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# The Bilateral State of Nature: Bargaining Power, Social Contract, and the Death Penalty

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THE BILATERAL STATE OF NATURE: BARGAINING POWER, SOCIAL CONTRACT,  
AND THE DEATH PENALTY  
by  
Brent Lee Domann

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## An Introduction

Imposition of the death penalty is among the most contentious issues facing scrutiny by the government and people of the United States. Should the government retain the ability to kill its own citizens? While this question can quickly devolve into a heated moral or religious debate, the question is ultimately an ethical one.<sup>1</sup> The success and strength of the social contract turn directly on the relative powers of the government and the people in a given society, and an understanding of that contract can provide further insight regarding the dilemma of lethal force than can be had from more traditional arguments. Thus the social contract serves as an excellent basis for argument on whether or not the government should be able to kill its citizens.

The social contract thrives when parties utilize it to deal with competition for resources and power. It shows its greatest efficacy in the state of nature—the situation in which individuals compete directly for satisfaction of wants and needs independent of the authority of law or sovereignty.<sup>2</sup> The founders recognized the value of competition in controlling the dynamic of power in the formation and maintenance of a social contract, and took deliberate steps to ensure that a competitive atmosphere was part of the American political system.<sup>3</sup>

The power dynamic between the sovereign citizen and the government must incorporate true competition, then, in order for the social contract to operate properly. Both the individual and the government must have the power to compete with one another: in terms of the social contract, the individual must be a threat to the government, and the government must be an equal threat to the individual. Because the individual has the power to threaten others and the

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<sup>1</sup> The term “ethical” is used in the Greek context, i.e., as part of a determination on “how one should act.” This understanding is distinct from the other bases for debate mentioned.

<sup>2</sup> Although the topic is discussed in greater depth below, *see* THOMAS HOBBS, *LEVIATHAN* 105-09 (Bobbs-Merrill 1958); *see also* JOHN LOCKE, *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 5-6 (Charles L. Sherman, ed., Irvington, 1979).

<sup>3</sup> For example, the division of power between branches of government prevents usurpation through competition. *See, e.g.*, *THE FEDERALIST* NOS. 47, 51 (James Madison).

government with complete destruction, the social contract therefore both justifies and requires the state to retain the capacity to use lethal force against its citizens. *The government cannot be prohibited from imposing the death penalty.*

This essay will examine how this justification applies. Section I will briefly outline the major influences on modern interpretations of the social contract, first by discussing its historical development and then by discussing the establishment of a social contract in the United States. Section II will demonstrate that the social contract and the need for competition require the government to retain killing power. It will do this in four steps: first, it will show that the ability to kill is a measure of power; second, it will show that the dynamic of power is crucial to the social contract; third, it will show that the power of individuals rises to the power to kill; fourth, it will show that the state must have equal killing power if the social contract is to be maintained. Section III will address a number of counterarguments and other considerations, and this essay will conclude with a statement of applicability and a summary in Section IV.

### **I. Historical Foundations**

This brief foray into the history of the social contract will focus largely on major contractarian influences on the founders of the United States of America. While sources for an understanding of the social contract are many and varied, most of this essay's attention will be on the ideas of two major contributors: Thomas Hobbes and John Locke. After an explanation of ancient and modern foundations of contractarian thought, this section will explain both Hobbes' and Locke's positions regarding the social contract and its related concepts. Finally, this section will segue into the influence these contributors had on the founders and how that influence was expressed in early United States law and rhetoric.

## A. A Brief History of the Social Contract

### 1. Ancient and Modern Foundations

The concept of a social contract can be traced in one form or another at least to ancient Greece, and its use as a tool of political science has continued through the middle ages and into the modern day. Among the earliest reckonings of social order based on contractual terms was Plato's *Crito*, in which Socrates refused an opportunity to escape unjust punishment because of his lifetime of benefit from Athenian democracy and law.<sup>4</sup> Socrates' recognition of such a trade—his adherence to Athenian law in return for its benefits and protections—is more “contemporarily contractual” than one might think: Socrates died to prevent unjust enrichment in a bargain with the state for its obligations to him and his fellow citizens.<sup>5</sup>

As a near-contemporary to Plato, Epicurus argued for the exchange of power in the creation of a state: “The justice which arises from nature is a pledge of mutual advantage to restrain men from harming one another and save them from being harmed.”<sup>6</sup> This position survives even today through its most fundamental premise: the administration of justice involves a compact between individuals to forego the ability to harm in exchange for protection from the same.<sup>7</sup> This premise remained present in Hobbes' recognition of the human existence as perpetually competitive and dangerous as well as in his acknowledgment that society (and legality) involves an agreement to disengage hostilities.<sup>8</sup> It was also present in Locke's

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<sup>4</sup> PLATO, EUTHYPHRO, APOLOGY, CRITO 60-62 (F.J. Church, trans., Macmillan 1948).

<sup>5</sup> *Id.*

<sup>6</sup> Epicurus, *Leading Doctrines in ETHICS: HISTORY, THEORY, AND CONTEMPORARY ISSUES* 186, 188 (Steven M. Cahn & Peter J. Markie, eds., 2d ed. 2002).

<sup>7</sup> *Id.*

<sup>8</sup> Hobbes, *supra* note 2, at 110 (“From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law; *that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.*”) (emphasis in original).

reservation of a right to revolt against an established arbiter (the government).<sup>9</sup> It was even present in the words of the founding documents of the United States of America.<sup>10</sup>

The theory of the social contract, both in terms of formation and maintenance, has changed dynamically throughout history. Hugo Grotius provided one of the earliest modern interpretations of the social contract.<sup>11</sup> Specifically, Grotius discussed the transfer of sovereign power as between individuals in a society or, alternatively, between the collective and an empowered party such as a king.<sup>12</sup> He argued that if an individual can assign power to another, a people should be able to do the same.<sup>13</sup> Moreover, he argued that an assignment of power might reasonably be complete (that is, a complete transfer of power).<sup>14</sup>

Grotius' argument indicates that the initial grant of power from government to Governor is irrevocable.<sup>15</sup> Once a ruler is given power by the ruled, the ruler cannot remain completely at the will of the governed<sup>16</sup>. Grotius further argued that although one may “frame an imaginary kind of mutual subjection” such that the governed retain the right to inspection of and control over their rule, the point is moot anyway. While Grotius recognized that the government cannot

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<sup>9</sup> Locke, *supra* note 2, at 100-01, 104 (“[Man] will always have a right to preserve what they have not a power to part with; and to rid themselves of these, who invade this fundamental, sacred, and unalterable law of *self-preservation, for which the enter into society.*”) (emphasis added).

<sup>10</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776) (The Declaration placed conditions of sovereignty—namely that the King or other sovereign must adhere with the people to common laws or principles that apply to both or risk justified revolt: “But when a long train of abuses and usurpations...evinces a design to reduce [the people] under absolute Despotism, it is their right, it is their duty, to throw off such Government....[T]he present king of Great Britain has...refused his Assent to Laws....”).

<sup>11</sup> HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (A.C. Campbell, tr., Batoche Books 2001).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 49-50 (“From [ancient] Law, it appears that any one might engage himself in private servitude to whom he pleased. Now if an individual may do so, why may not a whole people, for the benefit of better government and more certain protection, completely transfer their sovereign rights to one of more persons, whithout [sic] reserving any portion to themselves? Neither can it be alleged that such a thing is not to be presumed, for the question is not, what is to be presumed in a doubtful case, but what may lawfully be done.”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 57.

