

# NOTES ON SCOTTISH SOCIAL CONTRACT THEORY

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The history of social contract theory in Scotland displays a number of distinctive features, or “peculiarities” – peculiarities which are the subject of discussion here. Some of these peculiarities have been explored by commentators. Others await consideration. The present notes are intended not as a definitive summary but as a set of pointers to issues that may be considered in a more detailed way.

Of the issues that deserve further exploration, one in particular may be indicated at this stage. In the century or century-and-a-quarter following the Scottish Reformation of 1560, Scotland remained (for good or for ill) a country where the natural law tradition was relatively undeveloped. But this century or century-and-a-quarter was the period when Scottish social contract theory flourished most vividly. How – a historian of ideas may ask – can social contract theory remain coherent in the absence (or relative absence) of natural law? One aim in my notes is to suggest an answer to this question.

In section 1, I offer a short and stereotypic “thumbnail sketch” of how social contract theory is frequently viewed. Sections 2-6 explore intellectual history. Section 7 addresses the question: what may be the conceptual shape of a contractualism that owes little or nothing to natural law? Section 8 carries the story of Scottish social contract theory into the eighteenth century, and section 9 comments on the anti-contractualism of Hume and Smith.

## 1. *Social contract theory: a thumbnail sketch*

My aim in this section is not to prescribe a view of social contract theory. It is to allow comparative points to have a *prima facie* sense. Scottish contractualism partially resembles and – significantly – partially departs from the “norm” that the present section suggests.

A schematic introduction to social contract theory may take the form of a (very) short story. Once upon a time, social relations did not exist: human individuals lived in an asocial state of nature. In that situation, disadvantages (mainly insecurity) outweighed advantages (mainly liberty) and, in consequence, a social contract was entered into.

That is to say, individuals mutually or reciprocally promised to obey agreed-upon rules or laws – on condition that other individuals promised to do the same thing. Through such a mutual promise or contract, a portion of natural liberty was sacrificed and 'civil society' (together with its attendant benefits) came into being. At this point, the short story that lies at the core of social contract theory ends.

Versions of this story have a lengthy history in political theory. Elements of which the story is composed have been presented by social contract theorists in different ways. Not only do accounts of the state nature differ, from theorist to theorist, but the founding contract has taken a number of forms. At one extreme, the contract may be a *pact of association* – wherein there are, strictly speaking, as many mutual promises as there are relations between individuals. At the other, the contract may be a *contract of government* wherein a prospective ruler promises to rule justly (in exchange for the people's obedience) and a people who are to be ruled promises obedience (on condition that the ruler rules in a just way). Between a “horizontal” pact of association and a “vertical” contract of government, a number of hybrid forms may (in the history of ideas) be found. Owing to its frequent occurrence in Scottish theory, one such form may be mentioned here: in II Kings 11:17, the Old Testament speaks of 'a covenant made between the LORD and the king and the people, that they should be the LORD'S people; between the king also and the people'. The first stage in this twofold covenant or twofold contract<sup>1</sup> is a three-party promise between God, 'the people' and the king; in it, God takes the 'the people' and the king through the steps that a contract of government involves. The second stage is a – seemingly secular but, in fact, divinely approved – two-party promise between 'the people' and the king: it is a *contract of government* in the just-described sense. The twofold covenant of II Kings 11:17 is a useful reminder of the complexity that contractualism may display.

To the above schematic comments, I add a note about the relation between social contract theory (as here introduced) and natural law. In a state of nature where social relations are non-existent, natural law is frequently taken (by social contract theorists) to obtain. The “liberty” of the state of nature is, commonly, such liberty as natural law permits; the “insecurity” is seen in terms of proneness to natural law (or natural right) violations. The social contract, itself, is pictured as an attempt to buttress or supplement or, if necessary, modify obligations which natural law enshrines.

Does social contract theory require a “natural law” interpretation, along the lines sketched in the preceding paragraph? If my discussion of Scottish social contract theory makes sense, this question deserves a negative answer. At this stage, however, it is worth our while to notice a difficulty which a rejection of natural law seems to invite. If a state of nature is pictured as a realm where natural law is absent, and only

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1 I use the present occasion to make clear that I use *contract* and *covenant* as conceptually equivalent terms. In both cases, the notion of *mutual promising* is essential. Of course, in non-conceptual contexts, the terms may be have radically different associations. Note, in passing, that the notion of *tacit* promising may lessen the oddness in speaking of a contract/covenant with a (silent) God.

rational choice computations of instrumental advantage are appropriate,<sup>2</sup> arguments about how and why individuals should enter into a founding promise become entrained in difficulties of a “prisoners' dilemma” and “free rider” kind. Stated in more general terms, the laws or rules which result from the social contract and which are essential to 'civil society' lack an adequate foundation. Should we conclude from this that an attempt to sever social contract theory from natural law faces insuperable difficulties? My response is to deny that this is the case – but to construe the fate of a rational choice interpretation of social contract theory as a warning. If contractualism is to be conceptually independent of natural law, an alternative source of normative obligation (a source not vulnerable to “free rider” objections) must be found.

## 2. *Scottish social contract theory: possible sources*

Social contract theory became influential in Scotland during, and in the aftermath, of the Scottish Reformation. But did the did Scottish contractualism have pre-Reformation roots?

Did the social contract theory which emerged at the time of the Scottish Reformation build on previous instances of contractualist thinking? Edward Cowan has claimed that the 1320 Declaration of Arbroath articulates 'the principle of the contractual theory of monarchy which lies at the root of modern constitutionalism'.<sup>3</sup> Such a claim is, surely, too hasty: it assumes that the (frequently conflict-ridden) reciprocity which obtained between early-modern kings and their (leading) subjects may be seen as going forward along contractualist lines. It likewise overestimates the cogency of the Declaration as a theoretical text.<sup>4</sup>

Might *conciliarism* – which saw authority in the church as residing in an ecumenical council – be a source of Scottish contractualist thinking? John Mair (1467-1550) favoured conciliarist views,<sup>5</sup> and Mair taught George Buchanan and (possibly) John Knox. Knox and Buchanan are considered later. Here, however, I note that around 1550 'Buchanan is known to have held...conciliarist ideas partly derived no doubt from Major [Mair]'.<sup>6</sup> There is, I suggest, no reason why conciliarist ideas should not have trickled through to the Scottish Reformation period – but the significance of this

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2 See, for example, J. Hampton *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press 1986) – where Hobbes's conception of the state of nature is rightly or wrongly understood in this fashion.

3 E.J. Cowan *'For Freedom Alone': The Declaration of Arbroath 1320* (East Linton: Tuckwell Press 2003) p. 62.

4 According to the Declaration, 'consent and assent [*consensus and assensus*]' is only one circumstance on which kingship stands: the others are 'divine providence' and 'the succession to his right according to our laws and customs' (ibid. p. 145). Whilst a king who dispensed with *consensus et assensus* might be opposed, according to the Declaration, nothing is said about how resistance is to be justified if a king adopted a providence-based stance.

5 J. Mair 'A Disputation on the Authority of a Council' in M. Spinka, ed., *Advocates of Reform* (London: S.C.M. Press 1959); 'A Disputation Concerning the Authority of the Council over the Supreme Pontiff' in J.H. Burns, ed., *Conciliarism and Papalism* (Cambridge: Cambridge University Press 1997). See, for discussion, F. Oakley 'On the Road from Constance to 1688' *Journal of British Studies* Vol. 1 (1961) and Burns 'The Conciliarist Tradition in Scotland' *Scottish Historical Review* Vol. XLII (1963).

6 Burns 'Conciliarist Tradition' p. 102.

is not to be exaggerated. Scotland in Reformation years was in the grip of a political crisis and swarmed with a host of situation-specific ideas.

If attention is shifted from theory to social practice, a background to contractualism is easier to find. In fifteenth and sixteenth century Scotland, there emerged the tradition or practice of entering into or signing 'bonds' or 'bands'. These bonds were generally *bonds of manrent* given by a 'man' to his 'lord': in exchange for use of land, the 'man' undertook to support the lord should dispute (including armed dispute) arise. Towards the end of the sixteenth century, the notion of *bonds of friendship* – promises to help other signatories on condition that they pursued a common purpose – gained in importance. Signatories to a bond of friendship (unlike signatories to a bond of manrent) were, roughly, 'men of equal status'.<sup>7</sup> It is of interest in the present connection that the first specifically religious bond of friendship was the so-called 'first Band or Covenant' entered into by Argyle and others in December 1557:<sup>8</sup> with this Band, the secular forces supporting the Scottish Reformation started take form.

What importance should be accorded to 'bonds' and 'bands' in the development of Scottish contractualism? A full answer to this question requires that the social roots of manrent be explored. No such explanation is attempted here.<sup>9</sup> Instead, I quote two observations. One is by Wormald who comments that, at the time of the Scottish Reformation, 'every magnate in Scotland was thoroughly familiar with the making of bonds for social and political purposes'.<sup>10</sup> The other is by Dawson, according to whom 'the tradition of making bonds of manrent ensured that both the language and the practice of contractual relations were deeply familiar and could readily be fused with the concept of a biblical covenant'.<sup>11</sup> My suggestion (in conformity with these observations) is that bonding is less a precursor of social contract theory than a seed-bed from which such theorising might emerge.

### 3. *Scottish social contract theory and Calvinism*

The 1560 Scottish Reformation was Calvinist in character,<sup>12</sup> and contractualism was the political theory to which Scottish Calvinists turned. Politically radical Calvinism – sometimes referred to as “Calvinist resistance theory” – forms a background to

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7 J. Wormald *Lords and Men in Scotland* (Edinburgh: John Donald 1985) p. 3. My comments on 'bonds' or 'bands' draw heavily on this marvellous work.

8 The text of the Band is given in W.C. Dickinson, G. Donaldson and I.A. Milne, eds., *A Source Book of Scottish History* Vol. 2 (Edinburgh: Thomas Nelson 1953) p. 152.

9 Presumably, the practice of signing bonds of manrent corresponds to a situation where neither feudalism nor kinship-structures are socially cohesive and where a sovereign state authority has not yet emerged. On the role of bonds or bands in the consolidation of a social elite, see Wormald *Lords and Men* pp. 3, 23, 66, 76-7, 87-8.

10 J. Wormald *Court, Kirk and Community: Scotland 1460-1625* (Edinburgh: Edinburgh University Press 1999) p. 111.

11 J.E.A. Dawson 'Trumpeting the Resistance: Christopher Goodman and John Knox' in R.A. Mason, ed., *John Knox and the British Reformations* (Aldershot: Ashgate 1998) p. 140.

12 On the Calvinism of the Scottish Reformation, see J. Kirk *Patterns of Reform* (Edinburgh: T. & T. Clark 1989) ch. 3 and A. Ryrie *The Origins of the Scottish Reformation* (Manchester: Manchester University Press 2006) p. 131.

Scottish social contract theory,<sup>13</sup> as do Calvin's own thoughts on resistance and the development of Calvinist theology itself.

