Pufendorf's Solution to the Puzzle of Consent and Natural Law

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Like many early modern philosophers, Pufendorf holds that a state's legitimacy derives from the consent of its citizens. However, he also claims that natural law imposes a moral obligation, upon all humans, to consent to the state's authority. At first glance, there exists a tension between the voluntary dimension of the consent argument and the conception of an intrinsic obligation to give that consent to the state. This begs questions related to the exact role of consent in human society, and the relationships of that consent to the laws of nature: If the institution of political society is a rational and moral necessity, what does consent add to the picture of legitimate government? Further, how can there be natural obligations to bind oneself voluntarily to further obligations of consensual character, and what sort of consensual character do the latter keep as the fulfilment of obligations?[1]

Given that Pufendorf did not explicitly address these questions, we are left to reconstruct answers that would have been both plausible and consistent with his broader theoretical framework. Generally, the contours that define the interplay between consent and natural law merit interpretive efforts in any early modern consent theory. Yet, to date, the problematic has not received much attention, although it was raised by Riley[2] and Pitkin's[3] readings of Locke, as well as Murphy's[4] contribution to contemporary natural law theory.

[1] I would like to thank my reviewers, as well as Sandrine Baume, Frank Grunert, and audiences in Neuchâtel (Institut de Philosophie, 2017) and Turku (Finnish-Hungarian Workshop in Early Modern Philosophy, 2017) for their insightful comments on earlier versions of this paper. It is dedicated to Martin Abbühl.

[2] P. Riley, 'On Finding an Equilibrium Between Consent and Natural Law in Locke's Political Philosophy,' Political Studies, 22 (1974) pp. 432–452, p. 434: 'Assuming at least for the moment that it is reasonable to treat Locke as a theorist seeking an equilibrium between contract and consent, natural law, and natural rights, three main questions arise. (1) what is the exact nature of this balance?; (2) what is the nature of the natural law that Locke wants to balance against consent?; and (3) what sufficiently constitutes consent-representative government, majoritarianism, 'tacit' consent?'.

In this paper, I aim to show that Pufendorf's writings provide an innovative clarification of the respective scopes of consent and natural law that was not evidently apparent in other works of his time. Whereas there is a natural obligation to submit to *some* authority, human consent has the task of determining how this authority is to be organized in particular contexts. While unfolding the workings of this argument in Pufendorf's works, I will bring out close connections between two apparently distinct notions of consent: to wit, as an internal act of the will and as a political commitment. This should shed a new light on the meaning and history of the concept of consent itself.

My contribution thereby adds to recent contributions of scholarship on the relationship between Pufendorf's psychological and political theory. Haara has emphasised the importance of Pufendorf's thoughts on moral psychology for his theorizing of the social and political order, especially on habituation as a key mechanism to secure humans' compliance with natural law.[5] Further, Holland has observed an analogy at work in Pufendorf's works, between an individual's psychological faculties and the state's structure; the state is also conceived as a moral person endowed with a free will—the sovereign's will, composed of all citizens' wills—and an intellect giving reasons for action to its will—ideally, a council to provide advice and oversight of the sovereign's governance—which would correspond to Pufendorf's vision of the Holy Roman Empire.[6] In addition, if the affinities of Pufendorf's theory of will with Suárez's are now well-

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[3] H. Pitkin, 'Obligation and Consent I,' The American Political Science Review, 59 (1965) pp. 990–999, p. 996: 'In truth, the original contract could not have read any otherwise than it did, and the powers it gave and limits it placed can be logically deduced from the laws of nature and conditions in the state of nature. Not only does Locke himself confidently deduce them in this way, sure that he can tell us what the terms of that original contract were, must have been; but he says explicitly that they could not have been otherwise.'

[4] M. C. Murphy ('Natural law, consent, and political obligation,' Social Philosophy and Policy, 18 (2001) pp. 70–92, p. 71) warns us that 'the natural law theorist' may want to say that 'the natural law account [of political authority] just does not need consent: its premises about the place of the common good and justice in the reasonable person's deliberation, along with the need for authority to coordinate action justly for the common good, provides on its own an account of the obligation to adhere to the civil law; any appeal to consent would be either superfluous or inconsistent with the main thrust of this account.'

[5] H. Haara, Pufendorf's Theory of Sociability: Passions, Habits and Social Order (Cham, 2018).

[6] B. Holland, The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities (Cambridge, 2017), see especially p. 92 and pp. 102–103.

known, thanks to Pink's works in particular,[7] this paper will also highlight parallels between Pufendorf's and Suárez's political theories that have not been studied so far. Hence, it shows that Pufendorf's political thought not only draws heavily on Grotius and Hobbes, as he himself acknowledges,[8] but also more discreetly on Suárez's.

I

In Pufendorf, political authority rests upon 'the voluntary Consent and Subjection' of the citizens.[9] Such consent is necessary, given that human beings are naturally free when they are born, and endowed with 'a Power of being their own Governours and Directors.'[10] These premises lead Pufendorf to conclude that any individual 'is to be reputed *equal* to any other.'[11] Altogether, outside of political society, 'all Subjection and all Command are equally banish'd on both sides.'[12]

For these reasons, human authority can only be established artificially, via the consent of those human beings who will be subject to that authority:

> For all Men enjoy a Natural Liberty in the same Measure and Degree, which before they suffer to be impair'd or diminish'd, there must intervene either their own Consent, Express,

[7] T. Pink, 'Reason and Obligation in Suárez,' in The Philosophy of Francisco Suárez, ed. by B. Hill and H. Lagerlund (Oxford, 2012), pp. 175–208, and 'Natural Law and the Theory of Moral Obligation,' in Psychology and philosophy, ed. by S. Heinämaa and M. Reuter (Dordrecht, 2009), pp. 97–114.

[8] See the Preface of Pufendorf's early Two Books of the Elements of Universal Jurisprudence (=EL, ed. T. Behme, trans. W. A. Oldfather, Indianapolis, 2009), pp. 10–11. On Grotius's and Hobbes's influence on Pufendorf, see e.g. F. Palladini, 'Pufendorf Disciple of Hobbes. The Nature of Man and the State of Nature: The Doctrine of Socialitas,' History of European Ideas, 34 (2008) pp. 26–60, and I. Hunter, Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany (Cambridge, 2001).

[9] Samuel von Pufendorf, Of the Law of Nature and Nations. Eight Books (=DJN), ed. and trans. L. Lichfield et al., (Oxford, 1710), Book 7, Ch. 3, Section 1 (=7,3,1).

[10] DJN 1,6,11. See also DJN 2,2,3 and Samuel von Pufendorf, The Whole Duty of Man, According to the Law of Nature (=DO), ed. I. Hunter and D. Saunders, trans. B. Tooke (Indianapolis, 2003), Book 2, Ch. 1, Section 8 (=2,1,8). Liberty is defined as a power (*potestas*) over one's own actions (DJN 1,1,19) or alternately as 'an Internal Faculty of doing and omitting things according to the Direction of our Judgment' (DJN 2,1,2).

[11] DO 2,1,8. See also DJN 2,2,3.

[12] DJN 2,2,3. On his conception of equality, see K. Saastamoinen, 'Pufendorf on Natural Equality, Human Dignity, and Self-Esteem,' Journal of the History of Ideas, 71 (2010) pp. 39–62, and Palladini, 'Pufendorf Disciple of Hobbes', pp. 26–60.