<sup>16</sup> *Id.* at 50 (“[A] people may entirely relinquish their rights, and surrender them to another: for instance, they may have no other means of securing themselves from the danger of immediate destruction....”)

act against the law of God, “this by no means includes a right to any controul over the Prince’s conduct in his lawful government.”<sup>17</sup>

Although irrevocable power-granting is a much less popular concept in modern contractarianism, the true historical significance of Grotius’ argument comes from his explanation of the power dynamic as premised on the grant of power to a ruler by the ruled. This was one of the first modern re-illuminations of the source of governing power being the governed, and it set a foundation for future formulations of the social contract.

## *2. The Two Faces of the American Social Contract: Thomas Hobbes and John Locke*

Thomas Hobbes’ *Leviathan* provided the next major development in modernizing the social contract. Hobbes recognized that human beings are in a state of nature in which they directly compete with one another for resources, needs, and desires.<sup>18</sup> Incapable of self-control, the pressures of the state of nature compel people to bargain for security.<sup>19</sup> As a collective, Hobbes argued that such a bargain justifies the seating of power in an absolute sovereign.<sup>20</sup> Though portions of Hobbes’ argument have fallen out of favor philosophically (e.g. Leviathanic rule), his observations regarding the state of nature and mutual agreement for protection remain fundamental in contractarian thought.

John Locke further developed the understanding of social contract. Locke’s contributions to the concept were twofold: first, Locke introduced the notion of natural rights and argued that the inalienable nature of those rights (specifically the rights to life, liberty, and property) provide a basis for redress against the sovereign if necessary.<sup>21</sup> Second, this redress manifests through a

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<sup>17</sup> *Id.* at 55.

<sup>18</sup> Hobbes, *supra* note 2, at 104-09.

<sup>19</sup> *Id.* at 110-11

<sup>20</sup> *Id.* at 142-43.

<sup>21</sup> Locke, *supra* note 2, at 142 (The entire chapter “Of the Dissolution of Government” bears mention.).

right to rebel.<sup>22</sup> According to Locke, the sovereign’s role is to protect and maintain the inalienable rights of the citizenry (in the very least),<sup>23</sup> and in the event that those rights are infringed upon by the sovereign the people retain the right to change the government through a number of means, including dissolution.<sup>24</sup> These two contributions—inalienable rights upon which the citizenry can build a justification to rebel and the right to rebel itself—bring individuals to the bargaining table in order to establish government and later to engage in dealings with it.<sup>25</sup>

Locke’s position was distinct from Grotius’ irreversible grant of power to the sovereign and Hobbes’ creation of an uber-powerful, omniscient enforcer of societal agreement. Locke’s people give power to the government, but retain the ability to deny allegiance to that government in extreme circumstances.<sup>26</sup> In less extreme circumstances, the people can take great steps to alter the government or its makeup.<sup>27</sup> In establishing this protocol, Locke provided the founders with not only a full stable of ideas but also a complete vocabulary of terms and concepts they would implement in forming the early United States.

### *3. The Influence of Social Contractarian Ideals in the United States of America*

Social contractarian ideals in American law and politics are expressed in two ways. Textually, the founding documents of the United States incorporate and rely upon the arguments and aims of the social contract as described by John Locke.<sup>28</sup> Ideologically, the influences of Hobbes and Locke are evident in the personal histories of a number of founders and the inclusion

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<sup>22</sup> *Id.* at 152-53.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 82, 152-53.

<sup>25</sup> *Id.* at 63-65.

<sup>26</sup> *Id.* at 152-53.

<sup>27</sup> *See Id.* at 142-151 (Locke details methods other than revolution through force, such as dissolving a legislature and erecting a new one); *see also* IMMANUEL KANT, *THE METAPHYSIC OF MORALS* 325 (1799) (Kant expresses his preference for elections in this section.).

<sup>28</sup> *Compare* Locke, *supra* note 2, at 56 (“life, liberty, and estate”) with *THE DECLARATION OF INDEPENDENCE*, *supra* note 10 (“life, liberty, and the pursuit of happiness”).

of these influential ideas through the authorship of the founding documents themselves.<sup>29</sup> In other words, the Lockean social contract is expressed through both the founding documents themselves and through the philosophical loyalties of the authors of those documents. The remainder of Section I will explain this in greater detail.

## **B. Is there a Social Contract in the United States of America?**

The United States was, at least in part, built upon the theory of the social contract. It continues in many respects to operate under that same model of relations between the state and the citizenry. The influence of social contract theory on American political and legal thought arises from three main sources: first, the founding documents of the United States of America assert and exercise the rights of individuals according to the paradigm of a contractarian structure; second, the United States Constitution and Bill of Rights place individuals and their rights and the powers of government in continual dispute, and therefore compel them to negotiate. Third, even in the absence of an original state of nature or even a literal contract, the government and laws of the United States embody a de facto social contract and a secondary, artificial state of nature.

### *1. The Founding Documents are Contractarian in Nature*

The founding documents incorporate the social contract in both general terms and, more specifically, Lockean terms. Despite the political and military power that the British government had over the American colonies, the American Revolution embodied Locke's right to rebel. The

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<sup>29</sup> See, e.g., STUART GERRY BROWN, THOMAS JEFFERSON 208-12 (Washington Square Press 1966); see also JAMES K. HOSMER, SAMUEL ADAMS 17 (Houghton Mifflin 1913) (Adams' understanding of a right to rebel was clear at an early age: "[Adams] became Master of Arts, the thesis which he presented showed plainly what was his true bent. 'Whether it be Lawful to resist the Supreme Magistrate, if the Commonwealth cannot otherwise be preserved,' was his subject...."); see also Hosmer, *supra*, at 47-48 (Adams drafted a paper on behalf of an instructing committee for newly elected representatives in the General Court of Boston. This draft, submitted on May 24, 1764, stated, "If Taxes are laid upon us in any shape without our having a legal representation where they are laid, are we not reduced from the Character of free Subjects to the miserable State of tributary Slaves?" This highlights Adams' adherence to the Lockean principle that upon violation or destruction of the social contract, individuals return to the state of nature).

British controlled the colonies according to British law, but morally and in principle the colonies ultimately followed Locke's mantra: "[W]hen they are hindered by any force from what is so necessary to the society, and wherein the safety and preservation of the people consists, the people have a right to remove it by force."<sup>30</sup>

The Declaration of Independence operated as a direct and necessary establishment of the groundwork needed to legitimize such a removal by force. Locke stated that, "In all states and conditions, the true remedy of force without authority is to oppose force to it. The use of force without authority always puts him that uses it into a state of war, as the aggressor, and renders him liable to be treated accordingly."<sup>31</sup> Under Locke's paradigm, the revolution of the state is a complete process—it is not merely the overthrow of the problematic government, but also a reestablishment of governmental authority by the people. By declaring independence, the colonies took the first step toward legitimate revolution by removing tyranny. This rejection of tyrannical authority made a complete Lockean revolution possible—only *after* doing so could appropriate authority be established in a new government.

In that way, America internalized from the outset the Lockean right to rebel and the notion that authority to govern emanates from the people. The Declaration, then, enumerated the unalienable rights of individuals and exercised the right to rebel based on those rights. Moreover, the document described the circumstances under which the right to rebel was asserted in an attempt to satisfy Locke's philosophical requirements,<sup>32</sup> and applied them to the contemporary situation in colonial America.<sup>33</sup>

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<sup>30</sup> Locke, *supra* note 2, at 104.

<sup>31</sup> *Id.*

<sup>32</sup> THE DECLARATION OF INDEPENDENCE, *supra* note 10 (enumerating transgressions by King George III).

<sup>33</sup> Locke, *supra* note 2, at 100-01, 150-51, 163-64 (This is not an assertion that the founders literally enumerated Locke's requirements and set out on a mission to meet them. It is merely a statement that the founders recognized the same necessary bases for revolution that Locke did—undoubtedly as a result of their familiarity with Locke's philosophy—and utilized a Lockean argument to assert the rights of the colonies.).