Amongst works of “Calvinist resistance theory”, Christopher Goodman's *How Superior Powers Ought to Be Obeyed by their Subjects* deserves special mention: not only was the tract published in the same year as Knox's *Appellation* (1558) but Goodman – whose comradeship Knox highly valued – spent the years 1559-1565 in Scotland as minister of the Scottish kirk.<sup>14</sup> At the core of the *Superior Powers* is the idea that, under two conditions, a people 'constitute' or 'appoint' their own king:<sup>15</sup> first, the people must be God's chosen people and, second, the king must promote 'God's Laws and glory' – for which purpose, Goodman adds, the 'office' of kingship was ordained.<sup>16</sup> The notion of God's chosen people is unpacked by referring to a Biblical covenant. 'If' – says God, through Moses as an intermediary – 'you will diligently hear my voice, and observe my commandment, you shall be my proper people'. And the people answer: 'What so ever the Lord shall speak, that will we do'.<sup>17</sup> In atmosphere, Goodman's *Superior Powers* and Knox's *Appellation* are closely related and, in both cases, the conceptual structure – a contract of government grounded in a divine-human promise – is the same.

The remaining non-Scottish texts which, according to histories of political theory, count as instances of “Calvinist resistance theory” date from the years following the St. Bartholomew's Day Massacre of 1572. Although these texts cannot (evidently) be seen as influential on the Scottish Reformation, their closeness in political sympathy and line of argument may be admitted. The least relevant to Scottish concerns is Francis Hotman's *Franco-gallia* (1573): there, notions of elected monarchy and monarchy-by-acclamation are celebrated<sup>18</sup> – but in the context of a discussion of lost Frankish liberties. By contrast, Theodore Beza's *Concerning the Rights of Rulers over their Subjects* (1574) argues conceptually and presents a view where outlines of social contract theory start to become clear.<sup>19</sup> And the anonymous *Vindiciae, Contra Tyrannos* (1579) not only focuses on the notion of a 'covenant [*foedus*]' but alludes to Scottish theory by giving 'Edinburgh' as its (fictive) place of publication.<sup>20</sup> Referring

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13 Relatively recent discussions of Calvinism and resistance include Q. Skinner 'The Origins of the Calvinist Theory of Revolution' in B.C. Malament, ed., *After the Reformation* (Manchester: Manchester University Press 1980) and R.M. Kingdon 'Calvinism and Resistance Theory, 1550-1580' in J.H. Burns and M. Goldie, eds., *The Cambridge History of Political Thought 1450-1700* (Cambridge: Cambridge University Press 1991).

14 On Knox and Goodman and the latter's period in Scotland, see Dawson 'Trumpeting Resistance' pp. 132-5.

15 C. Goodman *How Superior Powers Ought to be Obeyed and Wherein they may lawfully by God's Word be disobeyed and resisted* (Whitefish: Kessinger Publishing n.d.) p. 19.

16 *Ibid.* p. 20.

17 *Ibid.* p. 62.

18 F. Hotman *Franco-gallia* (BiblioBazaar: Charleston 2007 [reprint of 1705 English translation]) pp. 57, 63, 67-8.

19 'To give a clearer answer to this question I must first lay down certain principles constituting as it were the foundations of the whole question. Assuredly, ... peoples did not in the first instance originate from rulers, but whatever peoples desired to be ruled by a single monarch or by chief men elected by them were anterior to their rulers. Hence it follows that peoples were not created for the sake of rulers, but on the contrary the rulers for the sake of the people...' – T. Beza *Concerning the Rights of Rulers over their Subjects and the Duty of Subjects towards their Rulers* (<http://fly.hiwaay.net>) p. 4. See also the paragraph headed 'Examples taken from the Spartans' on p. 13.

20 The title-page of the 1579 edition is reproduced in G. Garnett, ed., *Vindiciae, Contra Tyrannos* (Cambridge: Cambridge University Press 1994) p. 1.

back, briefly, to section 1 of our discussion, we may note that the *Vindiciae* structures its argument around the twofold contract which II Kings 11:17 sets forth.<sup>21</sup> We may add further that, as though in reciprocal acknowledgement of the *Vindiciae*, Scottish contractualists went on to employ II Kings 11:17 as a favoured Biblical text.<sup>22</sup>

If Calvinist resistance theory was important for Scottish political theory, a still more important background was Calvin's thought itself. What was it, conceptually, that the Scottish Reformation injected into Scottish culture when it drew inspiration from Calvin's work? I do not attempt to address this many-sided question here.<sup>23</sup> However, I comment briefly on two issues.

The first is Calvin's attitude to political resistance. No doubt owing to a concern to distance itself from Anabaptist radicalism, Calvin's massive *Institutes of the Christian Religion* is almost entirely an apolitical work. In both its first (1536) and final (1560) editions, however, it closes with a passage which clears a way towards a politically radical stance. Although Calvin generally counsels political obedience, he allows that junior magistrates – for example, the Ephors of ancient Sparta – have not only a right but a duty to 'curb the tyranny of kings'.<sup>24</sup> What this means, in essence, is that political resistance to a tyrant is admissible as long as that resistance is led by an officer of the *ancien regime*. To the remark regarding junior magistrates, Calvin adds that we may disobey a ruler whose commands are 'incompatible' with our duty to God.<sup>25</sup> How may these comments be related to the Scottish Reformation? The Lords of the Congregation, who provided secular leadership in the Reformation crisis, enacted the part of junior magistrates, or ephors, and Knox's *Appellation* ascribed to the nobility of Scotland an especial (although not a unique) role in supporting active revolt.

The second is Calvin's view of natural law. The question of whether Calvin was “for” or “against” the notion of natural law has been widely debated;<sup>26</sup> this question is, we may observe, the more complex because the place of Natural Theology (upon which a notion of natural law may rely) is controversial in Calvin's work.<sup>27</sup> Here, I note merely that, according to the *Institutes*, 'ancient [i.e. Classical] lawgivers' – and, more

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21 'We read [in the Bible] that there was a twofold covenant at the inauguration of kings: the first between God, king, and people, to the effect that the people should be the people of God; the second between the king and people, that while he commanded well he would be obeyed well' (*Vindiciae* p. 21; see also p. 54).

22 See, to cite one example of many, Samuel Ruthford's *Lex, Rex* (1644) as cited in A.S.P. Woodhouse, ed., *Puritanism and Liberty* (London: Dent 1992) p. 207. (See, however, James Craigie, ed., *Minor Prose Works of Kames VI and I*, Edinburgh: Scottish Text Society 1982, p. 131 [editorial note] for a pre-*Vindiciae* invocation of II Kings 11: 17.)

23 In my 'Calvin and the Migration of Ideas' (<http://richard-gunn.com>), I have argued that *scepticism* – in the sense understood by R.H. Popkin in his *The History of Scepticism from Erasmus to Descartes* (Assen: Van Gorcum 1964) – was part of the conceptual package which the Scottish Reformers admitted when they opened the doors to Calvin and Calvinism in 1560. The present notes do not attempt a systematic discussion of the issue.

24 J. Calvin *Institutes of the Christian Religion* (Grand Rapids: Eerdmans 1989), Vol. 2, p. 675.

25 *Ibid.*

26 See, for example, J.T. McNeill 'Natural Law in the Teaching of the Reformers' *Journal of Religion* Vol. 26, No. 3 (1946); W.J. Bouwsma *John Calvin: A Sixteenth Century Portrait* (Oxford: Oxford University Press 1988) pp. 75-6. These references are merely illustrations of discussion; a more fuller list could be extended.

27 The *locus classicus* for controversy on this issue is E. Brunner and K Barth *Natural Theology* (Eugene: Wipf and Stock 1946).

generally, 'men whom the Scriptures term natural' – retained (despite the Fall) sufficient acuity and clear-sightedness to see how human affairs and civil order should be arranged.<sup>28</sup> A position for natural law in Calvin's theology seems to be assured. Elsewhere in the same work, however, the emphasis falls on the extent to which the image of God in his creation is (through the Fall) damaged almost beyond recognition; the natural and human order of things is, without remainder, sodden with sin.<sup>29</sup> If this emphasis is characteristic of the “true” Calvin – or if, stated differently, the sceptical strand in Calvin's thought is thoroughgoing – no foothold for natural law in the edifice of Calvinist theology remains. My intention, in these brief comments, is not to resolve a complex interpretative issue. It is to lay a basis for a generalisation which, I suggest, holds good where Scottish intellectual history is concerned: in a culture where Calvinism is strong, the natural law tradition finds itself in a cold climate. Changing the metaphor, notions of natural law may appear from time to time but cannot readily take root. In the texts of “Calvinist resistance theory”, for example, notions of natural law feature occasionally<sup>30</sup> but do not play a fundamental conceptual part in discussion. My suggestion is that the same is true of natural law thinking in Scotland in the years when (Calvinist) contractualism prevailed.

#### 4. *Knox and Buchanan*

Sections 2 and 3 of my discussion concerned themselves with context; the present section embarks on a discussion of social contract theory which has – mainly, although not consistently – a narrative form.

The figures of John Knox and George Buchanan stand, so to say, on either side of a gateway through which social contract theory enters Scottish intellectual history. Although as individuals Knox and Buchanan were very different as individuals,<sup>31</sup> their thinking involves strikingly parallel ideas. Both writers are contractualists. To employ terminology introduced in section 1, above, both writers put forward contracts (or covenants) of a “vertical” kind. But, whereas Knox argues for a 'league betwixt God and us',<sup>32</sup> Buchanan favours a 'mutual pact between a king and his subjects'.<sup>33</sup> The difference between Knox and Buchanan is, in short, that between a divine-human contract and – in the terminology of section 1 – a standard contract of

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28 Calvin *Institutes*, Vol. 1, p. 236.

29 For relevant passages, see *Institutes*, Vol.1, pp. 233-66 and 292-3.

30 See, for example, Goodman *Superior Powers* p. 30 and Beza *Concerning the Rights of Rulers* p. 21.

31 In exile, Knox became an associate of Calvin; he re-entered Scotland on the eve of the 1559-60 crisis. Buchanan, a Renaissance humanist and educationalist, appears to have returned to Scotland in Mary Stewart's entourage. Whereas Knox's writings call for, and defend, religious reformation, Mary's 1567 deposition (or enforced abdication) has a similar role in Buchanan's political and historical work. Although Buchanan became a central figure in the Scottish Reformation, and in the last years of his life was close to Andrew Melville (Scotland's leading presbyterian), religious values appear all-but-absent from his thought..

32 'A Godly Letter of Warning or Admonition to the Faithful in London, Newcastle, and Berwick' [1553] in J. Knox *Selected Writings: Political Epistles, Treatises, and Expositions to the Year 1559* (Dallas: Presbyterian Heritage Publications 1995) p. 172; see also pp. 174-6.

33 G. Buchanan *A Dialogue on the Law of Kingship among the Scots* (Edinburgh: Saltire Society 2006) p. 140.

government. While Knox thinks in terms of a “vertical” contract that has sacred status, Buchanan opts for “vertical” contracting of a secular kind.

I comment briefly on Knox and Buchanan in turn.

A reader of Knox frequently struggles to decide which elements in his writings are conceptually fundamental. For example, he tells us that 'Princes have no fidelity further than for their own advantage'.<sup>34</sup> Does Knox wish us to believe that this is literally the case? He appears to share this belief when, later, he offers (unwanted) advice to Mary, Queen of Scots: 'It shall be profitable to Your Majesty to consider...what it is you ought to do to them [your subjects] by mutual contract'.<sup>35</sup> It is in the queen's interest, Knox seems to be saying, to consider your relation to your subject *as though* a contract of government was involved. But, we may ask, is Knox's scepticism regarding a sovereign's promises a matter of theoretical principle? Or is it a rhetorical exaggeration occasioned by Mary of Guise's cynicism about promise-keeping in pre-Reformation years?<sup>36</sup> The issue is important because, if princes have no conception of fidelity to promises, the whole notion of a contract of government must be ruled out of court. Is this Knox's considered position? If so, it is puzzling to encounter in Knox's *Appellation* an account of a 'solemn oath and covenant' made by the Old Testament king Asa: although what Asa promised was 'to serve God and to maintain His religion', and although his promise met with God's approval, Asa's subjects appear to have been the promise's promisee.<sup>37</sup> The passage's implication is that a contract of government is possible and may be approved.