> Tacite, or Interpretative [*consensus expressus, vel tacitus aut interpretativus*], or some Fact [*factum*] of theirs, by which others may obtain a Right of Abridging them of their Liberty by Force, in case they will not part with it by a Voluntary Submission.[13]

This applies to political authority, as well as to parental,[14] conjugal,[15] and domestic[16] authority. Citizens, in Pufendorf's view, are actually male family heads who have authority over their dependents, i.e., their wife, children and servants, all of whom have previously consented to subjugate their will to his. Free men consent to establish a political community and a state to govern it, and they offer up this consent on behalf of their households.[17]

To account for the rise of political authority, Pufendorf introduces two developmental stages of political consent: first, in the form of a covenant among individuals; and, second, in an additional covenant with the intended ruler or governing body.[18] In these passages, consent is akin to a

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[13] DJN 3,2,8.

[14] Parental authority has two sources. First, the fact that parents have a natural obligation to take care of their children requires them, as a 'Means' to this 'End,' to possess provisional authority over them (DJN 6,2,4; DO 2,3,2). The second source is the child's 'presumed Consent' (*praesumto consensu*), as in Hobbes's Leviathan (ed. R. Tuck, Cambridge 1991, Ch. 20). The main line of the argument can be stated as follows: children's reason may not be developed yet, but if they were rational adults, they would acknowledge their need for their parents' care in order to survive, and hence, their obligation to obey them. The presumed consent argument is already present in EL Book II, Obs. V, §8.

[15] On conjugal authority, see DJN 6,1 and DO 2,6. In spite of men's physical and intellectual superiority, women and men are 'naturally equal in Right' (DJN 6,1,9). Normally, a husband's authority is to be established by means of the wife's consent to marriage, or more crudely, 'by the Sword, in a just war,' like a master's authority over his slaves (*id*.).

[16] Similarly to Grotius (The Rights of War and Peace, ed. R. Tuck, trans. J. Morrice et al. (Indianapolis, 2005), Book 2, Ch. 22, §11) and Hobbes (Elements of law, natural and political, ed. F. Tönnies, London/New York 2013, Book 2, Ch. 3; On the Citizen (*De Cive*), ed. R. Tuck and M. Silverthorne, Cambridge 1998, Ch. 8; Leviathan, Ch. 20), Pufendorf holds that servitude arises from a contract reflecting the mutual interests of a wealthy master on the one hand and a person in need on the other. By consent, the latter commits to providing work for the former in exchange for food and shelter (DJN 6,3,4). The master incurs the obligation to provide for the servant, and obtains the right to give him orders, as well as to punish the servant at will.

[17] See DJN 7,5,4; 7,2,20; 6,1,11 and DO 2,1,6–7. On Pufendorf's views on women's subordination to men, see M. Drakopoulou, 'Samuel Pufendorf, Feminism and the Question of 'Women and Law'', in M. Drakopoulou (ed.), Feminist Encounters with Legal Philosophy (Oxon, 2013), pp. 66–91, and S. Sreedhar, 'Pufendorf on Patriarchy' History of Philosophy Quarterly 31 (2014), pp. 209–227.

[18] On Pufendorf's double covenant, see M. E. Nutkiewicz, 'Samuel Pufendorf: Obligation as the Basis of the State,' Journal of the History of Philosophy, 21 (1983), pp. 15–29; D. Wyduckel, 'Die Vertragslehre Pufendorfs und ihre rechts- und staatstheoretischen Grundlagen,' in Samuel Pufendorf und die europäische Frühaufklärung. Werk und Einfluss eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694–1994), ed. by F. Palladini and G. Hartung (Berlin,

promise that yields a moral commitment, which is honoured by virtue of the natural law that obligates us to keep our promises.[19] In the first covenant, a multitude of free men consent to establish an association (*coetum*) for their common safety. The members of this association subsequently decide, by mutual decree, on a mode of decision–making that relies on majority rule. Pursuant to this decree, the association selects a ruler, in the form of a monarch, a council, or a comprehensive democratic body. In the second covenant, the members of the association pledge obedience to the ruler, who is therefore obliged to take good care of the community.[20]

Tacit consent is introduced as a response to the challenging objection depicting the double covenant account as an 'arbitrary Fiction' of Pufendorf's own.[21] Pufendorf holds that 'a Man may become Member of a State two ways, by express, or by tacit, Covenant [*pacto nempe expresso, aut tacito*]'.[22] Due to the difficulty of making sense of political societies without their subjects' consent, tacit consent may be presumed in the absence of a recorded founding covenant:

> Since we cannot understand, how either this Union, or this Subjection could be made, without the Covenants or Agreements before mentioned, it is necessary, that the said Agreements must, tacitly at least, have pass'd in the Institution of Common-wealths. Nor is it anything to hinder, but that the Original of some things, not committed to the Monuments of Time and History, may be traced out by the Disquisitions of Reason.[23]

1996), pp. 147–165; and G. Hartung, 'Vertragstheorie und Konstruktion der Souveränität bei Pufendorf', in Naturrecht und Staatstheorie bei Samuel Pufendorf, ed. by D. Hüning (Baden-Baden, 2009), pp. 36–50.

[19] On the obligation to keep faith, see DJN 3,6 and DO 1,9.

[20] DJN 7,2,7–8; DO 2,6. In the case of a monarchy, Pufendorf holds that it is also possible to establish the monarch's authority by means of a single covenant, whereby 'each Man for his own Person only,' 'without any antecedent Agreement' with others, comes to subject himself to the monarch (DJN 7,2,8).

[21] DJN 7,2,8.

[22] DJN 7,2,20.

[23] DJN 7,2,8: 'Cum autem conjunctio illa & subjectio citra antedictas pactiones facta intelligi neque at, necessum est, in coalitione civitatum easdem faltem tacite intervenisse. Nihil autem obstat, quo minus alicujus rei origines ratiocinando investigari possint, utut de iisdem nulla literarum monumenta extent.' This applies particularly to democracies: as the citizens and the sovereign are the same physical persons (if distinct moral ones), an express covenant may not be 'of Use': 'yet 'tis absolutely requisite that we suppose it [*est intelligendum*] to have pass'd by tacit Agreement' (DJN 7,2,8). In contrast, founding agreements are 'far more visible' in aristocracies and monarchies, due to the tradition of express exchange of 'mutual Faith' between subjects and rulers in a ceremony (*id*.). On the general move from tacit to presumed consent, see DJN 3,6,2: 'This

Support for such a presumption can be found in Pufendorf's claim that the founders of a state intended it to benefit its future residents as well. This would imply that later generations do not only have the possibility of tacitly becoming its subjects but must be understood to have done so, at least by default, given the benefits of subjection to the state.[24] Therefore, rulers would not need 'express Homage and Allegiance' from the founders' descendants.[25] Alternately, Pufendorf justifies the presumption of a foreigner's tacit consent to obey a state's law, through 'the very Act' of his coming to this state, on grounds of 'a general Law in all States':

> He who comes within the proper Limits of a State, and much more if he desire to reap the Benefit of it, shall be presumed [*intellegitur*] to have abandon'd his Natural Liberty, and to have subjected himself to the Government there establish'd, at least for so long as he thinks fit to reside in those parts.[26]

II

Having established this general connection between consent and authority in Pufendorf's works, we can turn to his mode of constructing the obligation to consent to the state's authority. Pufendorf's predecessors had already laid the groundwork for this idea. Not yet making

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Consent is usually declared by express Signs, as by Speaking, Writing, Nodding, etc. Yet sometimes without the Help of any such Tokens it is sufficiently gather'd from the Nature and Circumstance of the Business. And it is well known that Silence it so in many Cases, is interpreted for Consent.'