The language in the Declaration was *facially* Lockean, as well, and adheres to Locke’s fundamental theory of the social contract. Locke’s reliance on the natural rights of man is his strongest argument for the right to rebel. Those natural rights—the rights to life, health, liberty, and property—form the basis upon which the limits of the sovereign’s authority must be set.<sup>34</sup> These rights were translated even into the earliest drafts of the Declaration as “life, liberty, and the pursuit of happiness.”<sup>35</sup>

## 2. *The State of Nature Compels Negotiation*

Secondly, the state of nature compels negotiation. It places the government arbitrarily in the position of a common person with whom each citizen must bargain, and its forces act to encourage bargaining according to Hobbes’ model.<sup>36</sup> There are two major avenues through which this is accomplished: first, the Declaration and other founding documents nominally place the government and the people in a position to negotiate; second, other sources indicate the juxtaposition of the government and the people through government structure and the assertion of rights.<sup>37</sup>

In this first avenue, the principles and text of the law guarantee that individual citizens and the government are placed in competition for political power. This necessitates negotiation or bargaining for portions of that power. James Madison’s *Federalist No. 46* is an excellent initial source for this understanding.<sup>38</sup> In this work, Madison explained that the relative power of

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<sup>34</sup> *Id.* at 56 (“Man being born...with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man or number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty and estate—against the injuries and attempts of other men....”)

<sup>35</sup> THE DECLARATION OF INDEPENDENCE, *supra* note 10, para. 2 (A scan of original draft containing this language is available online from the Library of Congress at: <http://www.loc.gov/exhibits/treasures/images/uc004215.jpg>).

<sup>36</sup> Hobbes, *supra* note 2, at 109, 110 (The term “Hobbes’ model” refers to the circumstances Hobbes argues compel mutual agreement—namely, in the state of nature competitors fear one another’s power, and it is this mutual fear that encourages agreements of mutual forbearance.).

<sup>37</sup> See THE DECLARATION OF INDEPENDENCE, *supra* note 10; see also U.S. CONST. amends. I-X (Bill of Rights).

<sup>38</sup> THE FEDERALIST NO. 46, at 285 (James Madison) (Bantam Classics ed., 2003).

the federal government would not—despite apparent arguments to the contrary—overshadow that of the state governments.<sup>39</sup> While this argument does not *directly* bear on a discussion of power emanating from the people, it works indirectly. Madison reasoned that, “adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontroled by any common superior in their efforts to usurp the authorities of each other.”<sup>40</sup> Reminding these gentlemen of their error, Madison stated that the ultimate authority from which sovereignty derives is the people; sovereignty is theirs alone, and they retain the ability to retake power from oppressive leadership.<sup>41</sup>

[T]he ultimate authority, wherever the derivative may be found, resides in the people alone...truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents....

Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors.<sup>42</sup>

This federalist argument that ultimately succeeded upon ratification of the Constitution reminds its audience that it is contention between the people and the government that is at the heart of American politics.

Similarly, the Bill of Rights is a strong demonstration of the intended juxtaposition of man and state that results in an adversarial relationship.<sup>43</sup> This is particularly visible in the Second Amendment, which reads, “A well regulated Militia, being necessary to the security of a

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 285-86.

<sup>42</sup> *Id.* at 285-86, 291.

<sup>43</sup> U.S. CONST. amends. I-X.

free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>44</sup> This right to keep and bear arms in fact produces such a relationship.

Sources going back nearly to the inception of the United States as a nation were very aware of this result. St. George Tucker wrote in his American references on Blackstone’s *Commentaries on the Laws of England* that English law limited the right to keep arms “under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen.”<sup>45</sup> On the other hand, “[i]n America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.”<sup>46</sup> Even Justice Joseph Story of the United States Supreme Court would have a similar opinion: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people.... The friends of a free government cannot be too watchful, to over come the dangerous tendency of the public mind to sacrifice...this powerful check upon the designs of ambitious men.”<sup>47</sup>

The point of this essay is not to demonstrate that the Second Amendment was necessarily intended to arm citizens against the government. However, the raw nature of opposition based on the available use of physical force reflects the mechanism at play. It is clear through both the statements and principles of the law as well as through the motives and understandings of contemporary major players in the early American political scene that the *result* of arming citizens through the Second Amendment was to provide them with the ability to maintain opposition to the government. This confirms the Lockean rights to self-defense and to

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<sup>44</sup> U.S. CONST. amend. II.

<sup>45</sup> St. George Tucker, BLACKSTONE’S COMMENTARIES 414 n.3 (Augustus M. Kelley 1969).

<sup>46</sup> *Id.*

<sup>47</sup> Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1842).

revolution, and in so doing *establishes the people and the government as adversaries in an artificial state of nature.*

To further illustrate the point, the second avenue utilizes competition for sovereign authority to place the people and the government in a position to have to negotiate for power. As Hobbes laid out, enemies with similar power over one another are compelled to agree.<sup>48</sup> The contentious relationship erected between the American people and the United States government forces the two into the positions of enemies as described by Hobbes.<sup>49</sup> Hobbes began with the concept of the state of nature, which he characterized as a continuing conflict between all individuals against all other individuals.<sup>50</sup> Within the Hobbesian state of nature, the only “rights” held by individuals are amoral rights to obtain whatever they can and want by physical force and coercion. For Hobbes, the state of nature necessarily precluded any individual from engaging in productive labor since any other individual could simply take by force the fruits of that productive labor.<sup>51</sup> The fear of such usurpation by others through force compels individuals to agree to mutual terms to protect themselves against one another.<sup>52</sup>

While he shared Hobbes’ view of the state of nature, Locke gave a very different mechanism by which man might remove himself from that state. Hobbes argued that the pressures and dangers of the state of nature compel an individual to come to agreement with his enemies. On the other hand, Locke explained that all men, being “free, equal, and

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<sup>48</sup> Hobbes, *supra* note 2, at 105, 109.

<sup>49</sup> *Id.* at 105 (“[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end...endeavour to destroy or subdue one another. And from hence it comes to pass that where an invader hath no more to fear than another man's single power, if one plant, sow, build, or possess a convenient seat, others may probably be expected to come prepared with forces united to dispossess and deprive him, not only of the fruit of his labour, but also of his life or liberty.”).

<sup>50</sup> *Id.* at 104-09.

<sup>51</sup> *Id.* at 107 (“In such condition [as the state of nature] there is no place for industry, because the fruit thereof is uncertain....”).

<sup>52</sup> *Id.* at 108-09 (“And thus much for the ill condition which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason. The passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggesteth convenient articles of peace upon which men may be drawn to agreement.”).

independent,”<sup>53</sup> form society through willful and knowing consent.<sup>54</sup> Locke’s primary focus was on mutual consent and its exercise by naturally free persons.<sup>55</sup> By basing the incentive to contract on natural freedom and mutual consent, Locke established that the people begin with all of the sovereign power in a closed-loop system.<sup>56</sup> That is, the government exists as an embodiment of power that emanates from the natural rights of individuals, and only the giving of power by mutual consent truly vests it in a government.

In this sense, the government is truly a corporation. It is nonphysical, but nevertheless serves the practical role of accepting power from each citizen and exercising it on behalf of the community.<sup>57</sup> Once the government exists, it is essentially an entity in possession of an equal division of power that was granted from each citizen. Being that the power of the government comes through grant, and that power comes *from* the people, the two entities—individual and government—are thus forced into an artificial state of nature wherein the common resource to be collected is power itself. Ergo, so long as neither is powerful enough simply to take from the other, the government and the people must negotiate for this limited resource.

### *3. The Hypothetical Contract and the Artificial State of Nature*

The social contract need not be a tangible thing, nor need it be something emblazoned on a piece of paper. In the absence of physical evidence for an agreement between citizens and their

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<sup>53</sup> Locke, *supra* note 2, at 63.