Knox's reference to princes and their fidelity (or infidelity) is introduced here merely as an example. The question of which elements in his writings are fundamental arises when we consider his approach to contractualism itself. Did Knox think of the league (referred to in 1553) betwixt man and God merely in passing or as a conceptual platform on which his subsequent thought might rest? I can think of no way of answering this question definitively. However, I am sympathetic for readings<sup>38</sup> which trace contractualist notions through his work as a whole. The generalisation which I find most plausible is that Knox, like Goodman, thinks in terms of a contract of government grounded in a contract or covenant with God.

If this generalisation is accepted, a question arises about the scope of contract-based obligations in Knox's thought. Jane Dawson and, following her, Roger Mason have

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34 J. Knox *The History of the Reformation of Religion within the Realm of Scotland* (Edinburgh: Banner of Truth Trust [popular edition edited by C.J. Guthrie] 1994) p. 82.

35 *Ibid.* p. 317.

36 Knox portrays Mary of Guise as breaking trust (to Scottish protestant ministers) with the declaration: "It becometh not subjects to burden their Princes with promises, farther than it pleaseth them to keep the same" (*ibid.* 160). There is a whole background to this frequently-cited declaration – a background concerning Machiavelli's *Prince* ch. 18 – which I do not discuss here. See, for relevant comment, M. Loughlin "The Dialogue of the Twa Wyfeis": Maitland, Machiavelli and the Propaganda of the Scottish Civil War' in A.A. MacDonald, M. Lynch and I.B. Cowan, eds., *The Renaissance in Scotland* (Leiden: E.J.Brill 1994) p. 228.

37 'Appellation' in J. Knox *On Rebellion* (Cambridge: Cambridge University Press 1994) p. 99.

38 Such as that in R.L. Greaves 'John Knox and the Covenant Tradition' *Journal of Ecclesiastical History* Vol. XXIV, No. 1 (1973).



maintained that in 1558 (the year of the *Appellation's* writing and publication) Knox distinguished between English and Scottish positions: in England, which had already endorsed protestantism, covenant-based obligations applied whereas in Scotland, where no such endorsement had taken place, covenant-based obligations were not in play.<sup>39</sup> An implication of this line of thought is that such obligations do not justify religious reformation and the political change that reformation entails. Here, I do not discuss Dawson's and Mason's claims in detail. However, I record my impression that the “revisionist” interpretation flies in the face of the *Appellation* and misjudges Knox's sense of his religious-*cum*-political situation. On the former of these points: Knox's claim is that obligations rooted in a divine-human covenant apply whenever 'God doth illuminate the eyes of any multitude, province, people or city' – and thereby 'putteth the sword in their own hand' to remove idolatry.<sup>40</sup> The implication of this passage is that, for Knox, a Reformation *movement* is – whether or not it is successful – sufficient to guarantee the applicability of promise-based obligations. This brings me to my latter point. In 1558, Knox is orienting his thought towards a future which, he hopes, will come into existence: in Scott Dolff's words, 'Scotland clearly stands on the precipice of revolution'.<sup>41</sup> Dawson and Mason seem oblivious to the drama and sense of anticipation that characterises Knox's contentions.

Earlier in the present section, I have commented on similarities and differences between Knox and Buchanan. In what follows, I take the chief similarity – namely, the employment of “vertical” contracting – for granted and point to what is distinctive in their views.

The most striking difference between Knox and Buchanan is that whereas the former invokes the Bible the latter thinks in terms of natural law. For Knox, as for Goodman, the ultimate normative source of political obligation is a Biblical covenant; for Buchanan, by contrast, the source is a 'law of nature' which allows humans to 'distinguish base from noble things'.<sup>42</sup> It is true that, in Buchanan's view, the capacity to make moral distinctions derives from 'a light [which is] divinely shed upon our minds':<sup>43</sup> in other words, the ultimate author of natural law is God. Note, however, the fine shading of Buchanan's position. His claim is *not* that moral authority derives from Biblical covenants. Whereas such covenants have a *rationale* owing to humanity's sinful nature, the 'light' to which Buchanan refers goes on shining only because the Fall has not irrevocably damaged the natural order of things.<sup>44</sup> One way of summarising the difference between Knox and Buchanan is to say that the former

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39 J.E.A. Dawson 'The Two John Knoxes: England, Scotland and the 1558 Tracts' *Journal of Ecclesiastical History* Vol. 42, No. 4 (1991); R.A. Mason *Kingship and the Commonwealth* (East Linton: Tuckwell Press 1998) ch. 5. See also Mason's comment on further reading in Knox *On Rebellion* p. xxix.

40 'Appellation' in Knox *On Rebellion* p. 103. The subsequent passage which addresses the Scottish nobility directly and which includes the phrase 'if ye confess yourselves baptised in the Lord Jesus' (ibid. p. 104) can be understood in an equivalent sense.

41 S. Dolff 'The Two Knoxes and the Justification of Non-Revolution: A Response to Dawson's Argument from Covenant' *Journal of Ecclesiastical History* Vol. 55, No.1 (2004) p. 74.

42 Buchanan *Law of Kingship* p. 49.

43 Ibid. p. 48.

44 Buchanist natural law is thus formally consistent with Calvin's views as reported at note 27, above.

draws inspiration from the darkest and most pessimistic strands of Calvinist discourse; the view of human nature adopted by Buchanan is, relatively, benign.

A related circumstance is that Buchanan includes in his discussion a picture of, in effect, a state of nature;<sup>45</sup> no such picture is offered by Knox. Because it draws in the notion of a state of nature, Buchanan's political theory conforms more closely to the "model" of social contract theory outlined in section 1, above. The presence of the notion of a state of nature is significant because, in Buchanan's view, the 'light' which makes moral judgements possible shines in a natural or, so to say, pre-contractual state. The conceptual package sketched in section 1, and endorsed by Buchanan, is one where the natural law of the state of nature is a base-line, or foundation, on which subsequent political legitimacy rests. In Knox's thought, where nature is vitiated by sin, no such foundation of political legitimacy may be assumed.<sup>46</sup>

To these comments on Buchanan, a qualification may be added: it would be a mistake to think of him merely as a theorist who applies natural law standards to politics. According to such an interpretation, the contract of government – the mutual promise between ruled and ruler – which is central to Buchanan's political theory performs little or no conceptual or normative work. Such an interpretation ignore Buchanan's claims that 'the original Scots, right up to our own times, elect their kings'<sup>47</sup> and that kings, when they are inaugurated, 'give a solemn oath to the entire people that they will obey the laws, customs and ancient practices of our ancestors'.<sup>48</sup> In short, the interpretation ignores the circumstance that, for Buchanan, notions of a contract of government and a *coronation oath* go hand in hand. For an understanding of Scottish politics, he considers, this link is all-important: Fergus, the first (mythical) king of Scotland, was 'declared king, in a full assembly of the people' and his status as king was subsequently 'confirmed...by an oath'.<sup>49</sup> Here, the historical accuracy or inaccuracy of Buchanan's claims regarding early Scottish history is unimportant.<sup>50</sup> The point which I wish to emphasise is that, as well as natural law, the notion of a coronation oath (and thereby the practice of mutual promising) is central to Buchanan's thinking. It is, I suggest, his emphasis on coronation oaths rather than his endorsement of natural law that points the way forward towards subsequent Scottish social contract theory.

In the development of such theory, what happened after Knox and Buchanan? The

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45 'Do you think there was one a time when men lived in huts and even in caves, living a wandering, nomadic existence without laws or settled habitations, and that they gathered together as their fancy took them...?' (ibid. p. 46).

46 In an early (pre-Calvinist) work, Knox makes very clear his view that, between God's 'light', and sin's 'darkness', there is no intermediate region of nature or natural reason: see his 'Epistle Dedicatorie' [no page numbers are given] to H. Balnaves *Confession of Faith* (Edinburgh 1584). Although published in 1584, Knox's text dates from 1540.

47 *Law of Kingship* p. 105.

48 Ibid. p.106.

49 G. Buchanan *The History of Scotland* (Glasgow: Blackie 1858 [James Aikman translation]) Vol. 1 pp. 159-60.

50 See, for discussion, M. Drexler 'Fluid Prejudice: Scottish Origin Myths in the Later Middle Ages' in J. Rosenthal and C. Richmond, eds., *People, Politics and Community in the Middle Ages* (Gloucester: Alan Sutton 1987); R.A. Mason 'Scotching the Brut: Politics, History and National Myth in Sixteenth-Century Britain' in his edited volume *Scotland and England 1286-1815* (Edinburgh: John Donald 1987).

next significant step in the story concerns not specifically political theory but Calvinist theology in a general sense. My paper does not explore the so-called Federal Theology which emerged in Europe (including Scotland) in the late sixteenth and early seventeenth centuries. However, it notes that Scottish theologians have sometimes seen such thinking as a descent from Calvin's own standpoint to a legalistic and, ultimately, works-based view of salvation.<sup>51</sup> Whether or not such a view is justified in its own terms, it fails to identify Federal Theology's political significance. At the core of Federal Theology is the conviction that *promising* is central to the Scriptures. Once the Biblical narrative is reconstructed in terms of promising – in the Old Testament, a 'covenant of works' and, in the New Testament, a 'covenant of grace'<sup>52</sup> – then, and then only, does the narrative of sacred history become clear. The line of thought may be extended: if the notion of promising unlocks the meaning of the Bible, must it not be a key to reality itself? The vast importance given to promising by Federal Theologians is, I suggest, a source – no doubt, one source amongst others – of the significance accorded to the *act of promising* in social contract theory's next instantiation.

## 5. *The National Covenant*

The National Covenant, first signed in Edinburgh on 28 February 1638, marks the high tide of Scottish social contract theory.<sup>53</sup> Whilst commentators have frequently discussed the Covenant's political significance, my concern in what follows is with the text's conceptual shape.

Following a short preamble or introduction, the Covenant falls into three sections. The first (which I do not discuss here) repeats, and incorporates, the Negative Confession (or King's Confession) subscribed to by James VI and his household in 1581. The second cites a number of mainly Jacobean Acts of Parliament: again, I do not comment on this section – except to note that it requires 'all Kings and Princes at their Coronation' to 'make their solemn oath in the presence of the Eternal God'.<sup>54</sup> In short, it endorses the notion of a contract of government and (in Buchananist fashion)

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51 M.C. Bell *Calvin and Scottish Theology* (Edinburgh: Handsel Press 1985) pp. 8-10; J.B. Torrance 'The Concept of Federal Theology – Was Calvin a Federal Theologian?' in W. H. Neuser *Calvinus Sacrae Scripturae Professor* (Grand Rapids: Eerdmans 1994) pp. 24-6; T.F. Torrance *Scottish Theology* (Edinburgh: T&T Clark 1996) pp. 59-62.

52 See for example S. Rutherford *Rutherford's Catechism* ['A Catechism Containing the Sum of Christian Religion'] (Edinburgh: Blue Banner Productions 1998) p. 28.

