Filmer himself in England's civil war. In order to counter resistance theories based on claims to an original liberty of individuals, Filmer developed a theory based on *a priori* reasoning only. He identified the principle of absolute obedience preached by Christian Gospel, and followed it so completely, that he does not allow any possibility of experience or contingency to impinge the totality of obedience. But if circumstances arise where absolute obedience is impossible, or is directly contrary to the preservation of Christianity, Filmer's theory becomes self-defeating (thus following Sarpi's first mode, from reason only).

SELDEN

John Selden was deeply involved in contemporary intellectual discourse, epistemological as well as moral and political. He was an early owner of Descartes' *Discourse on the Method* (1637), had carefully read and commented upon Grotius' *Jure belli* by 1635, and owned Hobbes' *De cive* by 1643 at the latest (a manuscript version was in wide circulation since 1640). Although there is no record of it, it is likely Selden would have had at least some acquaintance with Filmer and his ideas, since they frequented the same social and cultural circles, including their mutual friend and intellectual companion, Sir Roger Twysden³³.

33. For Selden's acquaintance with Descartes' and Hobbes' works, see R. Tuck, *Philosophy and Government 1572-1651*, p. 214-215. On Twysden and his ideas see for example G. Burgess, *Absolute Monarchy and the Stuart Constitution*, 1996, p. 142-146. Sir Roger Twysden (1597-1672) was a Kentish lawyer and scholar as well as an MP, who in the struggle between king and parliament held a centrist view, at first siding with parliament, later arguing against the resort to force against the king in his *Certaine considerations upon the government of England* (c. 1648). Filmer was an early acquaintance of Twysden, and wrote for him around 1625 the short *Quaestio quodlibetica, or A discourse, whether it may be lawful to take use for money*. The two remained lifelong friends: Filmer placed the massive sum of 5000 pounds as bail to get Twysden out of imprisonment during the civil war; Twysden brought the *Quaestio* to print in 1653, a short time before Filmer's death. Twysden was also acquainted with Selden, and the two edited together the collection of early English historians *Decem Historiae Anglicanae* (to which Selden also wrote the introduction) – incidentally published in 1652-1653, the very same time Twysden put Filmer's *Quaestio* to print.

However, unlike the previous three thinkers discussed above, who were fashioning their political theories to replace what they saw as a collapsed old order, Selden was attempting something different. Although he too did not shirk from criticizing scholastic ideas and practices, his goal was not to do away with traditional constitutionalism, but rather to repair its foundations, so that the English legal and political system would be solid enough to resist being swept away with other old certainties. His intention was thus essentially conservative, as he believed the common law tradition worth salvaging, while also appreciating that against the new type of political arguments that were gaining ground, a new type of legitimacy would be necessary. He therefore outlined a theory of law that would address the epistemological issue as well as supply a coherent justification for regarding customary law as a legal system that was moral, valuable and indeed preferable to the newly fashioned alternatives.

Although one can find occasional discussions of the issues in works like *Mare Clausum* (1635) and *De Synedriis* (1650-55) as well as the posthumous *Table Talk* (1689), by far Selden's most extensive and systematic treatment of the connection between epistemological outlook and the foundations of government and law is to be found in what has been described as the most "philosophical" of any of his writings, book I of his *Jure naturali*. His discussion of the issues displays what G.J. Toomer has termed an "astoundingly wide acquaintance" with philosophers, theologians and jurists, from ancient, medieval and modern times. The philosophical approach he adopted in this book (unusually for him), allowed Selden while discussing Jewish ideas, to expound his own theory of natural law³⁴.

In the first book of his *Jure naturali* Selden addressed reason-based theory both explicitly and implicitly, and the whole seventh chapter of the book in particular, reads like an intentional rebuttal of the foundations for Grotian ideas. The starting point for Selden's argument is that individual reason is neither sufficient for ascertaining in what natural law consists, nor able to obligate the individual to follow that law, even if he could have ascertained it. Selden's contention is that "uncertainty and inconsistency appear in the unrestricted use of pure and simple reason", and thus pure and simple reason cannot serve as the foundation for men's knowledge and understanding of the world. In short, the process of arriving at accepted notions by pure reason is "so intrinsically inconsistent and dissimilar