<sup>54</sup> *Id.* at 63-65 ( §§ 95-99 detail the mechanism through which individuals obligate themselves to one another in the formation of political society. See especially p. 65: “And thus that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society.”); See also *Id.* at 51-62 (Locke discusses the historical development of interpersonal relationships in this section, covering the most basic of conjugal relations between male and female through societal relations involving groups and their mutual compacts).

<sup>55</sup> *Id.* at 65, 56 (Locke argues in this section—among many others—that freedom is a natural and inalienable right).

<sup>56</sup> *Id.* at 63.

<sup>57</sup> Though Locke’s and Hobbes’ accounts of the formation and role of the sovereign differ, its nature as an aggregate entity is a common theme between both philosophers. See Hobbes, *supra* note 2, at 139-43 (arguing that the citizens truly vest power in an aggregate entity that is communal, but is also separate and distinct from the citizenry); see also Locke, *supra* note 2, at 85 (§131 lays out the requirement that although the government is given the power of natural right from citizens, its responsibility is to the public good as an aggregate entity).

government, a hypothetical contract is perfectly able to serve the necessary roles played by an actual contract for governing purposes.<sup>58</sup>

In *A Theory of Justice*, John Rawls explained his use of a hypothetical contract in describing justice as fairness.<sup>59</sup> In his argument, the original position of equality is directly correspondent with the state of nature (competitive and equalized) whether or not it has ever actually existed.<sup>60</sup> Rawls argued that it should be “understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.”<sup>61</sup> Rawls’ position relied heavily on the Kantian notion that the social contract is indeed hypothetical.<sup>62</sup> Kant’s position is clear by itself—the social contract is simply a legitimization of state sovereignty based on assent analogous to that in a contractual relationship:

[I]t is by no means necessary that this contract...be presupposed as a *fact*...[i]t is instead *only an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the untied will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will.<sup>63</sup>

Such a conception of the social contract is perfectly suitable within the framework of this essay, and thus should serve as a suitable alternative for any reader uncomfortable with the lack of a more tangible social contract.

But what about the state of nature? Neither Hobbes nor Locke could find the source of the state of nature: Hobbes would not admit that it had ever existed,<sup>64</sup> and Locke did not even *try*

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<sup>58</sup> John A. Rawls, *THEORY OF JUSTICE* 11 (Harvard, 1999); Kant, *supra* note 27, at 82, 113-14.

<sup>59</sup> Rawls, *supra* note 58, at 11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Kant, *supra* note 27, at 82, 113-14.

<sup>63</sup> Immanuel Kant, “On the common saying: That may be correct in theory, but it is of no use in practice” in *PRACTICAL PHILOSOPHY* 296-97 (Mary J.Gregor, ed., Cambridge University Press 1999).

<sup>64</sup> Hobbes, *supra* note 2, at 108.

to pinpoint the source.<sup>65</sup> Both, however, argued for its continued existence in certain circumstances.<sup>66</sup> As Locke noted, the state of nature persists in circumstances in which parties are in contention or in which parties fail to enter a single body politic.<sup>67</sup> This set of circumstances is precisely the one at work in the United States.

While American citizens have a mutual compact to establish the government, there is a second level of competition: the government by design is itself placed in a competitive power relationship with the people distinct from the one that exists among the people.<sup>68</sup> This is brought about because the natural rights of the people check government power and necessarily place the two at odds. The established government entity and the people must compete for power, and Hobbes' criteria for the reduction to a state of nature are met.<sup>69</sup>

Thus a hypothetical contract is not the only mechanism at work in the agreement between the American people and their government. Additionally, governmental design places the

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<sup>65</sup> Locke, *supra* note 2, at 11-12.

<sup>66</sup> Hobbes, *supra* note 2, at 108 (“It may peradventure be thought, there was never such a time, nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places where they live so now.” Hobbes gives examples such as “savage” peoples who lack government and persons of sovereign authority, such as kings, who exercise independency in a state of war.); Locke, *supra* note 2, at 11-12 (“[S]ince all princes and rulers of independent governments all through the world are in a state of nature, ‘tis plain the world never was, nor ever will be, without numbers of men in that state. I have named all governors of independent communities, whether they are, or are not, in league with others. For ‘tis not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic....”).

<sup>67</sup> Locke, *supra* note 2, at 11-12.

<sup>68</sup> See generally THE FEDERALIST NO. 46 (James Madison) (recognizing that sovereignty emanates from the people although it is manifested in the government); see also Locke, *supra* note 2, at 6, 82-83, 100-01 (setting forth unalienable rights, and the supreme sovereignty of the people, but limiting the subordination of community authority only to circumstances in which the government has been dissolved); see also U.S. CONST. amend. II (arming the people against oppression and preventing tyranny); see also U.S. CONST. arts. I, II (The division of power even in government reflects the extra-governmental power relationship between the people, as represented in article I, and the government as executive, as represented in article II.). All of these sources indicate a division of power as between the people and the government, and so the two must share power in a closed circuit.

<sup>69</sup> See Hobbes, *supra* note 2, at 105-06 (Hobbes' criteria are essentially sufficiently equal or threatening power, limited resources, and the lack of an arbiter or “Leviathan”: “[I]f any two men [one being in this case the incorporated government] desire the same thing, which nevertheless they cannot both enjoy, they become enemies....[I]t is manifest that, during the time men live without a common power to keep them all in awe, they are in that condition which is called war....”); see also Locke, *supra* note 2, at 6, 163-64 (Locke's unalienable rights and right to rebel provide an extremely strong foundation for threat to government power by the people.). Locke's right to rebel gives equalizing power to man against government, and the resultant mutual checking and sharing of power limits resources. Because there is no meta-government, the people and the government are thus in a state of war (i.e. state of nature).

government and the people in a competitive relationship and therefore imposes an artificial state of nature. This artificial state of nature and its practical value are what will dictate the need for vesting particular powers in the government as an aggregate entity.

## II. The Government Must Retain Killing Power: an Argument

The examination of bargaining power as a tool for social policy necessarily begins with a definition of what it is to be powerful. What is “power,” anyway? Does it take on particular meaning in the context of bargaining? Power has long held an important place in the social order and interaction between humans. However, the nature of power as a reality of sociopolitical interaction has only recently garnered skeptical if not scientific study.<sup>70</sup>

Power is only at the very least a measure of the ability of a party to exact influence over another; the concept has drawn a diverse set of other definitions.<sup>71</sup> Power has been described as the ability to obtain a desired outcome, the ability to impose cost, the capacity to modify the conduct of other individuals according to desire, and the ability to determine the range of available futures.<sup>72</sup> Additionally, the scope of these definitions has continually been altered, at times including or excluding particular sources such as physical coercion, influence, or positive or negative sanctions.<sup>73</sup>

This essay will not attempt to determine particular applicable sources for power (political or otherwise), nor will it digress on the intricacies of power as a concrete concept. Instead, it

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<sup>70</sup> See Robert A. Dahl, *The Concept of Power*, 2:3 Behavioral Science 201 (1957).

<sup>71</sup> Daniel Barnhizer, *Inequality of Bargaining Power* 76 Univ. Co. L. Review 139, 156-57 (2005).

<sup>72</sup> *Id.* at 155-56 (quoting YORAM BARZEL, A THEORY OF THE STATE 18 (2002) (“Power is the ability to impose cost.”), R.H. TAWNEY, EQUALITY 211 (1931) (“Power is ‘the capacity of an individual, or group of individuals, to modify the conduct of other individuals or groups in the manner which he desires, and to prevent his own conduct being modified in the manner in which he does not.’”), and Douglas W. Rae, *Knowing Power: A Working Paper*, in POWER INEQUALITY, AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL 17, 40 (Ian Shapiro and Grant Reeher eds., 1988) (“Power . . . is the knowing capacity to determine some aspect(s) of the future, or to determine the range of available futures from which such choices are made.”)).