53 Writings by David Stevenson are especially helpful in supplying historical background. See his *The Scottish Revolution 1637-44* (Newton Abbot: David & Charles 1973); *The Covenanters* (Edinburgh: Saltire Society 1988); 'The National Covenant: A List of Known Copies' *Records of the Scottish Church History Society* Vol. XXIII (1989); *King or Covenant? Voices from Civil War* (East Linton: Tuckwell Press 1996). See also R. Mason 'The Aristocracy, the Episcopacy and the Revolution of 1638' in T. Brotherstone, ed., *Covenant, Charter and Party* (Aberdeen: Aberdeen University Press 1989). M. Steele 'The "Politick Christian"' in J. Morrill, ed., *The Scottish National Covenant in its British Context* (Edinburgh: Edinburgh University Press 1990) gives a useful textual analysis and I.M. Smart 'The Political Ideas of the Scottish Covenanters 1638-88' *History of Political Thought* Vol. 1, No. 2 (1980) discusses subsequent Covenanting theory.

54 'The National Covenant' in W.C. Dickinson and G. Donaldson, eds., *A Source Book of Scottish History* Vol. 3 (Edinburgh: Thomas Nelson 1954) p. 100.

understands such a contract in the sense of a coronation oath.<sup>55</sup> Whatever subsequent passages in the text might add, the Covenanters of 1638 saw themselves as sustaining the political initiative of the 1550s and 1560s.

It is in its highly dramatic third section that the National Covenant breaks fresh ground. In part, this drama is linguistic: the section is structured around a series of speech acts – specifically, first-person plural *performative* speech acts<sup>56</sup> – which import a distinctive cadence and rhythm to the text. At first, this rhythm is hesitant and seems almost to stumble: 'Wee Noblemen, Barons, Gentlemen, Burgesses, Ministers & Commons...Do hereby *profess* and before God, his Angels, and the world *solemnly declare*, That, with our whole hearts we *agree & resolve*...to defend the...true Religion'.<sup>57</sup> Why *profess* and *solemnly declare* – unless one doubts one's good faith in agreeing and resolving? This hint of doubt (or self-doubt) is, I shall suggest, indicative of a more general difficulty. For the moment, I note that the sequence of speech acts unfolds in a less equivocal fashion: we 'promise, and swear by the Great Name of the Lord'; we 'declare before God and Men'; we 'promise and swear'; we 'faithfully promise'; we 'call the living God...to witness'.<sup>58</sup> A reference to 'humbly beseeching' rounds off the linguistic sequence.<sup>59</sup> and this formulation is likewise confident in terms of speech acts – however self-abasing a reference to humility may be. The employment in the Covenant of performativespeech acts stems, of course, from the bonding or banding tradition (referred to in section 2, above). What is new in 1638 is the use of bonding or banding as a model on which a public act of commitment may proceed.<sup>60</sup>

This said, the drama and the freshness of the Covenant's third section is not merely linguistic; seen in terms of Scottish social contract theory, it is conceptual as well. This conceptual novelty and drama comes into focus when we ask: *with whom* do the Covenanters make a covenant? In the numerous promissory speech acts of the Covenant's third section, who (singular or plural) is the promisee? Questions to this effect are difficult to answer. Is the promisee Charles I? Whilst it is true that the second part of the Covenant declares in favour of a contract of government, no first-person promise of this kind occurs in the Covenant's text. It is true that the Covenanters 'promise and swear' that they will 'stand to the defence of our dread Sovereigne, the King's Majesty'<sup>61</sup> – but to whom is the promise made? In speech act

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55 We may emphasise, here, the seriousness with which Scottish Calvinists took coronation oaths and their obligations. This seriousness is evident in the coronation oath which the (then infant) James VI was required to take by proxy (see J. Craigie, ed., *Minor Prose Works of King James VI and I* – see note 22, above – pp. 129-32). It is likewise evident in the ritual at Charles II's first (presbyterian) coronation at Scone on 1 January 1651: see *The Form and Order of the Coronation of Scharles the Second* (Aberdeen 1651).

56 I use the term *performative* in the sense given it in twentieth-century speech act analysis. According to Austin's classic discussion there exist utterances where an utterer, in uttering them, counts as 'doing rather than saying something': these he calls 'performative' utterances. See J.L. Austin *Philosophical Papers* (Oxford: Oxford University Press 1970) p. 235.

57 'National Covenant' in *Source Book* Vol. 3 p. 102 (emphases added).

58 Ibid. pp. 102-3.

59 Ibid. p. 103.

60 See, again, *Wormald Lords and Men in Scotland* p. 3.

61 'National Covenant' p. 102.

terms, a promise that such-and-such a person will be supported is not a promise *to* the person concerned. Is God the promisee? And is the Covenant a covenant with God? Astonishingly, there is no speech act in the text of the Covenant that is, explicitly, a promise or covenant made to God. There is, to be sure, a reference to Christians 'who have renewed their Covenant with God'<sup>62</sup> – but claiming to be such Christians is not the same thing as entering into, or renewing, the covenant itself. The only way in which the notion of a *promise to God* can be found in the text of the Covenant is, I suggest, to construe an oath, which one swears, as promise made to God. But such an line of argument is unconvincing: in an oath, one swears by God or takes God as ones witness – and, in terms of speech acts, the roles of *promisee* and *witness* are distinct. In sum, there is no greater reason to see the National Covenant as a covenant with God than there is to think of it as a promise made to Charles I.<sup>63</sup>

To whom, then, are the various performative speech acts of the Covenant – promises, oaths, etc. – addressed? A crucial passage in the third section declares that 'whatsoever shall be done to the least of us for that cause [the maintaining of true religion and the king's authority], shall be taken as done to every one of us in particular'.<sup>64</sup> The passage draws upon the notion of bonding or banding – more specifically, the notion of a band of friendship – and the phrase 'general [public] band' is employed (twice) in the Covenant's text.<sup>65</sup> Here, the Covenant's presentation of itself either *as*, or *as involving*, a general band is of fundamental importance. It suggests that the audience for the Covenanters' first-person speech acts – so to say, the promisee of its promises – is, in the first instance, the Covenanters themselves; I say “in the first instance” because, behind the circle of individuals who subscribe to the band, there stands a group of onlookers and *potential* signatories – a group as wide, in the Covenant's estimation, as Scotland itself. In short, for the very first time in the history of Scottish contractualism the notion of a *pact of association* (see section 1, above) makes its appearance. It does so because a (“horizontal”) bond of friendship is given not a “private” but a directly “public” status. Prior to this moment, only “vertical” contracting – for example, a sacred contract between God and man

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62 Ibid. p. 103.

63 As it stands, the conclusion of this paragraph is an exaggeration. The question of whether the National Covenant sees itself as a covenant with God admits of further discussion. Not least, the Covenant's co-authors – Archibald Johnston and Alexander Henderson – both wrote of the Covenant as though a covenant with God were involved. In the section of his *Diary* which covers the drafting and signing and circulating of the Covenant, Johnston writes of 'the covenant of this land with God', 'the covenant with the Lord', 'the national oath of the whole land with our aeternal Lord' and God's 'covenant with his people' (*Diary of Sir Archibald Johnston of Wariston 1632-1639*, Edinburgh: Edinburgh University Press 1911, pp. 319, 322, 326, 328) – and there is no room for doubting that the National Covenant of 28 February 1638 is the 'covenant' that he has in mind. Johnston's famous image of 28 February as 'that glorious marriage day of the Kingdome with God' (ibid. p. 322; cf. p. 328) turns on the idea of a divine-human marriage *contract*. Henderson for his part, preaching in St Andrews, exhorts his audience to sign the Covenant by telling them: 'to the end that ye may be perfectly blessed, enter into a Covenant with God' (A. Henderson *Sermons, Prayers and Pulpit Addresses*, Edinburgh: John MacLaren 1867, p. 15). And in his *Instructions for Defensive Arms*, a pamphlet written in 1639 in the context of the Bishops' Wars, he refers to 'the Covenant betwixt God and the people' (Henderson in J. Corbet *The Vngirding of the Scottish Armour*; see Smart 'Political Ideas of the Scottish Covenanters' p. 169). My suggestion that the National Covenant does not involve a covenant with God flies in the face – whether with good or bad reason – of its authors' interpretation.

64 'National Covenant' p. 102.

65 Ibid. pp. 95, 100.

(Knox) or a secular contract between ruler and ruled (Buchanan) – featured in Scottish political theory. As we have seen, the second part of the Covenant gave its support to the idea of a ruler-ruled contract. But now, in the Contract's third section – the section which foregrounds first-person speech acts – the figure of a “horizontal” pact of association comes on stage.

My picture of the Covenant as a text which *approves* (in the third person) a “vertical” contract of government but *is* or *involves* (in the first person) a “horizontal” pact of association rests, to be sure, on a number of assumptions. The first is that individuals who promise *together* may be seen as promising to one another – despite the circumstance that the promisee is unspecified and, further, no literal individual-to-individual promising takes place. The second is that individuals who (not always in one another's presence) append their signatures to the same document<sup>66</sup> count as standing *together* in the relevant sense. A third assumption concerns onlookers and potential signatories: the requisite *togetherness* is maintained, despite the circumstance that it becomes fainter and more notional the more the notion of a 'nationall Oath'<sup>67</sup> is pressed. Although such assumptions can be questioned, they serve (so I suggest) to bring into play the political situation which the Covenanters of 28 February 1638 viewed as theirs. They addressed their promises to themselves (as fellow signatories or bond-members) and, further, to what they saw as an *expectant* nation. A strength of my picture is that it throws the perceptions and self-perceptions of the signatories of the 1638 Covenant into relief.

In the light of this last-mentioned proposal, an final comment on the National Covenant may be added. I have referred to a *general difficulty* which lies behind the hesitancy, or seeming stumble, with which the Covenant's sequence of first-person speech acts begins<sup>68</sup> The difficulty is, I suggest, that the making not just of this or that promise but *any* promise is hard to reconcile with a stress on human sin. A promise counts as such, we may suggest, only if the person who makes it intends to carry it out.<sup>69</sup> A Calvinist (and hence a Covenanter) who believes that sin is deep-seated cannot be certain that he or she holds such an intention. The wiles of the devil prevent such a person from believing or knowing, beyond doubt, that he or she is sincere.<sup>70</sup> The text of the Covenant appears to acknowledge such a line of thought when it refers to 'suggestion, allurements, or terrour' that might afflict Covenanters.<sup>71</sup> In these notes, I do not explore this all-too-vertiginous difficulty.

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66 For an account of the circumstances under which the Covenant was signed in the days after 28 February 1638 – in effect, different groups of the population signed it separately – see Stevenson's *The Covenanters* pp. 1-2.

67 'National Covenant' p. 101; see also Johnston *Diary* p. 322.

68 See text quoted and comment at note 57, above.

69 As Austin maintains (*Philosophical Papers* p. 249), an utterance of the form 'I promise to but I don't intend to' is infelicitous.

70 It is because the individual cannot be certain that his or her *faith* is sincere that notorious Scottish Calvinist anxieties about assurances of salvation break out.

71 'National Covenant' p. 103.

## 6. *Divine right versus social contract*

The present section enlarges the frame of my discussion and offers an observation. In Scottish political thought of the seventeenth century, social contract theory (whose story we have been exploring) is only one voice in a protracted disputation or debate. The opposing voice is that of “top down” authority as represented in the theory of the divine right of kings. My section (a) comments on both sides of the debate and (b) observes the relatively minor part played by an issue which could have been central.