34. Toomer proposes that the very origin of the *Jure naturali* was Selden's wish to address the ideas broached by Grotius, the scholar of his generation who he most admired. Toomer correctly points out that Selden undoubtedly himself believed the theory of natural law that he described in *Jure naturali*, for he later reaffirmed it more than once in the *Table Talk*. See G.J. Toomer, *John Selden: A life in scholarship*, 2009, p. 492-493, p. 506, p. 825.

among men that it would be better for nothing to be derived from it". He adds that this basic "uncertainty" in all things arrived at by pure reason, is evident not only among men in general but also (and perhaps even more) among the most learned philosophers, who are ever divided into a plethora of completely opposing disciplines, disagreeing even about the definition of such an essential and basic term as "right reason"³⁵.

After making short shrift of pure reason as the foundation of knowledge, Selden proceeded to argue that regardless of the quality and nature of the knowledge that can be achieved by pure reason, it most certainly cannot serve as the source of obligation. Selden remarks that law is by definition a superior's command, and "sole and simple reason can persuade and prove, but it does not command". He pointed out that reason's inability to obligate was not merely a problem for individuals in their moral actions; it also posed an insoluble predicament in the political sphere, since its result is that nothing would really stand in the way of individuals withdrawing from the civil body when they do not like its commands. In effect the problem with obligation by one's own reason was that it "is not possible for a person to command or prohibit itself"³⁶.

Although Selden was treating here pure reason as it pertains to knowledge of natural law and to obligation, it is evident the same principle, skeptical of *a priori* reasoning, is relevant to all fields of human knowledge. Indeed, Selden himself presented the core of his theory in a manner that is both more condensed in form and more extensive in reach, in a saying recorded by the *Table Talk*:

"When the School-Men talk of *Recta Ratio* in Morals, either they understand Reason as it is govern'd by a Command from above; or else they say no more than a Woman, when she says a thing is so, because it is so; that is, her Reason

35. J. Selden, *Jure naturali*, B1C7 col. 139-140. Hobbes' argument against the possibility of basing human knowledge of laws or political obligation, solely on reason, parallels Selden's on this point: "... But no one mans Reason, nor the Reason of any one number of men, makes the certaintie [sic] ...[a] nd therefore, as when there is a controversy in an account, the parties must by their own accord, set up for the right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature; so is it also in all debates of what kind soever...". Th. Hobbes, *Leviathan*, chapter V.

36. J. Selden, *Jure naturali*, B1C7 col. 140-141. That Grotius himself was aware of this problem, is made abundantly clear by the significant efforts he devoted in Book I, chapters 3-4 of *Jure Belli* to attempts at circumscribing those cases in which men could, by use of their right reason, resort to their right of resistance and rise against their rulers. But these very attempts prove that his system could not escape individual right reason remaining as the final judge for one's submission or resistance.

perswades her 'tis so. The other Acception has Sense in it. As take a Law of the Land, I must not depopulate, my Reason tells me so. Why? Because if I do, I incur the detriment"³⁷.

Having demolished to his satisfaction the claims of knowledge and obligation from pure reason, Selden then proposed an alternative framework of knowledge and obligation. Since his epistemological theory assumes that individual reason is insufficient as a tool for identifying and understanding natural law, he had either to give up such knowledge altogether, or to propose an alternative path to it. In fact he proposed not one but two such possible paths: one is tradition; the other is an Aristotelian concept termed "Intellectus Agens" – active intellect³⁸.

The "active intellect" is an intellectual agency existing outside of individuals, to which some might gain access in certain circumstances – like revelation, or at least inspiration, leading to truth. However, since for regular human beings this is at most an uneven and unpredictable ability, it cannot be relied upon to direct men's affairs in a regular way; we may hope for it to appear, and when it does we should record it, so that we and others may usufruct of it in the future, but we have no certainty about when and how it might appear. The result is that ultimately, we have free and regular access only to records of past manifestations of active intellect. For Selden the divine light can be apprehended not only through direct revelation, but also through the study of historical records of it, as well as other providential events in history – events to be found not only in the records of Biblical revelation, but also through other records of human affairs. Thus, in the absence of direct revelation, tradition as accumulated human knowledge is left as the only effective method by which men can garner truth in any regular and consistent way: either through the accumulated record of men's regular past trials and failures, or through the recorded instances of those more irregular special cases when a higher truth illuminated the path of mankind through direct revelation or more indirectly by way of the active intellect³⁹.