[24] DJN 7,2,20: 'For they who were the Original Founders of Common wealths, are not supposed to have Acted with this Design [*non sane hoc censentur egisse*], that the State should Fall and be Dissolv'd upon the Dicease of all of those particular Men, who, at first, compos'd it, but they rather proceeded upon the Hope and Prospect of lasting and perpetual Advantages, to be derived from the present Establishments, upon their Children and their whole Posterity. We must therefore presume then to have had this in their Aim [*Igitur hoc quoque simul egisse censendi sunt*], that their Children and all their future Race should, as soon as they came into the World, enjoy the Benefits [*commoda*] and Blessings of the Publick Constitution. Which since it is impossible to obtain without Government, the very Life and Soul of a State, therefore all who are born within such Dominions, thereby supposed to have submitted themselves to the standing Government [*Quae cum sine imperio, quo civitas velut animatur, obtineri nequeant, eo ipso quoque omnes, qui in civitate nascuntur, imperio isti sese subjecisse intelliguntur*].' On this passage, see also Behme 1995:128–129.

[25] DJN 7,2,20.

[26] DJN 7,2,20.

reference to an obligation, Grotius conceives of the state as the best human arrangement, due to its congruence with our sociable nature, and our need to protect ourselves against violence, theft, and breach of agreement.[27] Hobbes goes on to cite a law of nature commanding the establishment of a common political authority, a step which Pufendorf integrates into his own framework as a natural obligation.[28]

According to Pufendorf, the initial impetus that drives humans to institute civil societies is a strong need to repel the numerous 'Injuries' that humans 'delight' in inflicting upon one another.[29] Further, Pufendorf regards 'private Judgment' (*propio iudicio*) and the diversity of human inclinations as the source of many mischiefs.[30] By default, the state of nature is a peaceful state,[31] yet Pufendorf concedes that this peace is 'too weak and uncertain' to adequately secure the 'Safety of Mankind'.[32] Like Hobbes before him, Pufendorf concludes that political society is necessary to preserve the safety of individuals and the survival of mankind, generally.[33] First, a significant number of individuals must unite in mutual support to deter harmful behaviour. Second, to sustain this union, all such individuals must be 'kept together by some general Fear', namely, that of a powerful sovereign.[34]

The necessity of the state is, however, not only characterized by prudence, but first and foremost, a moral necessity, revealed by natural law. Natural law is conceived as a set of universal and eternal rules that all humans must follow.[35] It is designed to square with 'the Rational and Social

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[27] Grotius, Rights of War and Peace, Book 1, Ch. 4, §7: 'But we must observe, that Men did not at first unite themselves in Civil Society by any special Command from GOD, but of their own free Will, out of a Sense of the Inability of separate Families to repel Violence; whence the Civil Power is derived, which therefore St. Peter calls a human Ordinance, tho' elsewhere it is called a Divine Ordinance, because GOD approved of this wholesome Institution of Men. But GOD, in approving a human Law, is thought to approve of it as human, and after a human Manner.'

[28] Hobbes, Leviathan, p. 92: 'That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe 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 himselfe.'

[29] DJN 7,1,6–7.

[30] DJN 7,1,10; see also 7,2,2 and 7,2,5.

[31] DJN 1,1,8.

[32] DJN 2,2,12. Pufendorf holds that 'no Creature is more fierce and unruly than Man, or exposed to more Failings, which tend to the Disturbance of Society' (DJN 7,1,4).

[33] See e.g. DJN 7,1,1 or DO 1,3,7.

[34] DJN 7,2,3; 7,2,5. See also 7,1,4: 'Nothing, besides the Fear of Punishment, could keep the greater Number in any tolerable Order'.

[35] DJN 2,3,1.

Nature of Man', in the sense that humans could not live in a 'peaceful and honest' society without it.[36]

The most fundamental law of nature is that of sociability: 'Every Man ought as far as in him lies, to promote and preserve a peaceful sociableness with others, agreeable to the main End and Disposition of Human Race in General.'[37] Now, Pufendorf identifies the state as the instrument most qualified to preserve 'the Safety of Mankind'.[38] For this reason, he posits a 'Natural Obligation to enter into Regular States and Governments',[39] with the explicit purpose of enhancing our capacity to readily apply the laws of nature:

> And, in as much as the Law of Nature cannot, amongst a great Multitude, be conveniently exercis'd, without the Assistance of Civil Government, 'tis manifest, that God, who imposed the said Law on Human Race, did command likewise the establishing of Civil Societies, so far as they serve for Instruments and Means of improving and inforceing the Law of Nature.[40]

[36] DJN 1,6,18. On Pufendorf's natural law, see H. Denzer, Moralphilosophie und Naturrecht bei Samuel Pufendorf. Eine geistes- und wissenschaftsgeschichtliche Untersuchung zur Geburt des Naturrechts aus der praktischen Philosophie (Munich, 1971); J. B. Schneewind, 'Pufendorf's place in the history of ethics,' Synthese, 72 (1987) pp. 123–55; S. Goyard-Fabre, Pufendorf et le droit naturel (Paris, 1994); T. Behme, Samuel von Pufendorf. Naturrecht und Staat. Eine Analyse und Interpretation seiner Theorie, ihrer Grundlagen und Probleme (Göttingen, 1995); K. Saastamoinen, The Morality of the Fallen Man: Samuel Pufendorf on Natural Law (Helsinki, 1995); K. Haakonssen, Natural Law and Moral Philosophy from Grotius to the Scottish Enlightenment (Cambridge, 1996); C. Carr and M. J. Seidler, 'Pufendorf, Sociality and the Modern State,' History of Political Thought, 17 (1997), pp. 354–78; and I. Hunter, 'The love of a sage or the command of a superior: the natural law doctrines of Leibniz and Pufendorf,' in Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment, ed. by A. Pagden (London, 2003), pp. 169–194.

[37] DJN 2,3,15. See also DO 3,9 and EL II, Obs III. On Pufendorf's notion of sociability, see Palladini, 'Pufendorf Disciple of Hobbes,' and I. Hont, 'The language of sociability and commerce. Samuel Pufendorf and the theoretical foundations of the 'Four-Stages Theory'', in The Language of Political Theory in Early-Modern Europe, ed. by A. Pagden (Cambridge, 1987), pp. 253–276.

[38] DJN 7,1,1.

[39] DJN 7,1,4.

[40] DJN 7,3,2.

In themselves, natural laws are the sole 'Means' to the 'End' imposed by God's will, namely that humans live sociably, thereby preserving the human species.[41] This implies a divine imposition of the obligation for humans to make use of these means:

> And since this [the preservation of mankind] cannot otherwise be atchiev'd, but by an Observance of the *Law Natural,* it must be understood, that there is from God an obligation laid upon Man to pay Obedience hereto, as a Means not *invented* by the Wit, or *imposed* by the Will of Men, nor capable of being *changed* by their Humours and Inclinations; but *expressly* ordain'd by God himself in order to the *accomplishing* this End. For he that obliges us to pursue such an *End,* must be thought to oblige us to make use of those Means which are necessary to the attainment thereof.[42]

Among such means is the establishment of a state via consent. In virtue of the same means-end reasoning, 'Civil Government may be truly said to be from GOD':

> For it being his Will, that the Practices of Men should be ordered according to the *Law of Nature;* and yet upon the Multiplication of Mankind, Human Life would have become so horrid and confused, that hardly any Room would have been left for the same to exert its Authority; and seeing the Exercise thereof would be much improved by the Institution of Civil Societies; therefore (since He who commands the End, must be supposed to command likewise the Means necessary to the said End) God also, by the Mediation of the Dictates of Reason, is to be understood antecedently to have willed, That Mankind, when they were multiplyed, should erect and constitute Civil Societies, which are, as it were, animated with a Supreme Authority.[43]

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[41] DO 1,3,11.
[42] DO 1,3,11; see also DJN 2,3,20.
[43] DO 2,6,14. See also DJN 7,3,2. According to M. Seidler, this is why Pufendorfian sovereigns are considered to rule both 'by divine and human right (granted through contract)'; ''Turkish Judgment' and the English Revolution: Pufendorf on the Right of Resistance', in F. Palladini and G. Hartung (eds.), Samuel Pufendorf und die europäische Frühaufklärung. Werk und Einfluß eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694–1994) (Berlin, 1996), pp. 38–104, p. 89.