<sup>73</sup> *Id.* (citing Peter Blau, *Differentiation of Power*, in POLITICAL POWER: A READER IN THEORY AND RESEARCH 293 (Roderick Bell et al. eds., 1969)).

will assume the most basic available premise because it is the least controversial required to support the structure of power available in a bargain over killing power: “power” is the ability to influence the results of a negotiation over the social contract.

A notable result of this definition entails that power is not merely a concept for the objective, detached examination of negotiations or other bargains. It is a very real, tangible, and important part of each individual process of bargaining: power is present in each and every negotiation or interaction between two or more parties;<sup>74</sup> power is complex, its measure based largely if not purely on the circumstances surrounding the specific situation at hand and its forms both varied and susceptible to masking and hiding;<sup>75</sup> and power is, perhaps most importantly, dynamic over time.<sup>76</sup>

#### **A. The Ability to Exact Death is a Measure of Power**

The ability to exact death is a major source of bargaining power, especially with respect to the social contract. Killing power’s nature as such comes from its relationship with brute physical force. While many concepts or ideas may or may not fall within a reasonable understanding of “power,” physical coercion is well-established as a means through which humans gain, lose, and exert power. Killing and the threat of killing are strong measures of physical coercion: they are chief examples of force in the war of all against all,<sup>77</sup> and, as Hobbes notes, the fear of death is among the most powerful means through which parties in the state of nature are compelled to impart reason to improve their conditions<sup>78</sup>.

Because it involves power in general, the ability to exact death or the ability to instill the fear of death can be linked to bargaining power. As described by Epicurus more than two

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<sup>74</sup> *Id.* at 160.

<sup>75</sup> *Id.* at 166.

<sup>76</sup> *Id.* at 178-81.

<sup>77</sup> Hobbes, *supra* note 2, at 110.

<sup>78</sup> *Id.*

thousand years ago,<sup>79</sup> a social contract stems in the most basic of terms from an agreement between individuals not to harm one another. The power to kill in the state of nature places individuals in a position to bargain,<sup>80</sup> and the threat of that power vesting in others compels individuals to agree on mutual restrictions on liberty.<sup>81</sup> That is, because the ability to kill is threatening and so is a strong source for power in general, that power acts a bargaining chip in the structuring of social contract rules.<sup>82</sup> In doing so the power to kill operates as bargaining power—the power to kill is a major consideration in the negotiation of a social contract.

The power to kill need not vest in a corporeal entity. As Hobbes stated in *Leviathan's* chapter on the state of nature, the fundamental equality that exists between persons in terms of the ability to kill, harm, or seize the property of others is a matter of much more than brute strength and being good at killing people.<sup>83</sup> The ability to kill relies on a number of variables: physical strength, mental prowess, the ability to design and implement strategy, and the ability to execute one's will through necessary agents such as individuals or groups.<sup>84</sup> Deficiencies with respect to one variable may be compensated for by aptitude with respect to another.<sup>85</sup>

A government therefore may retain the *ability* to kill despite its lack of corporeal existence. As an aggregate entity, the government of the United States maintains all of these abilities through its representatives. Any agent with normal human abilities has a measure of physical strength, and this measure is heightened in group agents such as the military. The same

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<sup>79</sup> Epicurus, *supra* note 6, at 188.

<sup>80</sup> Hobbes, *supra* note 2, at 109-10 (It is important to also note that the threat of others' power is not the only consideration for the individual in the state of nature – the ability to kill gives an individual power that he can bring to the table on his own behalf.).

<sup>81</sup> *Id.* at 109-10, 142-43 (Not only does the threat of others' power compel agreement as noted on page 87, but as is made clear at the introduction of the Leviathan on pages 114-15, it is the threat of force for violation of social or legal rules that actually provides for civil society. Without the threat of force for violating the rules, individuals would not abide by them.).

<sup>82</sup> *Id.* at 110; Epicurus, *supra* note 6, at 188.

<sup>83</sup> See Hobbes, *supra* note 2, at 104-05.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

rings true for governmental mental prowess: it manifests in agents in the same way. Even where these abilities may be arguably curtailed, the government has strategic implementation and executive abilities that are far in excess of those available to the typical individual. The military has the personnel, weaponry, and training necessary to implement strategies extreme even in times of war. All of these abilities contribute to a clear governmental capacity to kill.

This capacity in the sovereign to engage in violence and lethal force against individual citizens directly affects the bargaining power of those citizens in the context of the social contract. Just as an individual's capacity for lethal force acts as a bargaining chip in social contract negotiations, the government's congruent ability congruently applies. In combination with the imposition of an artificial state of nature (as described above) between the government and its people, the capacity to kill manifests as bargaining power for both individuals and the government: individuals negotiate with the government in the artificial state of nature on the same terms as between one another in the true state of nature.

## **B. Power is Crucial to the Continued Maintenance of the Social Contract**

### *1. Power is Crucial to Every Bargain*

It has been said that power, being present in any relationship between two or more actors, is in the application of voluntary contract interactions "uniquely concerned with the ability of private parties to influence or coerce one another into their respective preferred outcomes."<sup>86</sup> More specific to the negotiation process, power includes all conditions that encourage the other party to make unilateral concessions.<sup>87</sup>

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<sup>86</sup> Barnhizer, *supra* note 71, at 159 (internal citations omitted).

<sup>87</sup> DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 87 (1981).

Power also bears on the negotiation process in that the perception of relative levels of power between parties affects those parties' behavior.<sup>88</sup> Because each party uses power as a tool for achieving particular results, each party's perception of the level of power had by others encourages attempts to make demands or, alternatively, make concessions.<sup>89</sup> This entails that in every bargain or negotiation, power is influential with respect not only to outcome but also to negotiation strategy and, as Hobbes himself noted, the willingness of parties to negotiate at all.<sup>90</sup> Thus power is critical to every bargain.

## 2. *Bargaining over the Social Contract is Continuous*

In the reality of the social contract, no agreement is made, executed, and perpetuated. The social contract is continually renewed, either through the introduction of new citizens who must partake in the bargaining scheme or by continuous bargaining over the agreement by those already involved.<sup>91</sup> There are many ways in which bargaining continues even in a classical sense: continued bargaining is implicitly expressed in Locke's political philosophy and its manifestation in American law,<sup>92</sup> it is achieved through governmental change as described in Kant's *Metaphysic of Morals*,<sup>93</sup> and it is demonstrated by the problem of continued consent that political philosophers have long faced. Additionally, the modern concept of relational contracts encapsulates the understanding that contracts develop and persist over time. In all of these

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<sup>88</sup> *Id.* at 87-88.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; Hobbes, *supra* note 2, at 110.

<sup>91</sup> See Locke, *supra* note 2, at 100-01; see also Hobbes, *supra* note 2, at 142-43; see also William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 Wis. L. Rev. 545, 546-47 (1985) (quoting Ian Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and The Need for a 'Rich Classificatory Apparatus'*, 75 NW. U.L. REV. 1018, 1041 (1981) ("The exercise of choice [about contract content] is . . . an incremental process in which parties gather increasing information and gradually agree to more and more as they proceed. Indeed, the very process of exercising choice in such circumstances, such as through engineering studies, may entail major parts of the total costs of the whole project as finally agreed.")).

<sup>92</sup> Locke, *supra* note 2, at 6, 142-43, 153, 163-64; THE DECLARATION OF INDEPENDENCE, *supra* note 10.

<sup>93</sup> Kant, *supra* note 27, at 113-14.

senses, especially considering the nature of Locke's model involving continual assessment by the people, bargaining is a continual process.