37. J. Selden, *Table Talk*, section on "Reason".

38. That this was understood by contemporaries to be Selden's position, is best illustrated by Nathaniel Culverwel's (1618-1651) posthumous *An elegant and learned discourse of the light of nature*. Published in 1652 (while Selden was still alive), it attempted to present a system of rational theology, which would include natural law. Its position towards Selden's epistemology is evident in the name of the eight chapter: "*How the Law of Nature is discovered? Not by tradition nor an Intellectus Agens*". See J. Rosenblatt, *Renaissance England's chief rabbi: John Selden*, 2006, p. 203-204.

39. The crucial role of the active intellect is for Selden in the distinction between the capability of every man to understand the principles of natural law, and the acquiring of such knowledge. Selden holds that the capability of understanding exists in all men, but that actually acquiring it requires certain circumstances. He connects these circumstances to the concept of the divinely inspired

The central role of tradition was reiterated by Selden, in some form or other, throughout his works. Its epistemological basis is made most explicit in the *Table Talk*, where he is recorded as arguing that “[s]ay what you will against tradition; we know the signification of Words by nothing but tradition.” Elsewhere the same book witnessed a more expanded consideration on the issue of knowledge and meaning:

“Tis a great Question how we know Scripture to be Scripture, whether by the Church, or by Man’s private Spirit. Let me ask you how I know any thing? how I know this Carpet to be green? First, because somebody told me it was green; that you call the Church in your Way. Then after I have been told it is green, when I see that Colour again, I know it to be green; my own eyes tell me it is green; that you call the private spirit”.

For all the difficulties involved in discerning old errors from truths, tradition is thus indispensable for connecting between words and things, to establish meaningful knowledge⁴⁰.

However Selden’s view did not simply amount to the adoption of a nominalist position, by which received knowledge would be absolute and arbitrary. For this would amount to simply regarding all received traditions as self-justifying, and to denying value to any epistemological or moral principle found outside of it

active intellect posited by Averroes (Ibn Rushd). According to this concept, mens eyes can see the truth only when darkness is illuminated by divine light (and the metaphor of the eye that is capable of vision, but sees only when a candle is lighted, is explicitly used by proponents of this theory). To illustrate this point Selden uses the analogy of men knowing the discipline of geometry: men know it through learning the principles and explanation of this discipline as brought in Euclides; if individuals needed to acquire this knowledge only through their own devices, it is quite probable that more or less no one, would be able to. This theory supplies also Selden with an answer to the problem of the knowledge of natural law among societies and peoples that have no records of Biblical revelation – indeed he regards the records of activity by exemplary, semi-mythical figures, outside the Judeo-Christian tradition (like the Greek Nymphs or the Roman king Numa), as examples of the action of divine providence among all men. S. Caruso, *La Miglior Legge del Regno*, 2001, 2vols., p. 718-725.

40. J. Selden, *Table Talk*, sections on Tradition; Bible, Scripture; Power, State. The section on tradition continued thus: “You will say the Scripture was written by the Holy *Spirit*, but do you understand that Language ‘twas writ in? No. Then for Example, take these words, [*In principio erat verbum.*] How do you know those words signifie, [*In the beginning was the word,*] but by Tradition, because some Body has told you so?”. See also in the same vein in the section on Prayer: “‘Tis not the Original Commonprayer-book; why: shew me an original Bible, or an original *Magna Charta*.”. And section on “Humane invention” ending with “...I am sure the newer the Invention the worse, old Inventions are best.”

– in other words, a position of complete relativism. This was clearly not Selden's position, for he insisted that some kind of natural or universal moral law can be discerned by men, by a combination of past traditions and present experience. Even his remark quoted above bears this out, as after having been told the carpet is green he adds – “when I see that Colour again, I know it to be green; my own eyes tell me it is green”. That is, to be true, the received meaning of the color “green” has to be consistent with what his “own eyes” tell him. In other words, he holds that men have to keep looking at the relationship between words and meanings, between traditions and one's experience of the world around him, to see what is borne out, and what does not hold up to scrutiny⁴¹.