All of this therefore allows us to determine what does not require human consent in the establishment of political society. First, the moral necessity reflected in the laws of nature derives from their divine character, without regard for human will. We do not stand on equal footing in the context of our relationship to God, whose absolute authority does not rely on our consent. We must obey God's commands to do what we must to preserve mankind.

Second, and for this matter, of more importance, several factors related to the laws of nature do not hinge upon our will; as humans, we neither choose our nature, nor the laws derived from this nature. Our will is designed to aim at self–preservation, and, more generally, what is good for us.[44] There is no alternative to compliance with natural law to ensure our self–preservation and obtain the comfort for which we naturally strive. Indeed, if improperly managed, human nature is a source of harmful conflicts; humans have 'an unbrindled Lust of Power'[45] and are prone to all sorts of passions that lead to crime, such as greed and conceit. That we manifestly need to control these causes of conflict is not our own choice either. As Murphy observes, this is one reason that natural law does not require consent; its force is borne of a 'necessity to solve coordination problems'.[46] Humans are, by nature, bound to live together, and yet, this same nature is what makes it so challenging to do so, resulting in the imperative to observe the laws of nature.

III

Pufendorf furnishes us with a definition of consent (*consensus*) in his chapter on the will. Therein, a critical distinction between means and ends comes to the foreground. Recall that we have already encountered this distinction twice in the above discussion: first, by acknowledging states as a means to the end of 'inforceing the Law of Nature',[47] and again, as these laws are, themselves, 'Means' to the 'End' of sociability.[48] Interestingly, psychological consent is also

[44] DJN 1,4,1; EL, Obs. II, §7: 'The will, indeed, in general always seeks a good, and avoids an evil.'
[45] DJN 2,2,12.
[46] Murphy, 'Natural law,' p. 71.
[47] DJN 7,3,2.
[48] DO 1,3,11.

very much concerned with means. Some acts of the will, such as volitions, are directed at ends. Other acts of the will, like consent, aim at means:

> Consent is our simple Approbation of Means [*simplex adprobatio mediorum*], as we judge them proper for our Work [*utilia judicantur ad finem*], and these Means when they are plac'd within our Reach and Power, employ the two remaining Acts mentioned in our first Division, for Election determines, and Use applies them to the compassing of the End propos'd.[49]

Given how essential this definition is to the central claims in this paper, and to the history of the concept of consent, let me now retrace its origins to enable a full appreciation of Pufendorf's position. His definition situates him as a participant in a long tradition of regarding consent as a psychological notion. As a source, he only cites Aristotle's work on deliberation (*Nichomachean Ethics*, Book III). However, there are good reasons to link his account with the ensuing reception of Aristotle's passage, most notably, from Saint John of Damascus to Francisco Suárez (1548–1617). Pufendorf's conception of consent, and more generally, of human acts is parallel to Suárez's conception, as attested by this quote from Suárez's *De voluntario et involuntario*:

> Every action of the will, then, turns either concerning an end or concerning a means. That comes to happen two–fold: either in desiring or in attaining. From this a two–fold order arises of acts of the will and of the practical intellect, which governs the will in morals. Prior to all those it contains the acts which are necessary all the way to the next election of a means, which are will, intention, deliberation, consent [*consensus*], and election. The first three concern the end and the last concern the means, respectively. As a result of the election having been established, moreover, the will progresses to a free execution. And thus is the second order, in which only two acts are numbered: command and use.[50]

[49] DJN 4,1,1; the definition was already in EL, Obs. II,1.
[50] Francisco Suárez, De Voluntario et Involuntario, in Opera Omnia, vol. 4 (Paris, 1856), trans. by S. Penner (http://www.sydneypenner.ca/su/tract2disp6sec1.pdf, 2008, accessed October 25, 2018),

According to Schweighöfer, in Suárez, the will may be reluctant to consent if the intellect reveals that the desired end can be achieved only via morally corrupted means, or if the means demand a new chain of undesirable actions. Alternatively, the role of consent may simply be to choose among the variety of means available to us.[51]

This passage exemplifies Suárez's indebtedness to Aquinas, who has defined consent in terms of the approval of the means identified by the intellect as necessary to attain a desired end.[52] Aquinas himself cites Saint John of Damascus (c. 675–749) who, as Barad explains, has 'completed the Aristotelian psychology by positioning after deliberation an act which he called by the same term as Aristotle's [*gnome*]', but 'instead of giving it an intellectual value, as Aristotle had, he gave it the meaning of an act of will'. Thus, 'Damascene regarded consent as an act following judgment in which one is 'disposed to or forms a liking for the object of that judgment''.[53] As Zavattero and Gauthier confirm, what John has added to the classical

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Disputatio 6, Sect. 1. Note that Suárez as well refers to Saint John of Damascus in this work (for instance, Disp. 1, Sect. 1, §1 and Sect. 3, §3). See also the *Metaphysicae disputationes*, Disputatio XIX, in which Suárez argues that the will is not necessitated by the judgements of the intellect, but free, and where he repeatedly speaks of consent (*consensus*) as a free act of the will following and adhering to an intellectual judgement (*iudicium*). See also S. Penner, 'Free and Rational: Suárez on the Will,' Archiv für Geschichte der Philosophie, 95 (2013) pp. 1–35.

[51] S. Schweighöfer, 'Einleitung,' in Über das Willentliche und das Unwillentliche. De voluntario et involuntario: Lateinisch - Deutsch, ed. by S. Schweighöfer (Freiburg im Breisgau, 2016), pp. 1–36, p. 22.

[52] Thomas Aquinas, Summa Theologica, trans. by the Fathers of the English Dominican Province (Chicago, 1952), Ia IIae, Q. 15 art. 3: 'Consent is the application of the appetitive movement to something that is already in the power of him who causes the application. Now the order of action is this: First there is the apprehension of the end; then the desire of the end; then the counsel about the means; then the desire of the means. Now the appetite tends to the last end naturally: wherefore the application of the appetitive movement to the apprehended end has not the nature of consent, but of simple volition. But as to those things which come under consideration after the last end, in so far as they are directed to the end, they come under counsel: and so counsel can be applied to them, in so far as the appetitive movement is applied to the judgment resulting from counsel. But the appetitive movement to the end is not applied to counsel: rather is counsel applied to it, because counsel presupposes the desire of the end. On the other hand, the desire of the means presupposes the decision of counsel. **And therefore the application of the appetitive movement to counsel's decision is consent, properly speaking. Consequently, since counsel is only about the means, consent, properly speaking, is of nothing else but the means** [my emphasis].'

[53] J. Barad, 'Aquinas on Faith and the Consent/Assent Distinction,' Journal of the History of Philosophy, 24 (1986) pp. 311–321, p. 313. See also T. Osborne, Human action in Thomas Aquinas, John Duns Scotus and William of Ockham (Washington, 2014), p. 115 and O. Lottin, Psychologie et morale aux XIIe et XIIIe siècles, vol. 1. (Louvain, 1942), p. 421. John phrased this as follows: 'Thereafter [after deliberation], one becomes disposed to and forms a liking for that in favour of which deliberation gave judgment, and this is called inclination. For should one form a

Aristotelian account of voluntary actions is precisely the stage where the will comes to *like* the judgment resulting from deliberation. This new stage is what Aquinas and his followers come to regard as 'consent'.[54]

Returning to Pufendorf, his definition of consent, as the approval of means, testifies to his adherence to this tradition of understanding human acts in this way. The rest of his terminology also follows the same logic as Suárez's and Aquinas's, especially in terms of the distinction of the acts relating to ends (*voluntas, intentio*) and those to means: consent, choice, and usage (*consensus, electio, usus*). In his early work the *Elements*, the latter even take place in the same order as in Aquinas and Suárez: 'Now *consent* is applied to a simple approval of means, as far as they are judged useful to the end; and these means, when in our power, *election* destines to the obtaining of the end, and *utilization* employs.'[55]

In the absence of an explicit reference, it is difficult to determine whether Pufendorf appropriated these notions from Suárez, Aquinas, or another source. However, according to Pink and Holland, Pufendorf's account of the intellect and the will owes much to Suárez in particular,[56] who is

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judgment and not be disposed to or form a liking for the object of that judgment, it is not called inclination [*gnome*; first translated by Burgundio in Latin as *sententia*, 'disponit et amat quod ex consilio udicatem est', referred to as *consensus* by Aquinas]'; Saint John of Damascus, Exposition of the Orthodox Faith, trans. by S. D. F. Salmond, ed. by Aeterna Press (London, 2016), Book 2, Ch. 22. Medieval thinkers became acquainted with Burgundio of Pisa's Latin translation of it approximately 1148–1450.