*a. Continuity through Locke's Right to Rebel*

Locke's political philosophy and its American manifestation imply a continual renewal of the social contract. Locke expressly gives humankind a right to continually assess the validity of its sovereign,<sup>94</sup> and based on inalienable rights instills in humankind the right to change the government or, if necessary, destroy it and begin anew.<sup>95</sup> Under Locke's political philosophy, citizens may void the social contract and rebel at any time the conditions support the right of rebellion.<sup>96</sup>

This right to rebel reaches to great extents. The people may change the government by changing legislative representatives or their representative capacities.<sup>97</sup> The people may change the government by doing the same to the executive.<sup>98</sup> But, most importantly, in certain circumstances the people are authorized by natural rights to resort to force to change the government.<sup>99</sup> The people can go so far as to kill the sovereign, or otherwise destroy it, and begin anew. These circumstances depend largely on the actions of the sovereign, but the exercise of the right to rebel depends entirely on the people. Because of this, the people *must continually assess their position* and whether or not the actions of the government in relation to that position defeat, diminish, or fail to maintain the natural rights of all persons.

Because the ruled are the continual assessors and executors of the valid social contract between themselves and the government, the continuous change of circumstances and continuous

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<sup>94</sup> Locke, *supra* note 2, at 142.

<sup>95</sup> *Id.* at 153.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 101-02, 142-43.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 163-64.

assessment by the people necessitate a continually changing dynamic in the social contract. Thus, as continual acceptance and adherence is in turn necessary to avoid destruction of the sovereign through means up to and including complete destruction, there is a continual renewal of the contract in the practice of continued response to changing stimuli: the negotiation process never ceases.

*b. Continuity through Constant Revolution*

Kant argues in the *Metaphysic of Morals* that innumerable iterations of the social contract extend beyond history into the past.<sup>100</sup> That is, the history of the social contract is so long that it is untraceable.<sup>101</sup> However, not every change in government has required a violent revolution. In fact, revolution does not even require replacement of the government.<sup>102</sup> In the place of overthrow and replacement, intentional and disciplined change in the structure or content of the social contract have brought revolution to mankind when necessary.<sup>103</sup>

This principle, though abstract in appearance, is plain and practical: bargaining does not have to cease for change to occur. Change *in* government can be as effective as change *of* government, and can serve the same practical result.<sup>104</sup> Continued bargaining in this sense occurs through updating and amending a contract rather than voiding and renewing it.<sup>105</sup>

*c. Continuity and the Problem of Continued Consent: A Counterargument*

A demonstration of the fact that continued bargaining occurs arises simply from the realization that philosophers have a hard time fixing it. That is, much effort has been spent in philosophy dealing with the “problem of continued consent” and how it affects an individual’s

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<sup>100</sup> Kant, *supra* note 27, at 113-14.

<sup>101</sup> *Id.*; see also Hobbes, *supra* note 2, at 108.

<sup>102</sup> Kant, *supra* note 27, at 113-14; Locke, *supra* note 2, at 142-49.

<sup>103</sup> Kant, *supra* note 27, at 113-14; Locke, *supra* note 2, at 142-49.

<sup>104</sup> Kant, *supra* note 27, at 113-14.

<sup>105</sup> *Id.*; Locke, *supra* note 2, at 142-49; See also Macneill, *supra* note 91, at 1041.

ability to create, participate in, or leave the bounds of the social contract. While this “problem” is difficult to solve, and even has been argued as a non-issue by many, it clearly exists. We do it every day. The fact that we argue about it serves to show that we recognize it.

But a counterargument arises: the position that living geographically within a nation confers jurisdiction assumes that the jurisdiction of the sovereign is legitimate to begin with. The problem with this assumption, according to the counterargument, is twofold: first, only a positive engagement (that is, a clear act of consent) in the social contract can actually confer the jurisdiction in question, so justification based on tacit consent is puts the cart before the horse—it begs the question. Second, many if not most individuals lack a reasonable opportunity—or even a realistic option—to leave the jurisdiction in which they live. What would appear to be tacit consent is not consent at all. Individuals cannot consent by foregoing options that do not exist anyway.

As to the first problem, answers stem from both ancient and modern sources. Socrates argued that living within a state and deriving benefit from its laws *is* consent.<sup>106</sup> That very consent is what confers legitimate jurisdiction to the government according to Socrates.<sup>107</sup> This answer is subject to a number of its own complaints, namely those presented by the second problem noted above: people do not always have the option to leave a jurisdiction, and in some cases individuals are even actively prevented from leaving by the government itself. This issue dissolves, however, with a more modern understanding of continued consent.

In more modern terms, the social contract is better described as a relational contract that undergoes assessment and change over time.<sup>108</sup> It is not a discreet agreement to be executed

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<sup>106</sup> Plato, *supra* note 4, at 60-62.

<sup>107</sup> *Id.*

<sup>108</sup> Macneill, *supra* note 91, at 1041.

once and then left alone.<sup>109</sup> The result of this characteristic is that individuals may apply alternative pressures to assert power in the bargain over the social contract: jurisdiction is related to making use of the benefits and protections of a government, and this includes far more than staying in a geographical location. An excellent example of alternative pressures is civil disobedience. When the law is designed and set by the aggregate, an individual can willfully violate the law, accept the consequences of doing so, and make herself an example for other citizens to see. This in turn can affect the positions and desires of the aggregate and encourage governmental change. Civil disobedience works well as an example because it highlights the importance of *consent* as opposed to merely geographical location. It may be a willful act contrary to the laws of the state, but it is undeniably an exercise in *engaging the political and contractarian process*.

Active engagement in the process cannot occur without a basic consent to the process itself—this is a positive engagement. The accusation of question-begging arises, then, only from a shortsighted view of what active consent may include. Citizens do not have a contract to sign. They do not have a guard awaiting them at the border or at the birthing table to ask if they consent. Consent comes through daily actions, and those daily actions form a relational contract rather than a classical one.

As to the second problem, the counterargument again takes a position that requires the social contract and its related bargaining power to be completely static. That is, it assumes that bargaining power does not change, and it is the very characteristic of stasis that allows for there to be an alleged wall between tacit consent and legitimate rule. However, the social contract is formed and maintained subject to the conditions and circumstances of a changing government

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<sup>109</sup> See *Id.*; See also Ian Macneill, *Relational Contract: What we Do and Do Not Know* 1985 Wis. L. Rev. 483, 485-91 (1985).

and a changing populace. As a result, the relational social contract must be continually altered and re-evaluated by the people, and it does not fit the characterization made by the counterargument at hand.

Additionally, and again as above, staying within the borders of a jurisdiction is not the only method for consent. Actions that comply with the law of the jurisdiction or engage in its political process (whether legally or illegally, as with civil disobedience), and even those actions that attempt to impart change from within are part of the development of a contract over time.

What both of these answers highlight is that consent manifests not just through subsistence within a jurisdiction and acceptance of its benefits. Consent manifests through continued participation in the negotiation process over government. As seen by both Kant<sup>110</sup> and Locke,<sup>111</sup> changes *in* the government work just like changes *of* the government.

*d. Bargaining Continues, and So Does Power: Power is Dynamic*

Power is dynamic. It is part of a “dynamic relationship that *either* party is capable of altering at any time.”<sup>112</sup> Locke’s conception of the social contract preserves a right to rebel against the government, enforced by the condition that all power truly emanates from the natural rights of individuals.<sup>113</sup> Sources for power and changes in power are not limited to individuals, brute force, and natural rights. External forces bear on power levels in a negotiation as well. Not only does a successful strategist assess the strengths and weaknesses of both sides of a contest, he will also strive to understand external factors that bear on the ever-changing balance of power.<sup>114</sup>

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<sup>110</sup> Kant, *supra* note 27, at 113-14.

<sup>111</sup> Locke, *supra* note 2, at 142-49.