### (a) *The sides of the debate*

As indicated earlier, contractualism became prevalent in Scotland as the political theory of the Scottish (Calvinist) Reformation. In response to this emphasis on contract or covenant, James VI – who was, and who remained, not merely a lifelong protestant but a 'moderate' Calvinist<sup>72</sup> – urged that monarchs held their position by divine right.<sup>73</sup> The easiest way of dramatising the conceptual gulf of contractualist and divine right conceptions of kingship is, I suggest, to focus on directions of accountability: on a contractualist approach, accountability is reciprocal (between a king and his people) whereas, on a divine right approach, all accountability flows upwards: a people is accountable to their king and the king, for his part, is accountable to God. These schematic comments on accountability apart, however, an attempt to summarise divine right theory encounters difficulties. How *religious* is divine right theory?<sup>74</sup> Is it necessarily Christian?<sup>75</sup> May it be seen not as a last echo of medieval ideas but as a pointer towards “modern” notions of state sovereignty? Such questions (however fascinating) are not considered here.

Because James moved his court from Edinburgh to Westminster in 1604, the century that followed was one where, in Scotland, contractualist views could occupy centre stage. On the royalist side, William Drummond of Hawthornden upheld the view that 'Kings were raised to govern People, by Almighty God'<sup>76</sup> – but an avalanche of

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72 W.B. Patterson *King James VI and I and the Reunion of Christendom* (Cambridge: Cambridge University Press 1997) pp. 280, 339-40, 342.

73 The *locus classicus* of James VI's divine right theory of kingship is his 'The Trew Law of Free Monarchies' in *King James VI and I Political Writings*, ed. by J.P. Sommerville (Cambridge: Cambridge University Press 1994) pp. 62-84. See also *ibid.* pp. 179-84.

74 Writing in 1914, Figgis suggested that medieval divine right theory was an attempt to free political rule from papal control – and that James VI's affirmation of divine right was a parallel attempt to free Scottish kingship from control by protestant ministers: see J.N. Figgis *The Divine Right of Kings* (Bristol: Thoemmes Press 1994) pp. 44, 162. On Figgis's interpretation of James, see Mason *Kingship and the Commonweal* pp. 187-9.

75 A nuanced discussion of divine right would have to explore the possibility that James combined a “public” profession of Christianity with a “private” (or “esoteric”) view of himself as a Platonic philosopher king. In his semi-serious *A Counterblaste to Tobacco*, for example, he describes a king as 'the proper Phisician of his Politicke-body' – a description whose Platonic overtones are evident – but goes on to observe: 'If any thinke it [namely, a polemic against smoking] a light Argument, so it is but a toy that is bestowed upon it': see *King James VI and I A Royal Rhetorician*, ed. by R.S. Rait (Westminster: Constable 1900) pp. 32, 33. Is James arguing from analogy but hiding behind a semi-serious mask?

76 'The Magical Mirror' in W. Drummond *The Works* (Edinburgh 1711 [reprinted by Georg Olms in 1970]) p. 175. The

Covenanting publications (associated with the 1638 National Covenant itself and also the 1643 Solemn League and Covenant) rendered his voice insignificant. As an example of work associated with the Solemn League and Covenant, the anonymous *Covenanters Catechisme* of 1644 may be mentioned;<sup>77</sup> Samuel Rutherford's *Lex, Rex* – a work which calls for separate comment – belongs to the same phase of the debate's history.

In some respects, *Lex, Rex* follows tradition: Rutherford advocates a contract of government and deepens this notion with a reference to II Kings 11:17.<sup>78</sup> In others, however, the work is distinctive. First, it is almost unique amongst Scottish Presbyterian writings in the circumstance that it endorses the notion of natural law: 'the Scripture's arguments' – declares Rutherford – 'may well be drawn out of the school of nature'.<sup>79</sup> But which school of nature? A possibility is that Rutherford has in mind not present-day Fallen and sinful nature but nature of a pre-lapsarian kind.<sup>80</sup> This possibility is of interest, here, because it suggests that Rutherford experiences difficulty in reconciling natural law with a Calvinist perspective;<sup>81</sup> in effect, he resolves the difficulty by transmuting 'nature' into the revealed word of God. The second respect in which *Lex, Rex* is distinctive is, I propose, of a different order: amongst writers of the period, Rutherford displays an especially keen understanding of covenanting – I mean, here, the act of endorsing the National Covenant – as a constitutive political act.<sup>82</sup> Is this keen understanding accidental? I suggest that, on the contrary, his sense of active constitution and his strong commitment to Federal Theology<sup>83</sup> come together in the notion of *promising* as a performative and thereby normatively powerful act.

During the later stages of the Covenanting movement, contractualist ideas continued to play a pivotal role. James Stewart's *Naphtali* (1667) stipulates that 'there is no

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passage is quoted in R.H. MacDonald 'A Disputed Maxim of State in "Forth Feasting" (1619)' *Journal of the History of Ideas* Vol. 32, No. 2 (1971) p. 296. For discussion, see T.I. Rae 'The Political Attitudes of William Drummond of Hawthornden' in G.W.S. Barrow, ed., *The Scottish Tradition* (Edinburgh: Scottish Academic Press 1974).

77 A striking passage in the *Catechisme* declares that a 'Covenant' – unlike a 'bare promise' – involves 'religious invocation': see *A Covenanters Catechisme* (London 1644) p. 3. Does this passage undermine my claim (in note 1, above) that *covenant* and *contract* are conceptually equivalent terms? I think the opposite is the case. The circumstance that a promise involves 'religious invocation' leaves its status *as a promise* unaffected.

78 See *Lex, Rex* as referred to in note 22, above.

79 S. Rutherford *Lex, Rex* (Harrisonburg; Sprinkle Publications 1982) p. 3.

80 This possibility is explored by J. Coffee in his *Politics, Religion and the British Revolutions: The Mind of Samuel Rutherford* (Cambridge: Cambridge University Press 1997) pp. 152-5. We may note that Coffee finds the same focus on a pre-lapsarian view of nature in the work of Rutherford's friend and associate George Gillespie: see G. Gillespie *A Dispute against the English-Popish Ceremonies obruded upon the Church of Scotland* ([no place of publication] 1637) pp. 197-9.

81 For comments on the relation between Calvin's thought and natural law, see the final paragraph of section 3, above.

82 This is the sense in which I read a passage such as the following: 'The question is, Whether the kingly office itself come from God. I conceive it is, and floweth from the people, not by formal institution, as if the people had by an act of reason devised and excogitated such a power: God ordained the power. It is from the people only by a virtual emanation, in respect that a community having no government at all may ordain a king or appoint an aristocracy' (*Lex, Rex* p. 6).

83 On Federal Theology, see the final paragraph of section 4 in the present paper. Rutherford's works, I note in passing, set out Federal Theology's scheme of Biblical covenants in more than one fashion: compare S. Rutherford *Fourteen Communion Sermons* (Glasgow: Charles Glass 1877) p. 252 with *Rutherford's Catechism* as cited in note 52, above.



Voluntary Kingdom, which is not erected, sustained, and continued by a Fundamental Contract';<sup>84</sup> in addition, it refers to a covenant 'betwixt the Lord and His People'<sup>85</sup> and cites II Kings 11:17 in support of its position.<sup>86</sup> The Cameronian Sanquhar Declaration refers to Charles II as having breached his covenant 'to God and the Kirk' and, further, 'the very *leges regnandi* in matters civil'.<sup>87</sup> James Renwick, the Cameronian leader executed in 1688, refers approvingly to legislation which requires kings 'at the time of their coronation' to make 'their faithful promise by oath to God'.<sup>88</sup> In short, later Covenanting writings rehearse themes familiar from Scottish Reformation years.

Turning from the contractualist to the divine right side of the debate, we find (unsurprisingly) that the sequences of pro-Covenant and pro-monarchist publications intertwine: Rutherford's *Lex, Rex* was written to refute John Maxwell's *Sacro-sancta Regum Majestas* – which appeared in January 1644<sup>89</sup> – and Andrew Honeyman's *A Survey of the Insolent and Infamous Libel Entitled Naphtali* (1668) sought (as its title indicates) to destroy *Naphtali's* claims. George Mackenzie's *Jus Regium* (1684) and his *A Defence of the Antiquity of the Royal Line of Scotland* (1685) bring the flow of polemical texts to its end.

What perspectives are added if pro-monarchist writings are placed alongside contractualist works? In the first place, there is a broadening of historical context: not only was Maxwell's *Sacro-sancta Regum Majestas* published in Oxford – Charles I's base of operations during the Civil War – but the text itself attacks the *Observations upon some of His Majesties late Answers and Expresses* by the contractualist Parliamentarian Henry Parker.<sup>90</sup> In Scotland itself, Mackenzie's polemics remind us that, even in the 1680s, debates over the mythical or quasi-mythical origin of Scottish kingship retained at least part of their rhetorical force.<sup>91</sup> Second, monarchist texts make vivid the worries about 'Anarchie'<sup>92</sup> and the 'multitude',<sup>93</sup> and the prospect of 'private' men using the sword against magistrates,<sup>94</sup> which – whether in good or bad

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84 [J. Stewart] *Naphtali, Or, The Wrestlings of the Church of Scotland For the Kingdom of Christ* ([Edinburgh] 1667) p. 67.

85 *Ibid.* p. 54.

86 *Ibid.* pp. 67, 69.

87 *Source Book* Vol. 3 p. 178.

88 'The Testimony of Mr. James Renwick' in J. Renwick *A Choice Collection of Very Valuable Prefaces, Lectures and Sermons* (Glasgow 1776) p. 591.

89 J. Coffee 'Samuel Rutherford and the Political Theory of the Scottish Covenanters' in J.R. Young, ed., *Celtic Dimensions of the British Civil Wars* (Edinburgh: John Donald 1997) p. 77.

90 See Maxwell's reference to 'the *Observer*' in [J. Maxwell] *Sacro-sancta Regum Majestas: Or, The Sacred and Royall Prerogative of Christian Kings* (Oxford 1644) p. 129. On Parker, see R. Zaller 'Henry Parker and the Regiment of True Government' *Proceedings to the American Philosophical Society* Vol. 135, No. 2 (1991).

91 Whereas Buchanan's *History of Scotland* depicted Fergus – the mythical first king of Scotland – as deriving his authority from a contract of government (see 49, above), Mackenzie gives a monarchist twist to story by asserting that 'K. Fergus made himself King': see G. Mackenzie *Jus Regium: Or, The Just and Solid Foundations of Monarchy* (London 1984) p. 29. As Mackenzie points out, the royalist emphasis on 'himself' (or on self-legitimation) is present in John of Fordun's and also in King James's comments on Fergus: see *John of Fordun's Chronicle of the Scottish Nation* Vol. 1 (Edinburgh 1872 [reprinted by Llanerch Publishers 1993]) p. 28 and James *Political Writings* p. 73.

92 Maxwell *Sacro-sancta Regum Majestas* p. 112.

93 *Ibid.* pp. 97, 101.

94 [A. Honeyman] *A Survey of the Insolent and Infamous Libel Entitled Naphtali* ([Edinburgh] 1668) p. 65.

faith – royalists presented as central to their work. A third perspective is, I suggest, the most significant: a reader need not share conservative anxieties about the people to sense that contractualism is a conceptually unstable stance.