[54] I. Zavattero, 'La βούλησις nella psicologia dell'agire morale della prima metà del XIII secolo,' in Il desiderio nel Medioevo, ed. by A. Palazzo (Rome, 2014), pp. 133–150, p. 140, R. Gauthier, 'Saint Maxime le Confesseur et la psychologie de l'acte humain,' Recherches de Théologie ancienne et médiévale 21 (1954) pp. 51–100, pp. 80–92 and Osborne, Human action, p. 115. Aristotle did not have the notion of will that was developed in the Middle Ages, but he accounted for the psychological processes taking place in the mind before an agent commits an act as follows (I am relying on Zavattero as well as C. C. W. Taylor's comments in his edition of the Nichomachean Ethics, Oxford 2006): a rational desire (*boulesis*) triggers the agent's deliberation, i.e., a reflection attempting to identify the means to fulfil this desire. Deliberation ends with judgment, when the means are found. The agent's choice (*proairesis*) is defined as 'deliberative desire of the things which are up to us; having judged as a result of deliberation, we desire in accordance with our deliberation' (Nichomachean Ethics, Book 3, Ch. 3, 1113a).

[55] EL 2, Obs. II, 1.

[56] B. Holland, 'Pufendorf's theory of facultative sovereignty: On the configuration of the soul of the state,' History of Political Thought, 33 (2013) pp. 427–454, pp. 436–441; T. Pink, 'Reason and Obligation in Suárez,' in B. Hill and H. Lagerlund (eds.), The Philosophy of Francisco Suárez (Oxford, 2012), pp. 175–208; and 'Natural Law and the Theory of Moral Obligation,' in S. Heinämaa and M. Reuter (eds.), Psychology and philosophy (Dordrecht, 2009), pp. 97–114. Palladini's reconstruction of Pufendorf's library in Berlin (La biblioteca di Samuel Pufendorf, Wiesbaden, 1999) informs us that he did not own books by Suárez or Aquinas in 1697 (De Jure

generally known to have exerted considerable influence on Pufendorf.[57] Doubtless, it would have been difficult for Pufendorf, as an intellectual and official residing in Protestant territories, to supportively cite Catholic authorities.[58] In any case, there is strong evidence to substantiate the claim that these passages from Pufendorf belong to a continuous line of thought that can be traced back to Aristotle, and then forward to Saint John of Damascus, Aquinas and, at last, to Suárez.

IV

It now remains to determine the links between this psychological notion of consent and the consent invoked in Pufendorf's political theory. After all, Pufendorf's definition of consent, as an approval of means, is drawn from a chapter on the psychology of human acts, and not from his political theory. Fortunately, there are striking parallels—to which I now turn. Indeed, it appears that political consent also intervenes in the selection of means, but this time aims to apply the laws of nature. Speaking of political consent, Pufendorf affirms that God has ordained the human creation of civil societies and approves of governments 'as his own Appointment'.[59] Now, human will remains free to decide how to fulfil this command, across various particular contexts: 'But whether or no God expressly commanded the instituting of States, as to particular

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Naturae et Gentium was first published in 1672, revised in 1684). Yet, that does not suffice to exclude any engagement with these influential references during Pufendorf's life.

[57] On political consent in Suárez, see D. Schwartz, 'Francisco Suárez on Consent and Political Obligation,' Vivarium, 46 (2008) pp. 59–81; J.-P. Coujou, 'Political Thought and Legal Theory in Suárez,' in A Companion to Francisco Suárez, ed. by V. Salas and R. Fastiggi (Leiden, 2015), pp. 29–71, H. Höpfl, Jesuit Political Thought. The Society of Jesus and the State, c. 1540–1640 (Cambridge, 2004), pp. 248–257, D. Recknagel, Einheit des Denkens trotz konfessioneller Spaltung. Parallelen zwischen den Rechtslehren von Francisco Suárez und Hugo Grotius (Frankfurt am Main, 2010), pp. 105–145 and T. Pink, 'Introduction,' in Francisco Suárez: Selections from Three Works, ed. by T. Pink (Indianapolis, 2015), pp. ix–xxii. On Suárez's influence on Pufendorf, see Holland, 'Pufendorf's theory of facultative sovereignty,' Pink, 'Obligation in Suárez,' pp. 197–203; Pink, 'Moral Obligation'; H. Haara, 'Pufendorf on Passions and Sociability,' Journal of the History of Ideas, 77 (2016) pp. 423–44, p. 429; I. Hont / M. Ignatieff, 'Needs and justice in the Wealth of Nations: an introductory essay,' in Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment, ed. by I. Hont and M. Ignatieff (Cambridge, 1983), pp. 1–44, p. 32.

[58] See Holland, 'Pufendorf's theory of facultative sovereignty,' p. 436 and I. Hunter, 'Conflicting obligations: Pufendorf, Leibniz and Barbeyrac on civil authority,' History of Political Thought, 25 (2004), pp. 670–699, p. 675.

[59] DJN 7,3,2.

Times and Places, is a Point in which we have no certain Information.'[60] This typically is considered to refer to the form of their government: 'But it is purely the Act and Disposal of Men, whether they will intrust the Supreme Authority with one or with many Persons, and what particular Methods they will follow in establishing distinct Forms of Commonwealth.'[61]

Here, Pufendorf quotes Boeckler (1611–1672), one of Grotius's German commentators. Both Pufendorf and Boeckler respond to one of Grotius's most influential passages in *De Iure Belli ac Pacis*, in which he advocates a people be empowered to choose a preferred form of government:

> But as there are several Ways of Living, some better than others, and every one may chuse [*eligere*] which he pleases all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will [*voluntate*] of those who conferred it upon him.[62]

Thus, if the institution of political authority is a necessity, which of its variable modalities should prevail, is left to consent. This favours an analogous conception of psychological and political consent: political consent determines the *means* to be used that allow us to comply with our natural obligations in a particular set of circumstances.

As to the various modes of organizing political authority, Pufendorf approves of several political regimes, ranging from systems that are absolutist in character to systems that limit the sovereign power. He even admits that consent has the potential to legitimate a flawed political arrangement. So-called 'Vices in Government' may arise 'from the Persons who administer the Government' or 'from the Badness of the *Constitution* it self'; however, they do not change 'the Nature of the Authority it self, or the proper Subject in which it resides.'[63] The most obvious

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[60] *Id*.
[61] *Id*., quoting Johann Heinrich Boeckler, Hugonis Grotii Ius Belli Et Pacis, Ad Illustrißimum Baronem Boineburgium Commentatio (Argentorati, 1663), Book 1, Ch. 3, §6; in Grotius, Rights of War and Peace, Book 1, Ch. 3, §8. For Pufendorf, see also DJN 7,7,4: the people have the 'Privilege of marking out the Person who is to govern them by their own free Choice'.
[62] DJN 7,3,2.
[63] DO 2,8,5.

example would be the Holy Roman Empire, which Pufendorf regards as an irregular form of government, given the division of its sovereignty among the emperor and the local princes. His polemical and influential work, *The present state of Germany* (1667), seeks to highlight major weaknesses in its constitution.[64]

Consent also determines the form of a government and the identity of its ruler.[65] The laws of nature, coupled with our natural dependency on others, may oblige us to consent to some common authority, but human authority is, nonetheless, not natural. Due to our natural equality and liberty, acknowledging that *someone* of our own (human) kind might be empowered to impose constraints upon us requires our consent.