<sup>112</sup> Barnhizer, *supra* note 71 at 178.

<sup>113</sup> Locke, *supra* note 2, at 152-53.

<sup>114</sup> Barnhizer, *supra* note 71, at 178 (*citing* SUN TSU, *THE ART OF WAR* 90-91 (Thomas Cleary trans., Shambhala Publications 1988)).

In its early capacity, the United States government lacked a standing army, held limited power over constituents and states, and consisted of new personalities in new offices. The situation has changed, though, over the last two hundred years. The government is not what it used to be. It has grown into an independent entity with vested power that has existed for generations. In that very real sense, the government at this point in time is less like Locke's limited ruling body living on charity of power and is instead somewhere between that and Grotius' king. Continued bargaining and changing times have created and applied external factors that have continually altered power levels between the government and the people.

An excellent example of the dynamic contest for power in the artificial state of nature is visible in the historical disputes over the Second Amendment.<sup>115</sup> Throughout American history, there have been a number of major arguments over the rights of individuals to bear arms under the Second Amendment.<sup>116</sup> These arguments demonstrate the continual contest for power between the armed citizen and the government. Though they occur on the legal plane rather than that of the social contract, they demonstrate a clear volley for access to the physically coercive power of controlling and owning a firearm. In this respect, the continually changing dynamic of power between citizen and government relates directly to continued bargaining; power is both a tool and a prize in negotiations between the government and the people.

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<sup>115</sup> U.S. CONST. amend. II.

<sup>116</sup> See, e.g., Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 59-66 (2007) (giving an excellent overview of the historical underpinnings of the Second Amendment and the reasoning for arming the populace.); see also Tucker, *supra* note 45, at 414 n.3; see also Story, *supra* note 47, at 264; see also JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 135, 163-64 (1994) (noting continued debate over the meaning of the Second Amendment and arguing that the founding fathers intended the amendment as a "safety valve" that protected liberties and provided a means to alter the government); see also SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 70 (2006).

### **C. The Power of Individuals Rises to the Power to Kill**

Earlier in this essay, an historical note regarding the concept of the social contract described the state of nature as envisioned by philosophers looking to explain the motivations and needs of individuals to agree to a “cease-fire.”<sup>117</sup> This state of nature is a raw, competitive reality in which parties vie for limited resources. By natural means, humans retain the ability to kill: while each individual case may vary, humans on a basic level all have equal capacity.<sup>118</sup> The question in relation to the social contract is not one of legal power, but instead one of physical, mental, strategic, and executive capabilities.<sup>119</sup> In those terms, humanity has demonstrated its ability to kill through its position in the state of nature as well as its bloody history.

### **D. The State Must Have Equal Power**

As explained in earlier pages,<sup>120</sup> the American social contract is one of an arbitrary state-of-nature-by-design. Textually, the Declaration of Independence and the Constitution of the United States place checks on power between the government and the people. Moreover, the Bill of Rights and early Constitutional scholarship juxtapose individual and government in the same way. These characteristics of the American government serve to protect the natural rights of individuals and prevent oppressive action by the government while allowing the government the necessary power to enforce the law of the land. By design, however, this becomes a secondary contest for power distinct from the one that exists in the state of nature between individuals. This essay has termed this the “artificial state of nature.”

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<sup>117</sup> Hobbes, *supra* note 2, at 106-10.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See supra* notes 66-69 and accompanying text.

The government is created and given power by the people.<sup>121</sup> Once the government's power is vested (and it has), the artificial state of nature acts exactly as the real one would. The government becomes an entity with power in a contest with other powerful entities—individuals, citizens. In order to preserve his or her natural rights, each person must influence the balance of power with the government, either individually or collectively (as an aggregate). In this way, the people wield their power against the government by design.

As Hobbes stated, it is the threat or fear of equal power had by contestants in the state of nature that compels agreement.<sup>122</sup> If each party to the social contract is to be compelled to agree in the way that individuals in the (natural) state of nature are, the power had by both parties must be sufficient to instill that fear. Each individual citizen, as Hobbes would argue, retains the capacity to kill.<sup>123</sup> This capacity is heightened beyond question when individuals can act collectively, for it dramatically increases strategic and executive capacities for killing.

From Locke's natural rights and their importation into the American social contract, the people retain a power equivalent to killing power with respect to the government. The people have the authority—if circumstances and certain criteria exist—to completely destroy the government through force. This capacity for destruction is as close to the capacity to kill can get for a noncorporeal entity. The danger for the government in a contest for power is therefore absolute destruction. In the artificial state of nature, only an equivalent power on the part of the government can return such a threat and compel agreement. Thus, the power of the government must include *no less* than the power to kill.

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<sup>121</sup> Locke, *supra* note 2, at 63-65.

<sup>122</sup> Hobbes, *supra* note 2, at 109-10.

<sup>123</sup> *Id.* at 104-05.

### III. Counterarguments

#### A. If Killing is Illegal for Both the Individual and the State, Both Share Equal Power

The argument that equal bargaining power in the social contract requires the government to retain the right to kill is not without its counterarguments. The first possible counterclaim is that if killing is illegal for the individual, then making it illegal for the state preserves the balance of bargaining power anyway. That is, if the state makes it illegal not just for itself to kill but also for individuals to kill, any disparity in bargaining power is lost.

This counterargument fails. It is a fallacious reading of what it means to have the power to kill. Because the argument in chief deals with both constitutional and legal concepts, the question posed by the counterargument may seem fair. However, the bargaining power in question is external to the question of legality or constitutionality. The ‘ability to kill’ as used in the context of this essay is not a question of legality or illegality—it might be called a “non-legal” question; instead, it is a question of actual ability.

Humans have the ability to kill in the state of nature. People, in general, have the requisite strength and intelligence to accomplish the task of killing one another.<sup>124</sup> The government, on the other hand, is not a human being. As described above, the government is created through the establishment of an artificial entity (literally a corporation), instilled in which are powers granted by the people. In order to effectuate a continued negotiation and allow for the oversight necessary to meet the American (and historically Lockean) ideal of the right to rebel, this incorporated entity must be given the power necessary to be a true competitor in the artificial state of nature created by the act of incorporation and the granting of power.

Put otherwise, people have natural abilities and the government does not. The government only has what powers are given it. If the people wish to bargain, they must create

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<sup>124</sup> *Id.*

the necessary conditions to facilitate bargaining. This has been accomplished by artificially placing the government in a state of nature with the people. The capacity for negotiation will depend on the need for agreement,<sup>125</sup> and so the government needs to be created with abilities and capacities that rival humankind's.

### **B. The Lockean (American) System was Designed to Confer No Power to the Government**

A second counterargument comes in the claim that the American concept of a social contract is largely Lockean in nature, and that Locke's system by design actually gives the government no power. That is, the people retain all sovereign power and the government is more like an agent of the people than an entity unto itself. It has been a major part of the exposition of this essay to characterize the United States government as being uniquely Lockean in design, so that point must be conceded. However, there are other measures that bear on the validity of this counterargument, and these measures will ultimately invalidate it.

Bargaining power is dynamic.<sup>126</sup> The amount of power granted to the government by the people may change over time; as may the ability of the government to retain power or even the nature of the government itself. One may grant that at the outset the United States government was given very little power by its people. However, both time and habit have deeply altered the nature of the government as an incorporated entity. While Lockean ideals may be rooted in the hearts and minds of sentimental Americans, they are no longer rooted in reality. The government now exists with a great amount of power that cannot be stripped through traditional "government-changing" strategies.<sup>127</sup> It is possible that only the right to rebel remains.

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<sup>125</sup> *Id.* at 109-10.

<sup>126</sup> Barnhizer, *supra* note 71, at 178.