*Sacro-sancta Regum Majestas* is the seventeenth-century work which most powerfully identifies this instability. Maxwell points towards the instability by contrasting Buchanan's position with Parker's: whereas the former 'put the *Legislative power*, in the Community', the latter saw the same power as 'entirely transferred' to parliament (that is, to a representative body).<sup>95</sup> In short, social contract theory may see 'the people' either (*à la* Buchanan) as 'a multitude of equals' or (*à la* Parker) in a 'corporatist or inegalitarian' fashion.<sup>96</sup> In Maxwell's view, a "Buchananist" position is rigorous in its own terms but has unacceptably anarchist implications – whereas a "Parkerist" position avoids anarchy but views political authority in an eclectic way. At the source of this uncertainty between positions lies a fundamental ambiguity. As seen by Maxwell, contractualism veers between a celebration of the people as an unstructured multitude and a sacrifice of the people (in what the twentieth century would later term an "alienation" contract) to top-down political rule.

What are we to make of Maxwell's diagnosis of conceptual instability? Here, I do not explore the issue raised but express a personal opinion. It is that, for social contract theory to be defensible, the notion of an unstructured multitude must be taken as a point of departure and held consistently in view.

#### (b) *A relatively minor issue*

My comments on the great debate in Scottish seventeenth-century political theory suggest a general observation: in the eyes of neither set of protagonists does the debate primarily turn on notions of natural law. Neither set of protagonists sees contested issues as turning on appeals to standards supplied by natural law – on how natural law is to be supplied. Contractualists and monarchists agree (so I suggest) that their dispute does not go forward in a natural law conceptual framework.

Before commenting on my suggestion, I wish to forestall a misinterpretation. My claim is *not* that the notion of natural law plays no place whatsoever in the dispute under discussion. On the contrary, invocations of natural law may be found on both sides of the debate. On the monarchist side, the 'law of Nature' is one of three heads under which James discusses the notion of kingship (the others being religion and 'the fundamental Lawes of our owne Kingdome')<sup>97</sup> and Maxwell – to take another example – refers to 'many kinds of powers, and many kinds of subjections' which he

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95 *Sacro-sancta Regum Majestas* p. 129; see Zaller 'Henry Parker' pp. 266-7.

96 The words quoted in the present sentence are Wootton's: see D. Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (London: Penguin Books 1986), Intro., p. 47.

97 James *Political Writings* p. 64.

regards as God-given.<sup>98</sup> The thought which underlies the passage from Maxwell is that of a natural hierarchy. On the contractualist side, Rutherford's endorsement of natural law has already been considered. *Naphtali*, finally, alludes to natural law when it stipulates a 'Primaeve [primeval] Right and Priviledge, which at first gave Being and Rise to all Societies'.<sup>99</sup>

How much weight should we give to the natural law invocations? Although the question is difficult to answer, we should note circumstances which weaken their significance. The 'law of Nature' to which James refers is only one, and that not the most important, of the heads under which he discusses kingship.<sup>100</sup> When Maxwell tells us that he values the opinion of 'Jurists' – I take him to mean *natural* jurists – he qualifies his admiration: their opinion, we learn, 'hath not the truth of all the Kings right in it divinely enough'.<sup>101</sup> If Rutherford's is comfortable in referring to the 'school of nature', its is because (as we have suggested) he understands nature in its pre-lapsarian meaning. And *Naphtali*, whose focus is on religious issues, makes no attempt to employ the natural law category of primeval right in a systematic way.

A list of such qualifying considerations prepares the way for a suggestion about how, conceptually, the debate between monarchists and contractualists may be seen. I have proposed that the stakes in the debate – so to say, the prizes which protagonists seek to obtain or the targets they attempt to hit – are not, mainly, ones which the natural law tradition presents. But what image of the debate may be set in a natural-law-inspired place?

Such an image may be provided if we think of reality as divided into three sectors, namely: *human practice* and *nature* and *supernatural existence*. Such a conception of reality corresponds – I suggest without argument – to the world-view held by seventeenth-century Scottish theorists. If the monarchists-*versus*-contractualists debate is mapped on to the three-sector distinction just indicated, the nature of prizes for which protagonists competed (or saw themselves as competing) becomes clear.

A mapping of the debate on to my proposed three-sector distinction may start by considering *nature*. Expressed in terms of this distinction, my claim is that, for Scottish monarchists and contractualists alike, nature is not (*pace* natural law thinking) a realm where moral values are inscribed.<sup>102</sup> So to say, nature is not so much a realm where prizes may be sought but a terrain across fire is exchaned. To employ a metaphor from a different century, nature in the Scottish seventeenth century's great debate is a conceptual no-man's land.

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98 *Sacro-sancta Regum Majestas* p. 86. (Maxwell's examples of such powers and subjections are a husband's power over his wife, a father's power over his son and a king's power over his subjects. In addition, he tells us, there is a distinction between superior and interior members 'in the body of every man'.)

99 *Naphtali* p. 16; see also p. 25.

100 The most important head is, for James, religion – or scriptural back-up for divine right theory.

101 *Sacro-sancta Regum Majestas* p. 100.

102 Insofar as natural law thinking sees moral values as inscribed in reality, an “enchanted” view of nature is implied.

What may be said about the prizes at which monarchists and contractualists take aim? An answer to this question brings the remaining terms in my proposed distinction into play. I comment briefly on monarchists and contractualists in turn.

For James, and for other divine right theorists, the values which an account of kingship employs are not, in the last instance, *natural* – but *supernatural*. For Maxwell, to the same effect, the 'designation' of a monarch may take place in a number of fashions (including succession and conquest) but the 'real constitution' of sovereignty and royalty is 'immediately from God'.<sup>103</sup> A king's authority, that is to say, has not merely a human nor a natural but a supersensible basis.

For the contractualists, by contrast, the sector of reality to which theory makes its appeal is human – rather than natural or supernatural. Contractualism roots political obligation in promising, and promising is a practice that has a human status.<sup>104</sup> To the claim that promising has a human status, an objection – one based on the foregoing discussion – may be raised: is there not something unlikely about the notion that Calvinists oriented their thinking towards a feature of the distinctively human realm? My reply to this objection is that such a notion is less unlikely than it may seem. If divine right theorists gaze across nature to a quasi-Platonic vision of supernature, seventeenth-century Scottish contractualists strain their eyes to see, beyond sinful nature, a redemptive potential. Is there something in human nature which, despite the fall, justifies a hope of salvation? For Federal Theologians and, more broadly, Calvinist social contract theorists this is, indeed, the case: the *power of promising* may, however hesitantly,<sup>105</sup> be singled out as an indication of humanity's capacity to transcend scepticism and sin. It is because a power of promising survives in sin-sodden humanity that God's mercy (and not merely his justice) may be displayed. One way of approaching this complex of ideas – a complex which comes close to endorsing conceptual opposites – is to think of Scottish Calvinists as linking this-worldly and other-worldly perspectives in a vertiginous way.

## 7. *Scottish social contract theory*

In the first section of my paper, I set out a schematic model of social contract theory. Although the model admitted of variations, my intention was to outline a manner in which social contract theory has frequently been seen. Now, after discussion of more than a century of intellectual history, I ask how far Scottish contractualism corresponds to my outlined conceptual scheme.

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103 *Sacro-sancta Regum Majestas* p. 22.

104 What about promises by God? Conceptually, such promises are problematic. First, there is the problem which Hobbes raised about covenants with God: 'we know not whether our Covenants are accepted, or not' (T. Hobbes *Leviathan*, Harmondsworth: Penguin Books 1968, p. 197). And second, there is a notorious theological difficulty about whether an all-powerful God can bind himself to humankind. Such problems arise, I suggest, when the human status of promising is denied.

105 See the final paragraph of section 5, above.

My reply is that Scottish social contract theory departs from this scheme, and does so not merely in points of detail but in fundamental respects. In order to bring out the nature of these departures, I return to the (very) short story through which, in section 1, social contract theory was introduced.

The story is (a reader will recollect) one which starts from an account of humanity in its natural condition; it continues by imagining a mutual promise through which civil society comes into being. My suggestion is that Scottish contractualism departs from this story – or, at least, changes the story's emphasis – in two significant ways. In the first place, the state of nature from which the traditional story begins is all but dispensed with: a peculiarity of Scottish social contract theory is that, in the writings that we have surveyed, the notion of a state of nature receives scant mention. In the second place, the act of promising which, in the traditional story, carries the narrative of social beginnings forward leaps to a conceptually prominent position: for Scottish contractualists, the act of (mutual) promising becomes an all-important foundational event. So to say, the normative energy which Scottish contractualists subtract from the notion of a state of nature, or natural condition, is injected into the performative speech act of promising itself.

In a moment, I shall comment on the significance of these changes. Before doing so, however, I offer observations on the changes themselves.

Regarding the state of nature: my claim is not that the notion of a state of nature is altogether absent from Scottish theorising. As we have seen, Buchanan refers to what is in effect a state of nature.<sup>106</sup> And, arguably, *Naphtali's* invocation of a 'Fundamental Contract'<sup>107</sup> presupposes a conception of humanity in its pre-civil as well as its civil state. Although references to a state of nature (or its equivalent) can be discovered, however, a reader of Scottish contractualist texts is struck by their widespread lack of interest in the details which an account of a natural condition might contain. If the texts of Scottish contractualism are placed alongside, for example, Hobbes's *Leviathan* chapter XIII ('Of the NATURALL CONDITION of Mankind') or Locke's *Second Treatise* chapter II ('Of the State of Nature'), the contrast is dramatic: whereas it matters to Hobbes's and Locke's arguments that a description of humanity's natural condition contains these or those details, the Scots proceed as nothing turns on how a state of nature may be imagined or seen. What accounts for this difference? Below, I suggest an answer to this question.

Regarding the act of promising: if my comments on Scottish thought's relation to the idea of a state of nature underline a lack of interest, my remarks on promising as a speech act point to a concern that is easy to see. In different texts of Scottish contractualism, the act of promising is seen in different fashions. Sometimes it is seen as an echo – perhaps, a renewal or repetition – of Biblical covenants. Sometimes it is seen as a coronation oath which links a new monarch to his or her people. In

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106 See note 45, above.

107 See note 84, above.

politically and religiously urgent cases, it may have the connotations of a 'band' or 'bond'. Sometimes, as in the 'national oath' of the National Covenant, the promise or promises is enshrined in a document which each and every citizen of Scotland is asked (or required) to approve or sign. Although the the promises concerned may differ, as these examples illustrate, the focus on the speech act of promising is present throughout the Scottish contractualist texts that we have surveyed. Without exception, the Scottish texts which have been considered are ones where promising as a performative speech act holds conceptual pride of place.

From the nature of Scottish contractualism's departures from the traditional story I turn to their significance. What accounts for the departures? Are the departures ones which may interest only a historian of ideas or do they generate a new and distinctive conception of what social contract theory may mean? My suggestion is that the answers to these questions are related. What accounts for the changes is the Calvinism and, thence, the critical stance towards natural law introduced into Scotland by the 1560 Reformation. And, taken together, the changes add up to a version of social contract theory that (unlike its English counterpart) cuts itself free from the natural law tradition. To these general observations, some further suggestions may be added. One is that peculiarly "Scottish" social contract theory highlights a longstanding association between contractualism and the notion of revolution. Another is that it chimes in with with a demystified or disenchanting view of "nature" – a view which, for good or for ill, makes the notion of natural law difficult to defend.

In the remainder of this section, I offer thoughts on the just-given observations and suggestions. My discussion is not systematic, and on a number of issues I am content to let the provisional character of my remarks stand.