For instance, Pufendorf considers the possibility of electing one's rulers:

> As for the voluntary Consent of the People [*consensu populi*], a Government is acquired by it, when in an Election [*electione*] the People, either in order to their Settlement, or at any Time after, do nominate such a One, to bear that Office, as they believe is capable of it. Who, upon Presentation of their Pleasure to him, accepting it, and also receiving their Promises of Allegiance, thereby actually enters upon the Possession of the Government.[66]

The importance of the choice of ruler is also reflected in Pufendorf's claim that elected rulers cannot choose to alienate their sovereignty, assigning it to another ruler without notice, given that citizens certainly have 'peculiar reasons why they chuse to submit to this Person rather than to any besides.'[67]

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[64] On this work, see M. J. Seidler, 'Introduction,' in The Present State of Germany, ed. by M. J. Seidler (Indianapolis 2007), pp. ix-xxviii, M. Scattola, 'Pufendorf und die Tradition der Mischverfassung,' in Naturrecht und Staatstheorie bei Samuel Pufendorf, ed. by D. Hüning (Baden-Baden, 2008), pp. 97–125, P. Schröder, 'Reichsverfassung und Souveranität bei Samuel Pufendorf,' *ibid*., pp. 126–137, Alfred Dufour, 'Pufendorfs föderalistisches Denken und die Staatsräsonlehre,' in Samuel Pufendorf und die europäische Frühaufklärung. Werk und Einfluss eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694–1994), ed. by F. Palladini and G. Hartung (Berlin, 1996), pp. 105–122. See also DJN 7,5, and DO 2,8.

[65] DJN 7,3,2.

[66] DO 2,10,3. On the sort of elections Pufendorf has in mind, see for instance DJN 7,2,16–17 and The Present State of Germany (trans. E. Bohun, ed. M. J. Seidler, Indianapolis, 2007), Ch. 1, §7 and Ch. 4, §1.

[67] DJN 6,7,3.

Here, it is interesting to note that Pufendorf's argumentation again bears striking similarities to that of Suárez, who also holds that humans are born naturally free and yet 'potentially subject' to political power. Unlike Pufendorf, however, who considers humans to be naturally disinclined to political obedience (but desirous of their fellows' company, to some extent at least),[68] Suárez sees humans as 'social animal[s]' who naturally come to desire and form political communities.[69] Now, the *consequence* of the existence of such communities is that there must be some common power in the community, granted by God, to 'provide for the common good' and give it prevalence over private advantages when necessary.[70] It is for the establishment of distinctive political authorities ruling over this natural community that the 'intervention of human will' is required.[71] This is where the resemblance between Suárez and Pufendorf's accounts becomes striking: If political power is to 'reside in a given individual, as in a sovereign prince, it must necessarily be bestowed upon him by the consent of the community [*consensu communitatis*].'[72] This consent can either be given 'little by little', i.e., 'according as the people is gradually increasing', or when the 'community, already perfect, voluntarily elects a king to whom it transfers its power' (note, once again, the resemblance to Pufendorf's own account).[73] Like Grotius and, later, Pufendorf, Suárez writes that 'the specific application' of this natural power, 'as a certain form of power and government', is a matter of

[68] See DJN 7,1,2–4.
[69] F. Suárez, A Treatise on Laws and God the Lawgiver (in Selections From Three Works of Francisco Suárez, vol. 2, pp. 13-392, ed. G. L. Williams et al., Oxford, 1944), Book 3, Ch. 1, §11–13.
[70] Suárez, Laws, Book 3, Ch. 1, §5. This power is a natural phenomenon in the sense that it is a 'characteristic property resulting from nature, that is to say, resulting through a dictate of natural reason' - stating that God has provided mankind with 'the power necessary to its preservation and proper government'. As Schwartz observes, this idea of 'natural resultancy' (sometimes also conceived as 'emanation') comes from Suárez' metaphysics: a substance can cause its own properties, which 'complete' the substance in question ('Suárez on Consent,' p. 73). Thus, once the community exists, its political power comes to existence as well. See also Suárez's Defense of the Catholic and Apostolic Faith against the Errors of Anglicanism, trans. P. L. P. Simpson, ed. Lucairos Occasio Press (New York, 2012/2013), Book 3, Ch. 2, §14.
[71] Suárez, Laws, Book 3, Ch. 1, §11.
[72] Suárez, Laws, Book 3, Ch. 4, §2. See also §1: 'men are not compelled by the sheer force of the natural law to place this power either in one individual, or in several, or in the entire number of mankind; and therefore, this determination [as to the seat of the power] must of necessity be made by human choice.' Or see the Defense of the Catholic Faith, Book III, Ch. 2, §14: 'natural reason alone does not introduce the transfer of power from one man to another through the sole designation of the person without the consent and efficacy of the will of him by whom the power is to be transferred or conferred'.
[73] Suárez, Defense of the Catholic Faith, Book 2, Ch. 2, §14.

'human choice' (*arbitrio humano*).[74] Like Pufendorf, Suárez acknowledges the possibility of a pact between kings and subjects that delimits the king's powers.[75]

One salient difference between Suárez and Pufendorf regarding consent is that, in Suárez, the power to consent originally lies with the community, which does not need each of its members' consent; whereas, in Pufendorf, the community is constituted by this very consent. This attests to Pufendorf's more characteristically modern focus on the individualist perspective, quite consistent with the positions of Grotius and Hobbes, both of whom assert that consent is given by each individual separately, and respectively, to form a political community or to enter into the social contract.[76]

V

So far, we have seen how consent relates to the means selected by a community to organize its political system. Interestingly, Pufendorf advances a similar argument about consent in marriage, which proves instructive for our investigation, as it raises a tension akin to that of our initial puzzle. Natural law prescribes the propagation of the species: by default, humans are under obligation to multiply. To do so decently, they are under the further obligation to get married.[77] Yet, this hardly specifies who should be married to whom; such a determination requires mutual consent, the source of the spouses' particular obligations to each other:

[74] Suárez, Defense of the Catholic Faith, Ch. 4, §1.
[75] Suárez, Laws, Book 3, Ch. 4, §5.
[76] See Grotius's Rights of War and Peace, Prolegomena 16: 'For those who had incorporated themselves into any Society, or subjected themselves to any one Man, or Number of Men, had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained'; and Hobbes's *De Cive* (the version of his political theory usually quoted by Pufendorf): 'each man subjects his will to the will of a single other, to the will, that is, of one Man or of one Assembly, in such a way that whatever one wills on matters essential to the common peace may be taken as the will of all and each' (Ch. 5, §6).
[77] DJN 6,1,6–8.