What is then for Selden the truth outside of tradition, and how is it discovered? Selden proposes that there is only one intuition, and a principle following from it, which can be said to be found in all men, completely independent of tradition – and therefore are the closest thing in his theory to a natural or universal law. The intuition existing in all men at some level is, according to Selden, that there is some kind of principle of justice and equity active in the universe – what the more sophisticated human societies have termed as “there is a God and he deals with recompense”. From this metaphysical intuition of equity (that is, the supposition that equity extends beyond the span of an individual's life and time), follows for Selden the one universal principle that all men can be expected to recognize, and can be held to account for breaking: “Fides est servanda” – promises have to be kept. Thus, Selden establishes that reason by itself cannot establish natural law, first because it is uncertain even about the most basic questions like what right reason is, second because even if there was agreement among men about definitions this would not impose obligation. There is nothing to prevent men from observing or not some laws, except for some outside authority, ultimately founded on the existence of a providential equity, ordaining that one's obligations have to be kept⁴².

From this minimalist natural law, Selden holds, follow the principle of obligation to oaths, promises and pacts, as well as the human quest for the moral precepts one has to keep in order to abide by the rules of providential equity.

41. This point is importantly discussed in D.S. Berkowitz, *John Selden's formative years*, 1988, p. 73-73 and S. Caruso, *La Miglior Legge del Regno*, p. 492-493, p. 780-789. Most interesting is Caruso's definition of words in Selden's view as is intersubjective (“Intersoggettivo”) and socio-historical – conventional not as an arbitrary invention, but as a convention supported by a tradition. See S. Caruso, *La Miglior Legge del Regno*, p. 510-511.

42. J. Selden, *Jure naturali*, B1C7. See also discussion in G.J. Toomer, *John Selden: A life in scholarship*, p. 500-501.

These moral principles, against which particular traditions are to be judged for their validity, are identified by Selden once again by tradition: the tradition of Noahide precepts given to all humanity by God after the flood, preserved and transmitted through the ages, in some form by most human societies and traditions, but best of all by the oldest continuous tradition of human affairs and divine intervention – the Jewish one. For Selden, this means that every society can look for the moral principles in their own traditions, but can be aided by comparing it to other traditions, and especially to the Jewish legal tradition⁴³.

Selden's traditionalist epistemology does not necessarily lead to a particular type of political regime, for by itself it tends merely to justify established regimes, be they monarchical or republican (and the longer their existence, the better). However his stress on the keeping of obligations, not only by subjects but by rulers too, does lead to a strictly contractual interpretation of politics, whatever the type of government. Such an interpretation regards the political order as a framework of precise obligations binding all relevant political actors – what we call today a constitution. From such a perspective there are no absolute sovereigns, for every political actor, be he a king, a judge or a member of parliament, is obliged to follow the rules regulating his office, and any change of the rules requires the consent of all the parties to it.

Obviously, Selden's constitutionalist political theory is incompatible with anything like an absolute sovereign of the Filmerian or Hobbesian type, be he monarchic, republican or other. Political claims of the Grotian type, from either right reason or individual consent, are also unacceptable to Selden's theory, for the constitutionalist approach only allows political claims that are either sanctioned within the existing constitution, or accepted by all components of the constitutional order. Moreover, while Selden's *Jure naturali*, does not explicitly criticize Grotius' theory of Natural law, it not only rejects the Grotian pure reason basis for understanding and obligation, but also, as G.J. Toomer has pointed out, it "must have been obvious to Selden's readers" that his theory founding natural law on God's commands is "in direct contradiction" to the famous passage of the *Iure Belli* where Grotius proposed that the law of nature would remain valid even without God's existence. A similar contradiction would have been apparent to those who would have read Hobbes' works published some years after the appearance of Selden's *Jure naturali* – for Hobbes' whole system is ultimately based on the fear for one's life and safety, a view directly opposed to Selden's postulation

43. J. Selden, *Jure naturali*, B1C4 col. 108-109, B1C8 col. 141-142, B1C2 col. 92-93, B1C1 col. 79-80.

of a central role for men's quest for an equity (of divine provenance) that would hold true beyond one's life⁴⁴.