First of all, I comment on Calvinism. A reader who has followed my discussion thus far will, I hope, be in no doubt that the period of Calvinism's ascendancy in Scotland and the period when Scottish contractualism flourished were one and the same. For an understanding of Scottish social contract theory, so I propose, Calvinist thought is an indispensable key. More specifically, the strand of Calvinism which is important is its conception of nature (including human nature) as a realm of being corrupted with sin.<sup>108</sup> In such a realm, the image of God is defaced and normative order is no longer readily to be found. In a culture such as that of post-1560 Scotland, where such a view of nature (and of human nature) prevails, notions of natural law are unlikely to thrive.<sup>109</sup> This being the case, it is unsurprising that the notion of a state of nature

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108 See note 29, above.

109 Note that – as stressed in text at notes 97-99, above – my claim is *not* claiming that natural law is literally absent from Scottish thought during the period concerned. Such a claim would be fallacious. I have referred to Buchanan (see note 97), to James VI (see note 97), to Rutherford (see note 79), to Maxwell (see note 98) and to the author of *Naphtali* (see note 99) as authors who refer to natural law. Further references might be given: for example, T. Craig *The Jus Feudale* (Edinburgh: William Hodge 1934) pp. 105-6. See further Honeyman *Survey* p. 16 – and, for comment, C. Jackson 'Natural Law and the Construction of Political Sovereignty in Scotland, 1660-1690' in I. Hunter and D. Saunders, eds., *Natural Law and Civil Sovereignty* (Basingstoke: Palgrave 2002) p. 163. My claim is not that such references are non-existent but that, in Scotland during the period under consideration, natural law

(where a normative order is supposed to subsist in unsullied purity) made little or no conceptual appeal to Scottish thinkers.

The section of the social contract theory which *did* appeal to Scottish Calvinists was the act of promising – and the Biblical (and Federal Theological) resonances which such a notion possessed. Here, my concern is to indicate how (I consider) Scottish contractualism's conception of the act of promising is to be seen.

I have proposed that, for (most of) the Scots, the act of promising takes place in the absence of an appeal to a natural order or a state of nature in which such an order might be enshrined. This means that, for Scottish contractualism, the act of promising is *not* a mere unfolding or an application of a pre-existing norm. The task attempted in the act of promising is not that of fine tuning or, indeed, preserving or modifying a rule (or set of rules) whose normative force already obtains.<sup>110</sup> According to the “Scottish” model of contractualism, the task attempted in covenanting or promising that not of *redirecting* but *constituting* normativity *per se*. In social contract theory *minus* a state of nature, literally everything – literally everything *normative* – depends on the act of promising itself. Stated differently, the act of promising becomes a *performative speech act* on which all else – moral obligations, social existence, civility – depends.

Let us employ a “before-and-after” scenario to bring out what an act of promising, thus seen, implies. *Before* promising takes place, a number of obligations may or may not obtain. (We are reminded of the references to 'Wee Noblemen, Barons, Gentlemen, Burgesses, Ministers & Commons' in the National Covenant.<sup>111</sup>) In a truly constitutive or performative act of promising, such obligations are suspended or (so to say) count for naught. Such obligations are trumped by whatever the act of promising decides. Viewed in this manner, it scarcely matters – we may note in passing – whether the pre-promising situation is asocial (a state of nature) or whether, as in the example of the National Covenant, a range of social stations and their duties is in play. *Whether* and *what* obligations exist prior to the act of promising matters as much and as little as the nature of material which fire may consume.

Insofar as fire suggests white heat, and a social existence so intense as to be molten, it supplies an apt image of the act of promising in Scottish contractualism's sense. In what has been referred to as a truly constitutive and performative act of promising, everything – everything normative and social – is at issue: there are no pre-given or externally given standards, and a group engaged in an act of constitutive promising

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ideas did not put down theoretically formative roots. The point is the more striking because the seventeenth century has been seen as a period when the (modern) natural law tradition strongly influenced English thought: see R. Tuck *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press 1979) and *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press 1993).

110 It is not even (to take, as a limiting case, the Taylor-Warrender interpretation of Hobbes's thought) a matter of bringing into play the *conditions of applicability* of a law of nature – a law of nature which, prior to the contract, obliged only *in foro interno*: see *Leviathan* p. 215.

111 *Source Book* Vol. 3 pp. 96, 101.

is, in effect, a group-in-fusion in Sartre's sense.<sup>112</sup>

After the act of constitutive promising takes place, the normative world inhabited by parties to the promise may take a range of forms. At one extreme, the post-promising world may be one where only obligations arising from the promise exists. Such a world is a 'new beginning', in Arendt's meaning of the phrase.<sup>113</sup> At another extreme, the post-promising world may be one where – in Hegel's description of French Revolutionary events – individuals 'again submit themselves to negation and distinctions, arrange themselves in the various [social] spheres and return to an apportioned and limited task'.<sup>114</sup> Between these extremes intermediate forms occur.

What are we to make of Scottish social contract theory, as thus schematically characterised? My responses to this question fall into two categories – one turning on the history of Scottish ideas and the other more general in its character.

The first of these responses concerns a specific individual: Archibald Johnston, co-author of the National Covenant. Johnston was a deeply religious and (not to put too fine a point upon it) a deeply superstitious man. Johnston it was who, walking near Edinburgh's High Street, was hit by 'and hard lump of lyme blouen of the houses with wynd'.<sup>115</sup> He was not, he records, 'greavously hurt'<sup>116</sup> – but was this a sign that God regarded the writing and signing of the Covenant as a blasphemous act? Johnstone remained deeply anxious until, in Curry church some days later, the minister exhorted his congregation to endorse the Covenant. Even then Johnston remained unmoved and troubled. Only when the congregation was asked 'to stand up and lift up thair hands and sueare unto the aeternal God' did Johnston feel that he had received the needed divine approval – and experience the consequent feeling of emotional release.<sup>117</sup> The story has is not merely of anecdotal but conceptual importance because it illustrates the importance attached to promising *as a performative speech act* in Covenanting thought. This said, it is a story which raises more questions than it answers: did Johnson, a Calvinist, regard himself as *too sinful* to make promises?<sup>118</sup> And did he regard *successful promising* as an assurance the he, himself, was of the saved? The pages of his *Diary* do not – or do not explicitly – tell.

My second response concerns promising and the revolutionary tradition. If social contract theory takes as its starting point the notion of a state of nature, and views itself as an instantiation of natural law thinking, then it sees itself as based upon already-existing norms. At a conceptual level, there is nothing revolutionary about it. If, on the contrary, promising as a performative speech act is emphasised the notion

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112 J.-P. Sartre *Critique of Dialectical Reason* (New Left Books 1976) pp. 345ff.

113 H. Arendt *On Revolution* (Harmondsworth: Penguin Books 1973) p. 211.

114 G.W.F. Hegel *Phenomenology of Spirit* (Oxford: Oxford University Press 1977) p. 361.

115 Johnston *Diary...1632-1639* p. 324.

116 Ibid.

117 Ibid. pp 327-8.

118 See the final paragraph of section 5, above.



of founding a 'new world'<sup>119</sup> becomes a central concern. In a word, Scottish social contract theory belongs – whatever be the commitments of individual contractualists – in the tradition of what I have elsewhere termed 'revolutionary promising'.<sup>120</sup> One may go further: contractualism which turns on the notion a performative speech act regards *promising* as a first installment of the social existence which it aims to install.

## 8. *Social contract theory after the Covenanting movement*

The last two sections of the present paper, or series of notes, are in effect an epilogue: the high point of Scottish social contract theory was the Reformation and post-Reformation period to which I have referred. What remains is to comment on Scottish contractualist thought in the years between the Glorious Revolution of 1688-9 and the Scottish Enlightenment (the task of the current section) and to offer thoughts on the Scottish Enlightenment's anti-contractualist critique (the task of section 10).

At first glance, the years following the Glorious Revolution were ones where, in Scotland, the influence of social contract theory might be expected to grow. Not only was the Revolution an event which, famously, placed the notion of an 'original contract between King and People' at its centre.<sup>121</sup> In addition, presbyterianism (which throughout the seventeenth century favoured contractualism) received state authorisation. In a separate development, moreover, natural law thinking became, in the late-seventeenth and early-eighteenth-centuries, acceptable in the Scottish university system.

In the light of such expectations, contractualist theory in Scotland between 1688 and the Scottish Enlightenment must strike a historian of ideas as undramatic. It is true that, in the pamphlet literature associated with the Revolution, a number of contractualist passages may be identified. One such passage insists that kings count as merely 'imposed' until they 'swear to Rule us according to Law and no otherways'.<sup>122</sup> The second opens with a Buchananist declaration: 'When *Fergus* the first was chosen King the Estates gave the Crown to him his Heirs and Successors, and confirmed it by an Oath'.<sup>123</sup> And a third regards a king as a 'King by Contract', his relation to his subjects requiring '*Oaths of Allegiance*'.<sup>124</sup> In the same year, Francis

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119 I borrow the phrase from Hegel's *Phenomenology* p. 7.

120 R. Gunn 'Revolutionary Theory in 1579' *Common Sense* No. 21 (1997) pp. 81, 90.

121 I quote from the Convention of both houses of the Westminster parliament which met in January 1689: see (for example) J.R. Green *A Short History of the English People* (London: Macmillan 1909) p. 682.

122 A Lover of His Religion and Country [A. Fletcher?] *A Letter to a Member of the Convention of Estates in Scotland* (no place of publication 1689) p. 5. John Robertson includes the pamphlet in a list of texts that 'have been attributed to Andrew Fletcher': see 'Bibliographical guide' in A. Fletcher *Political Writings* (Cambridge: Cambridge University Press 1997) p. xxxvi.

123 Anon. *A Short Historical Account Concerning the Succession to the Crown of Scotland* (no place or date of publication [Edinburgh 1689?]) p. 1. (See C. Jackson *Restoration Scotland 1660-1690*, Woodbridge: Boydell Press 2003, p. 198 n. 29.) Note that a translation of Buchanan's *History of Scotland* from Latin into English appeared in 1689/1690.

124 Anon. *Salus Populi Suprema Lex* (no place of publication 1689) p. 5.

Grant (later Lord Cullen) opens a more extensive discussion by stipulating that 'there were two (yet subsisting) *Fundamental Contracts*...in our Kingdom; viz., One Popular and Anterior...amongst the Fathers of Families...another Rectoral and Posterior betwixt that body Politick...and one Sovereign as Head thereof'.<sup>125</sup> (Grant's allusion is to the “two contracts” version of contractualism developed by Pufendorf: I return to this version presently.) In the years following the Revolution, Stair presents an account of law that MacCormick describes as being 'erected on the basis of a contractual theory of the state'.<sup>126</sup> And a good deal later, in the 1720s, Gershom Carmichael's lectures at Glasgow supplies a defence of social contract theory. This defence is, as in Grant, based on Pufendorf's “two contracts” scheme<sup>127</sup> – and the scheme is echoed in Hutcheson's natural law texts.<sup>128</sup> Whilst this list of sources in the Glorious Revolution to Scottish Enlightenment period contains material that is significant by any conceptual standard, a historian of ideas is struck by, so to say, its chronologically “patchy” appearance. Despite its initial appearance, contractualism in post-1688 Scotland was far from undergoing a resurgence or a renaissance. What had happened?