> It is the Duty of a *Husband* to love his Wife, to cherish, direct and protect her; and of the *Wife* to love and honour her Husband, to be assistant to him, not only in begetting and educating his Children, but to bear her Part in the Domestick Cares.[78]

Nor does natural law establish a specific matrimonial regime, which varies according to the civil laws of each country. We are thus obligated to consent to marriage, but we may choose our spouses; civil law regulates the modalities of the union. For example, 'since the Natural Obligation to Matrimony is underdeterminate, and admits of some Latitude, the Civil Legislator may fairly fix the Age of the Persons, who shall be thus join'd together.'[79] As he does of irregular constitutions, Pufendorf also refers to 'irregular' yet licit marriages.[80] One example he provides is the culture of the Amazons, in which the husband neither acquires authority over his wife, nor their children, contrary to Pufendorf's own understanding of regular marriages, which are 'more suitable to the Condition of Human Nature', and to men's natural superiority to women.[81]

Altogether, one remarkable conceptual advantage of repartitioning the functions of consent and natural law, common to the state and matrimony, is that it delivers an account of concrete situations exemplifying the implementation of natural law. As a set of universal and eternal rules, natural law provides general prescriptions that may be applied in various ways. For exegetical purposes, it will be useful here to draw upon a parallel to Aquinas's notion of 'determination' of natural law, that is, the derivation of the mode of its application that is contingent on the specificities of a particular context.[82]

Granted, Aquinas makes this point with respect to the determination provided by civil laws concerning natural laws. For instance, if natural law prescribes the punishment of a crime, the mode of punishment remains open for determination by civil law, which hinges on human

[78] DO 2,2,10.
[79] DJN 6,1,8. Another example is the repartition of the spouses' respective property, which may be determined either by civil law or by their own convention, DJN 6,1,11.
[80] DJN 6,1,9.
[81] DJN 6,1,10–11. See also his discussion of the potential licit nature, but undesirability, of polygamy with a view to its compatibility with natural law, DJN 6,1,15–19.
[82] Aquinas, *Summa Theologiae*, Ia IIae, Q. 95 art. 2.

judgment.[83] It is precisely one function of human law to render such determinations. As a human decision among various options, it is subject to change, unlike natural law.[84] By contrast, in the passages from Pufendorf quoted above, we are dealing with the determination, by the subjects' consent, of the particular form a government might assume and of the ways to obtain political power. Yet, the structure is similar: natural law provides general injunctions that may allow for diverse modes of implementation, subject to determination by human will.

Consent thus seems to derive its normative force from what natural law leaves open to its implementation. However, natural law intervenes again to reinforce this consent as soon as it is operational. As we have seen, various means may be suitable to fulfil the natural obligation to submit to some political authority (or to get married). However, once particular means have been selected by the community, this consent is then fortified by what Pufendorf calls a 'hypothetical'[85] command of natural law, namely one applying as a consequence of human acts. Thus, after political authorities have been established by the community's consent, sociability requires obeying them for the sake of a peaceful life: 'Thus much indeed is certain, that the Violators of Civil Laws do, by breaking their intervening Covenant, mediately sin against the Law of Nature.'[86]

In this context, this point has the additional advantage of allowing Pufendorf to discredit divine rights theories of authority, without rejecting God's authority as a source of approval of human

[83] *Id*.

[84] *Id*.: 'But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g. that 'one must not kill' may be derived as a conclusion from the principle that 'one should do harm to no man': while some are derived therefrom by way of determination; e.g. the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature. Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law.'

[85] DJN 2,3,24. see B. Tierney, Liberty and Law: The Idea of Permissive Natural Law, 1100–1800 (Washington, DC, 2014), p. 285 on this notion.

[86] DJN 2,3,24.

decisions. Despite the Pauline injunction to obey the powers that be,[87] the more 'immediate Cause' of the assumption of power by human authorities is, nonetheless, human will; whoever is in a position of political power has received this power from humans, not directly from God.[88] Pufendorf's particular target is Johann Friedrich Horn's *Architectonica de Civitate* (1664), according to which a people's recognition of its ruler may well 'mark out' the divine gift of power, but plays no role in the constitution of this power, which is conferred entirely by God.[89] Elsewhere, Pufendorf also attacks Horn on marriage with the same strategy; a husband's authority over his wife may be consistent with God's will, but its immediate source lies in the wife's consent.[90]

VI

As Pufendorf did not express himself on the matter, uncertainty remains regarding the connection he saw between psychological and political consent (both *consensus* in Latin). However, a comparison offers insight for exegetical purposes. How does consent, as an approval of means, relate to the consent Pufendorf cites in his account of the two covenants involving the political consent of citizens? These passages actually refer to a notion of consent modelled on legally binding commitments—as an explicit, tacit, or supposed expression of one's will that generates rights and obligations. Are these two notions of consent then merely two distinct concepts that happen to bear a strong resemblance to one another, or, more persuasively, two related, yet distinguishable, facets of a single concept? My interpretation asserts a viable connection between these apparently distinct uses of consent, as follows.

To begin, political and psychological consent operate similarly: while the latter refers to the approval by the will of means proposed by the intellect to reach an end, the former is about means to give shape to a political authority in a certain context—an end fixed by natural law, yet without concrete determination as to its fulfilment. This symmetry highlights a fluid continuity

[87] St Paul, Letter to the Romans, 13:1–7.
[88] DJN 7,3,2.
[89] DJN 7,3,1; on Horn's theory of the state, see H. De Wall, Die Staatslehre Johann Friedrich Horns (Aalen, 1992), Pufendorf also argues against Horn in DJN 6,3,1 and 7,1,5.
[90] DJN 6,1,12.

from psychological consent to political consent. Given Pufendorf's theory of the will (and the internal acts that take place in it, cf. III), it is sensible to consider there is an act of psychological consent that has a share, in the individual's mind, in the formation of the will expressed by his political consent. As we have seen, psychological consent refers to the moment when the will endorses the suggestions of the intellect before acting, inasmuch as it approves of the means proposed to reach a given end. When it comes to the moral authority of certain rulers, or certain institutions, this corresponds to the moment when the will acknowledges, as a decisive reason for action, the moral necessity of subjecting itself to certain rulers or institutions by way of a particular means of fulfilling the natural obligation to submit to some authority.

This suggests that psychological and political consent fulfil complementary functions in Pufendorf's theory of the legitimacy of the state. Indeed, one's inward acceptance of another person's authority over oneself may be the core requirement for the legitimacy of this authority, but this does not yet render this pivotal stage accessible to others. This is where political consent comes in to make it socially effective, an outward act that transmits obligating power to our internal acts of will, thereby embedding our will into social practices. This makes it a valuable device in the social realm, precisely for its outward documentation of a person's inner will: either by means of a speech act, as in the case of express consent that renders an inward act of will operational, or in the case of tacit consent, by means of a behavioural equivalent that Pufendorf takes to have the same moral effect.

In my interpretation, this complementarity is all the more successful in explicating Pufendorf's (controversial)[91] use of tacit consent as a substitute for express consent. Psychological consent can exist as an internal act of will, even if it is not communicated to others via express consent. Hence, it would still make sense to speak of a consensual foundation of the political order, even in the absence of explicitly given consent, if the process described above still takes place within citizens' minds. Thus, there remains an actual available consent to presume, if not the socially

[91] Theories of tacit consent have been heavily criticized from Hume onwards, mainly because the citizens may not even be aware of their alleged tacit commitment, and not all of them would be genuinely free to leave their country to avoid being presumed to consent, and thus, having to obey their authorities. See D. Hume, 'Of the Original Contract', in T. H. Green and T. H. Grose (eds.), David Hume. Essays moral, political and literary, vol. 1 (Aalen, 1964), pp. 443–460, p. 4, and A. J. Simmons, Moral Principles and Political Obligations (Princeton, 1979).

effective one (i.e., political consent). This internal consent may not be a source of obligation (which only express consent could provide, or other actions—mainly, residence in a country—that, according to Pufendorf, would allow a presumption of it according to the principles exposed in section I). Yet, it is a consent that may suffice to account for the legitimacy of an authority in terms of the subjected person's will (the main thesis of consent theories), given that psychological consent embodies the moment in which an action recommended by the agent's intellect becomes an action properly willed by him.