Selden sought to counter theories that would have done away with England's traditional law and constitution. In the theory he developed, a traditionalist epistemology supplied the basis for his no less traditionalist political theory, of strictly contractual constitutionalism. His definition of the equity intuition in all men, and the connection of this intuition with the existence of providence, supplied his theory with a principle of obligation, as well as also denying the possibility of its sliding into relativism. Selden's theory certainly is not irrational, only it begins with tradition as past experience, and goes on to test it by use of current sense and reason ('Thus matching Sarpi' fourth mode, beginning with sense and following with reason).

CONCLUSION

The early 17th century witnessed a widespread intellectual assault on the value of tradition. The assault started on the epistemological front and spread to political theory. Tradition is denied authority in political theories predicated on either absolutism or individual reason, as well as in Hobbes' mix of the two. Hobbes plainly stated that "[w]hen long Use obtaineth the authority of a Law, it is not the Length of time that maketh the Authority, but the Will of the Sovereign signified by his silence..."; and similarly Filmer after asserting that in every state the will of the sovereign power is, by definition, above the law, explained that "[c]ustoms at first became lawful only by some superior power which did either command or consent unto their beginning". Now, the identification of the *origin* of customary laws (in both cases with England's common law clearly intended) as the will of some sovereign power was not in itself necessarily undermining the authority of such law, for this argument was shared by several (though not all) common lawyers, including Selden. The point of contention was rather that views like Hobbes' and Filmer's held the continuing and arbitrary power of sovereign will over all political laws. Selden did not reply to Hobbes' or Filmer's writings, but he did reject the idea of a perpetual arbitrary will, identifying instead another supreme principle of political society, that commitments made must be kept⁴⁵.

44. G.J. Toomer, *John Selden: A life in scholarship*, p. 490-491, and note 8; Th. Hobbes, *Leviathan*, part I chapters 12 and 14.

45. Th. Hobbes, *Leviathan*, Part I Chapter 26, sec. 138-139; J.P. Sommerville (ed.), *Filmer, Patriarchia and other writings*, 1991, p. 44-46. J. Selden, *Jure naturali*, B1C8 col. 150, see also in *Table Talk*, sections on "Law of Nature" and "Power, State".

As we have seen, Grotius' theory too dispensed with tradition. For although both expediency and "unbroken tradition" did appear in his theory, in each case he had ensured that, their appearance supplied arguments only "partly" (tradition) or as "reinforcement" (expediency), with reason always delivering the decisive validation. In short, they embellished his system, perhaps even aided it, but it would not suffer vital problems without them⁴⁶.

While there is no proof that by the time he completed the *Jure naturali* (by late 1639), Selden was acquainted to any significant degree either with Hobbes' or with Filmer's theories, his own theory, on top of rejecting Grotius' epistemology, in effect undermines also the theoretical grounds on which both Hobbes and Filmer attempted to erect their systems. Selden's insistence on the intuition of divine justice as the source for moral obligation seriously conflicts with Hobbes' materialist and self-interested epistemology; while Selden's insistence on the human and contingent nature of politics, is a direct refutation of Filmer's fideistic and patriarchal premises.

Selden strived, from early on in his career, to defend and justify a coherent worldview upholding the necessary and beneficial role of custom in political society—a position we would today call *traditionalism*. As he witnessed increasing attacks on the English legal and constitutional tradition at the hands of rising absolutist and naturalist theories, Selden found himself compelled to find adequate justification for the constitutional tradition of his nation. He thus embarked on a wide-ranging reflection on the nature of customary political and judicial systems, not only within the English context, but as a generally desirable feature of all political societies. The result was the richest and most impressive defense of political tradition to arise in British thought, informing and influencing the more familiar works of later thinkers who draw on him such as Matthew Hale and Edmund Burke.



46. See H. Grotius, *Jure belli ac pacis*, prolegomena sec. 11-17.

Summary :

This essay traces the connection between the epistemological assumptions and the political theory of John Selden, on the background of the theories developed by some of his most prominent contemporaries. I will look at the ideas of Grotius, Hobbes and Filmer – thinkers who knew Selden’s work, and like him developed and put to paper their main political ideas, between 1620 and 1640 – with a special emphasis on the connection between their political thought and their epistemic approach. This review will allow us to put Selden’s ideas into the context of the early modern debate on the foundations of the political order, and to better understand many of the issues he was addressing.