An answer to this question takes, I suggest, a number of forms. One relevant consideration is that contractualism may have been less central to the Glorious Revolution than historians have tended to assume.<sup>129</sup> Another is that the two post-1688 developments in Scotland which I have mentioned as seeming to favour contractualism – on the one hand, the state's authorisation of presbyterianism and, on the other, the university system's acceptance of natural law – were developments which pulled in opposing directions. Regarding natural law: for both Stair and Carmichael, for example, a turning to natural law was made possible by a softening of Calvinist doctrine.<sup>130</sup> Nature must count *not merely* as a realm of sin, if notions

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125 F.G. [Francis Grant] *The Loyalists Reasons for Giving Obedience, and Swearing Allegiance, to the Present Government* (no place of publication 1689) opening pages. Note that Grant's scheme of a double contract derives from Pufendorf: see S. Pufendorf *Of the Law of Nature and Nations* (London 1729) pp. 639-40; *On the Duty of Man and Citizen* (Cambridge: Cambridge University Press 1991) pp. 136-7. For discussion of Grant, see C. Jackson 'Revolution Principles, *Ius Naturae* and *Ius Gentium* in Early-Enlightenment Scotland: The Contribution of Sir Francis Grant, Lord Cullen (c. 1660-1726)' in T.J. Hochstrasser and P. Schroder, eds., *Early Modern Natural Law Theories* (Dordrecht: Kluwer 2003).

126 N. MacCormick 'Republicanism: Fletcher and Ferguson' in P.H. Henderson, ed., *The Saltoun Papers* (Edinburgh: Saltire Society 2003) p. 35. My impression – which I report but do not here argue – is that Stair's conceptual apparatus is less contractualist than the quoted passage implies.

127 See J. Moore and M. Silverthorne, eds., *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael* (Indianapolis: Liberty Fund 2002) pp. 147-53.

128 F. Hutcheson *A Short Introduction to Moral Philosophy* (Indianapolis: Liberty Fund 2007) p. 241; *A System of Moral Philosophy* (London: Continuum 2005), Vol. 2, p. 227; see F. Hutcheson *Philosophical Writings* (London: Everyman 1994) p. 192. For discussion, see J. Moore 'The Two Systems of Francis Hutcheson: On the Origins of the Scottish Enlightenment' in M.A. Stewart, ed., *Studies in the Philosophy of the Scottish Enlightenment* (Oxford: Clarendon Press 1990).

129 For “revisionist” discussion to this effect, see J.P. Kenyon *Revolutionary Principles: The Politics of Party 1689-1720* (Cambridge: Cambridge University Press 1977) chs. 1-2.

130 See James, Viscount Stair *Institutions of the Law of Scotland* (Edinburgh and Glasgow: University Presses of Edinburgh and Glasgow 1981) pp. 77, 89: although 'sin and evil custom' had 'much defaced' natural law, 'God in his goodness hath given man more radiant rays of reason and preserved it more after his fall, about his rights of *meum* and *tuum*, than in any other science or knowledge'. For Carmichael, see Moore and Silverthorne *Threshold* pp. 24, 30-1, 229-31.

such as Natural Theology and natural law were to make sense.<sup>131</sup> Regarding presbyterianism: the final decade of the seventeenth century saw, in Scotland, a hardening of Calvinist-presbyterian attitudes rather than the reverse.<sup>132</sup> The circumstance that contractualism was caught between these conflicting pressure or tendencies goes some way, I suggest, towards explaining the relative absence of contractualism in post-Revolution years.<sup>133</sup>

A further factor contributing to the quiescence may be seen in the period's most conceptually sophisticated contractualist theorist. In Carmichael's Pufendorf-based discussion, contractualism acquires a fundamentally defensive stance. In large part, his advocacy of what I have termed a "two contracts" approach is an attempt to make contractualism seem 'more probable' – or less historically 'implausible' – than its alternatives.<sup>134</sup> In effect, his claim is that Pufendorf's scenario of, first, a coming-together of individual householders and, second, a conferring of authority on a ruler<sup>135</sup> is sufficiently concrete and multi-stage to be admissible as an account of how states come into being.<sup>136</sup> We may note that, in rounding out his account of two-contract or multi-stage constitution, Carmichael draws upon Locke's notion of 'consent, given expressly or tacitly'.<sup>137</sup> The present comments on Carmichael are, to be sure, brief and highly schematic – but two observations are suggested by them. One is that, the more complex and gradated an account of state-formation becomes, the more *defensive* is contractualism's overall position. It is as though the the cost paid for avoiding incredibility is that theory moves further and further from the notion of a reciprocal or mutual promise. (This is especially so, if notions of 'tacit' consent are added to the picture.) So to say, Carmichael writes with a sense that the days of contractualism are numbered. The second observation is that a multi-stage version of social contract theory, such as that favoured by Carmichael, is in effect a rejection of contractualism in its speech-act-focused or – see section 7, above – characteristically "Scottish" guise.

## 9. Social contract theory and the Scottish Enlightenment

The political theory of the Scottish Enlightenment is famous for its critical rejection of social contract theory and its advocacy of non-contractualist accounts of social development. This critique is pioneered in Hume's *Treatise*, presented in a popular

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131 For background to this remark, see the final paragraph of section 3, above.

132 See A. Raffe 'Presbyterianism, Secularisation and Scottish Politics after the Revolution of 1688-1690' *Historical Journal* Vol. 53, No. 2 (2010) p. 321; A. Shukman *Bishops and Covenants: The Church in Scotland 1688-1691* (Edinburgh: John Donald 2012).

133 Unsettlingly, Francis Grant appears to endorse both natural law and hard-line presbyterianism.

134 *Threshold* pp. 146-7.

135 S. Pufendorf *Of the Law of Nature and Nations* (London 1729) pp. 639-40; *On the Duty of Man and Citizen* (Cambridge: Cambridge University Press 1991) pp. 136-7.

136 See *Threshold* p. 151. Note that, under certain circumstances, the two species of contract may in Carmichael's view be conflated (ibid. pp. 148-9): his point that, even when they are *de facto* conflated, they remain conceptually distinct.

137 Ibid. p. 152.

form in his 1748 essay 'Of the Original Contract' and summarised in his *Enquiries*.<sup>138</sup> It is referred to favourably in Smith's Glasgow lectures<sup>139</sup> and underlies Ferguson's frequently-cited declaration that mankind 'are to be taken in groupes'.<sup>140</sup> I close the present notes asking (without attempting to answer) the question: if Scottish social contract is as I have described it, how much (or how little) difference does the Scottish Enlightenment critique of contractualism make?

My question itself may strike a reader of eighteenth-century thought as misguided and, before commenting on it, I pause to explain why this is the case. In Hume's widely consulted 'Of the Original Contract', no mention whatever is made of the National Covenant or the Covenanted movement – and a reader may form an impression that its author is interested only in social contract theory with a Lockean form. So to say, Hume's critique and the material referred to in previous sections seem unrelated and to face in different directions.

This appearance of unrelatedness is misleading, however. Throughout his work, Hume writes in opposition to Calvinist presbyterianism and, if this point is allowed, there is every reason to extend it to his critique of contractualism. In Scotland at least, the Calvinists were – as my notes have contended – the chief upholders of social contract theory. For Hume to have made *no* mention of Scottish contractualism<sup>141</sup> is incomprehensible – unless he is relying on a Scottish reader to fill in the silences with which (so I suggest) 'Of the Original Contract' is filled. And, read in this fashion, the essay contains points of signal interest. Although it does, indeed, attack the Lockean notion of '*tacit* consent',<sup>142</sup> its main target is contractualism which understands social contract theory in actual and empirical – or, stating the point differently, in speech-act-based – ways. It is such contractualism that Hume has in mind when he declares that almost every state 'of which there remains any notion in story [i.e. history]' is 'founded originally' not on promising but on 'usurpation or conquest, or both'.<sup>143</sup> The central argument of Hume's essay is directed, in other words, against a form of contractualism that was widespread amongst the presbyterian Scots. But there is more: the form that this argument takes in 'Of the Original Contract' is one which deflects the claims of Scottish contractualism in an astute way. In section 7, above, I have suggested that "Scottish" social contract theory is an instance of revolutionary promising. For the Covenanters, for example, the signing of the Covenant counted for little unless the signing took place in the here and now. But the promising to which 'Of the Original Contract' objects is, as the just-quoted passage indicates, one which

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138 D. Hume *A Treatise of Human Nature* (Oxford: Clarendon Press 1978) Book III, Part II; *Essays: Moral, Political and Literary* (Indianapolis: Liberty Fund 1987) pp. 465-87; *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* (London: Clarendon Press 1902) p. 306.

139 A. Smith *Lectures on Jurisprudence* (Indianapolis: Liberty Classics 1982) pp. 316-7.

140 A. Ferguson *An Essay on the History of Civil Society* (Edinburgh: Edinburgh University Press 1966) p. 6; for similar formulations, see pp. 3, 16.

141 There *is*, of course, not merely a mention but an extended presentation of events surrounding the National Covenant in D. Hume *The History of England* (Indianapolis: Liberty Fund 1983), Vol. V, pp. 249-63. But this merely demonstrates that Hume is familiar with that whereof he elsewhere fails to speak.

142 'Of the Original Contract' in *Essays* p. 475.

143 *Ibid.* p. 471.

allegedly took place at the dawn of history. Hume defuses the revolutionary challenge implied in the Scottish model of contractualism by altering the chronological perspective of the view which (so I suggest) he rejects.

I return to the question: what difference does the Scottish Enlightenment's critique of social contract theory make? My suggestion – which I offer in passing, without embarking on systematic discussion – is that the difference concerned was relatively slight. I have proposed that distinctively Scottish social contract theory (a) virtually dispensed with the notion of a state of nature and (b) focused on the speech act of promising. In regard to (a): far from making a break with the past, Scottish Enlightenment theorists who dropped the notion of a state of nature<sup>144</sup> were embracing an already-established view. They were, in effect, following in the footsteps of Scottish social contract theorists themselves. In regard to (b): whilst it is true that the Scottish Enlightenment rejected social contract theory's invocation of *promising*,<sup>145</sup> the resulting distance between its own views and those of Scottish contractualism are smaller than, at first, may seem to be the case. From what form of human practice does social and political values originate? For the contractualists, such values originate from promising. For Scottish Enlightenment theorists, such values originate from social interaction.<sup>146</sup> The seeming distance between Scottish social contract theory and the Scottish Enlightenment shrinks, however, once we notice that – in the swearing of the National Covenant, for example – Scottish contractualism pictures promising in an interactive way. Scottish contractualism's emphasis on promising as a speech act is – and, conceptually, has to be – an emphasis on interaction and mutuality as well. Viewed in such a perspective, the interactionism favoured by Scottish Enlightenment theorists is less a break with the past than an enrichment and a broadening and a sense of the constitutive potential that is inherent in social relations *per se*.

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144 As did Ferguson, when he said that human individuals are to be 'taken in groupes'.

145 See, for example, Hume's *Treatise* pp. 489-90; also his comments on '*fidelity* or the observance of promises' in 'Of the Original Contract' pp. 480-1.

146 The Scottish Enlightenment theorist who discusses interaction most fully in this connection is, I suggest, Smith: see A. Smith *The Theory of Moral Sentiments* (Oxford: Clarendon Press 1976) Parts I and III. For discussion which supports this reading of Smith, see R. Gunn 'Scepticism, Religion and Political Theory in the Scottish Enlightenment' (<http://www.richard-gunn.com>).