<sup>127</sup> *See* Locke, *supra* note 2, at 142-49 (discussing government changing strategies that do not destroy the government or the social contract); *see also* Kant, *supra* note 27, at 113-14 (discussing means through which a social contract develops and evolves as it is changed by circumstances and/or the parties). Even the revolutionary aspects of election cycles and term limits may be ineffective, for other political forces such as political parties and factions self-perpetuate beyond turnovers.

Though the government has not devolved into a Grotian<sup>128</sup> or a (God forbid!) Leviathanic<sup>129</sup> “power monster,” the power granted to it nevertheless cannot revert to the people at will. Reversion is not based solely on the will of the people (or for that matter the will of the government)—it is instead *automatically* forfeited at the instance of oppressive rule:

[T]he power that every individual gave the society when he entered into it, can never revert to the individuals again as long as the society lasts, but will always remain in the community, because without this there can be no community, no commonwealth, which is contrary to the original agreement...[but] when by the miscarriages of those in authority it is forfeited; upon the forfeiture, or at the determination of the time set, it reverts to the society, and the people have a right to act as supreme, and continue the legislative in themselves; or place it in a new form, or new hands as they think good.<sup>130</sup>

Even the Lockean concept of power emanating from the people allows for a government to retain power given it.<sup>131</sup> And so the counterargument that a Lockean contract vests no power in the government may have worked in 1790, but is toothless today.

### **C. Bargaining Power Should Not Be Assessed by the Courts as a Collective Consideration – Bargaining Power Must Be Considered a Legal Fiction**

The third counterargument to the position of this essay is clearly the strongest, and for many reasons must be accepted as a valid and sound position in itself: bargaining power is not properly a part of any collective consideration.<sup>132</sup> Furthermore, courts of law should not be concerned with individual cases involving inequality of bargaining power, for it is the duty of the legislature to examine collective bargaining power and to legislate so as to adjust that power to

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<sup>128</sup> Grotius, *supra* note 11, at 57.

<sup>129</sup> Hobbes, *supra* note 2, at 142.

<sup>130</sup> Locke, *supra* note 2, at 163-64.

<sup>131</sup> *Id.*

<sup>132</sup> Barnhizer, *supra* note 71, at 192-93.

meet the needs or desires of the people.<sup>133</sup> In other words, the question of bargaining power is one of public policy, not one of legality.

This argument is strong. In fact, it is probably as accurate as any position that could be taken with respect to the traditional legal understanding of bargaining power. But the bargaining power at stake in this argument is not a power of legal characteristic, for the bargain over the social contract in the state of nature precedes the law. The use of the term “bargaining power” in this argument is thus *not* the traditional understanding of bargaining power taken by the courts in a legal setting.<sup>134</sup> This argument’s understanding of power and how it bears on negotiation is consistent with the judiciary’s growing definition,<sup>135</sup> but because of the peculiar nature of the social contract as beyond legal authority, the legal weight taken not to apply by the counterargument at hand does not apply anyway.

Even if the law should not look to bargaining power in individual contract cases, the *social contract itself* is not immune to the forces of bargaining power and cannot be subject to derivative and successive law anyway.<sup>136</sup> The argument that bargaining power must be equalized as between the government and the people is a philosophical argument, and most certainly *not* a legal one. In this case, the two are not combined in some elusive proportion. Where this argument applies, there is no law other than that of the state of nature. And although

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<sup>133</sup> *Id.* at 193.

<sup>134</sup> *Id.* at 194-97 (noting the development of bargaining power as a legal concept for rectifying arbitrary determinations of unconscionability in contracts cases including *Lochner v. New York*, 109 U.S. 45 (1905); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942); UCC §2-302; and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

<sup>135</sup> *Id.*

<sup>136</sup> This statement is intended to acknowledge merely that the social contract precedes the law that it creates. A much stronger but still applicable position one might take is that the rule of law comes from consensus external to government. Early modern philosophers adhered to such a principle. *See, e.g.*, THOMAS AQUINAS, *SUMMA THEOLOGICA* 1043 (Fathers of the English Dominican Province tr., 2d ed. 1920) (arguing that if human law is inconsistent with natural law, it is not true law). This position is apparent in Locke’s acknowledgment of unalienable rights. Locke, *supra* note 2, at 6. Such a position continues with modern legal scholars and philosophers. *See* Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DePaul L. Rev. 469, 474-77, 505 (2007) (arguing that an instrumental view of the law—a view that the law is not subject to higher authority and instead is a flexible tool for any purpose—contributes to the destruction of the rule of law).

it may be artificially created and artificially applied, it is beyond the reach of the law nonetheless.

Even if the argument in chief were subjected to the forces of the American legal and political system, and the limitations on collective consideration<sup>137</sup> were properly applied, this would only serve to remove the judicial system from the picture. The legislature, as the supreme source of public policy, is still a valid audience for the plea not to prohibit the death penalty. It remains subject to the argument in chief regardless of the position or capacity of the Supreme Court.

## **IV. Conclusion**

### **A. A Statement of Applicability**

So the social contract and the balance of power between its parties require that the government retain the capacity to kill. This statement must be qualified, however, through two specific points: primarily, the argument that the power to cause death cannot be taken from the government is not an argument that the death penalty as punishment for crime must be exercised. It is within the wills of the people and executive to refrain from exacting such an ultimate price, and that characteristic must remain. However, the argument in chief certainly renders that the death penalty cannot be prohibited. It must always be an “option” for the government.

Secondly, the third counterargument—denying the court the right to examine bargaining power as a collective consideration—*would apply* in a case where the court came to review an act prohibiting the death penalty. That is, if the legislature should prohibit the death penalty by legal act, no remedy through judicial review would be available because the government could not take into judicial consideration a non-legal (i.e. legislative) issue.

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<sup>137</sup> That is, if the position of this third counterargument were a given.

## B. Conclusion

To summarize, the role of bargaining power in negotiations is indisputable. It carries massive weight in the process of negotiation and it truly bears on each of the negotiating parties' ability to affect the outcome of a bargain. Additionally, the ability to apply physical coercion through death or the threat of death is among the most basic sources of power in any sense (bargaining or otherwise). In the state of nature, individuals retain this power of physical force and use it as a bargaining chip; they trade it in exchange for protection from other individuals with the same power. In the American social contract, the government does not play the role of the Leviathan—it does not absorb all of the power given it and consolidate that power to force the people into submission. Instead, and as Locke intended, each individual has a common relationship with the government through which the individual and the collective can continually assess the deal and ensure that each party will fulfill its promise.

The application of an artificial state of nature is necessary to this individual exchange between the person and the government. Hobbes saw it, Montesquieu saw it, Locke saw it, and the founders implemented it.<sup>138</sup> This straw man serves as the source of contention between the person and the state, and only when the two share the capacity to destroy one another can the two be truly compelled to agree.<sup>139</sup> In that sense, the power to destroy—or kill—must be imputed to

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<sup>138</sup> Hobbes, *supra* note 2, at 109 (“The passions that incline men to peace are *fear of death*, desire of such things as are necessary to commodious living, and a hope by their industry to obtain them. And reason suggests convenient articles of peace, *upon which men may be drawn to agreement.*”) (emphasis added); see also BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 150 (Thomas Nugent, tr., Hafner Publishing 1949) (“[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go...To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.”); Locke, *supra* note 2, at 100 (“[T]here remains still in the people a supreme power to remove or alter the legislative...for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it who may place it anew where they shall think best for their safety and security.”); see *THE FEDERALIST NOS.* 46, 47, 51 (James Madison) (discussing checks on power generally and checks and balances in government); see also U.S. CONST. arts. I, II, III (rife with power divisions that act as checks and balances).

<sup>139</sup> Hobbes, *supra* note 2, at 109-10.

both parties to the negotiation, the man, to whom nature has given such an ability, and the government, to whom such a power can only be granted by man.