VII

Remaining at the nexus of psychological and political consent, I now turn to an additional function of consent, as a complement to natural law: its specific moral status as a voluntary act. Some passages of Pufendorf's work emphasize the importance of *voluntary* compliance with one's obligations, in order for these obligations to be of moral character. This is far from incidental given Pufendorf's frequent assertions on the depravity of most humans' moral character.[92] In what follows, I wish to advance the claim that these passages bear on consent arguments as well. As an act of the will, one's consent to do what one is morally obligated to do appears to have some intrinsic moral value. This perspective points to an additional philosophical function of consent when considering our initial puzzle—that of the specific value of political consent within the framework of natural law.

Pufendorf is affiliated with a long tradition of Christian thought that emphasizes the moral value of free will. God decided to grant us freedom, even though He could have set us up as machines that acted automatically in accordance with His will. It seems that God has done so, because He wants us to *will* to obey His commands. Recognizing His authority necessitates the commitment to submit one's will to God's demands. Darwall formulates this idea in a comment on Suárez's conception of natural law, which also proves insightful here:

[92] See for a paradigmatic example DO 2,5,6: 'Farthermore, there is no Creature whatsoever more fierce or untameable than Man, or which is prone to more Vices that are apt to disturb the Peace and Security of the Publick.'

> First, 'ordering pertains to the will', so moral norms or laws must aim to *direct a will*; only thus can they have 'binding force' [...]. So, second, moral norms are God's will as *addressed* to us and our rational wills. Suárez's idea is not that God simply wills us to act in certain ways, that he seeks to determine our wills directly. If that were so, we could not fail to comply ('all these precepts would be executed') since God is omnipotent [...]. Rather, God wills 'to bind' his subjects by addressing legitimate demands to them through commands that they can then choose to follow for what they can regard to be good reasons [...].[93]

Such a structure contributes to explaining the compatibility of obligations and consent in Pufendorf. God's wish for the world order is that human wills should be subject to moral constraints, and yet retain the possibility of ignoring them. Humans possess free will and, hence, the capacity to adjust their will to that of God. Obligations can only be fulfilled voluntarily—that is, when the agent endorses compliance or is, at least, aware of it.[94] Now, in Pufendorf's theory of the will, (psychological) consent can relate to any means towards any end, including morally neutral or even bad ends, thus not necessarily to an obligation. But when the fulfilment of an obligation is the end at stake, consent inherits this value as an act of the will.

Indeed, if Pufendorf holds that humans are 'capable of receiving Obligation,' it is because they are 'indu'd with Will, which can turn to either side, and so guide it self by a Moral Rule; unlike same other Beings which by some intrinsical Constraint are determin'd to one and the same way

[93] S. Darwall, 'Pufendorf on Morality, Sociability, and Moral Powers,' Journal of the History of Philosophy, 50 (2012) pp. 213–238, p. 302. On the first point, see Suárez, Laws, Book 2, Ch. 10, §4, as well as Pink, 'Moral Obligation,' p. 102. On the second point, see Suárez, Laws, Book 2, Ch. 6, §9 and J. B. Schneewind, The Invention of Autonomy (Cambridge, 1988), p. 65.

[94] In Denzer's words (Naturrecht bei Samuel Pufendorf, p. 77): 'Die Erkenntnisfähigkeit des Menschen, sein Stehen unter dem Gesetz und sein moralisches Wesen fordern notwendig das Vorhandensein des freien Willens. Das besondere Erkenntnisvermögen erfüllt keinen Zweck, wenn die Menschen wie die Tiere dem Instinkt, d.h. einem ihnen übergeordneten Gesetz naturnotwendig folgen müßten. Und ein Sittengesetz hat nur einen Sinn, wenn es als Norm bejaht oder abgelehnt werden kann. Sittliches Handeln ist nur möglich in der Freiheit des Willens von der Vernunft und dem Trieb in dem Sinne, daß es eine Entscheidungsfreiheit geben muß, die das Gute und das Gesetz wählen kann.' On Pufendorf's concept of obligation, see Nutkiewicz, 'Pufendorf: Obligation' and B. Lipscomb, 'Power and Authority in Pufendorf,' History of Philosophy Quarterly, 22 (2005) pp. 201–2019.

of acting.' An obligation binds us by 'Moral Necessity' to perform or omit an action.[95] All obligations share a common feature: 'that the Duties they enjoyn, a Man ought to perform Voluntarily, and as it were upon his own internal Motion.'[96] For instance, a law is said to be 'the Cause of Rectitude in an Action' when the action proceeds from an 'Intention of paying Obedience' to the law in question.[97]

These ideas are compatible with the psychological notion of consent discussed above. Here, the focus is on the moral significance of the recognition, by the agent's will, of an external moral necessity applying to him. The obligation becomes his obligation, in just the way that God wanted to shape the workings of morality.

When it comes to political consent, this picture suggests that acting in conformity, by consenting to constraints imposed by the state, qualifies as a moral behaviour. Recognizing one's political obligations (giving one's consent, as well as fulfilling the obligation of obedience arising from it) is essential to peace, whereas breaking these obligations is not only irrational but, first and foremost, morally repugnant. Acknowledging the weight that these obligations bring to bear on one's own will, and being willing to fulfil them for the sake of their moral value, attests to moral rectitude. This holds especially true when the intention to act in accordance with moral laws is the prime consideration, as well as when compliance conflicts with more private interests, or when it overcomes a momentary weakness of will.

* * *

[95] DJN 1,1,21. Our liberty of action sees itself restricted by a 'Moral Bridle (*frenum*)': 'so that though the Will does actually drive another way, yet we find our selves hereby struck as it were with an internal Sense, that if our Action be not perform'd according to the prescript Rule, we cannot but confess we have not done right; and if any Mischief happen to us upon that Account, we may fairly charge our selves with the same; because it might have been avoided, if the Rule had been follow'd as it ought (DO 1,2,3).'

[96] DJN 3,4,6. Pufendorf considers this to apply to all obligations, including obligations from natural law, even though natural law is said elsewhere to aim at our 'external Actions' only, whereas the guidance of Christians' 'Inward Thoughts' is left to moral theology (which is directed at the afterlife and takes its principles not from reason, but from the Scriptures; DO, *Preface*, see also DJN 3,4,6). Thus, even though natural law solely requires certain actions from us (and thus not certain thoughts or desires from us), these passages suggest that for a natural obligation to be fulfilled, the action must nonetheless be willed by the agent as a consequence of reason's grasp of the obligation, as opposed to a bare instinctive impulse that happens to coincide with natural laws.

[97] DJN 1,7,3.

On my reading, Pufendorf gives us much material to elucidate the role of consent within the framework of natural law. There are at least three reasons why consent is required to complement natural law. The first two are well known: first, consent ensures the compatibility of human authority with the natural human values of equality and freedom; second, consent is a way of obligating particular persons to one another. It engenders associated individuals into one definite political society, and it establishes an obligation to behave obediently towards the chosen ruler, mirrored by the ruler's obligation to govern this specific community, per established agreements. Similarly, consent ties spouses to the mutual obligations that engender the smaller, yet crucial, society of marriage.

Third, as I have shown in this paper, one of Pufendorf's great insights is that the contingent aspects of political authority must be decided by consent, as natural law fails to provide specific rules for each particular context. Consent relates to the means that humans choose to apply the indeterminate prescriptions of natural laws, the rest falling beyond human will (the natural obligations and the necessities attached to human nature that befall them). Consent determines who should rule and under which system. Making the correct determination of the most appropriate means hinges upon the peculiarities of a given social context, on which humans have to reach an agreement. In a similar vein, humans are obligated, by default, to get married, but who marries whom and under which matrimonial regime is, in principle, a matter of consent.

On this relationship between consent and means, I have highlighted a convergence, observable in Pufendorf's account, of consent as a political and psychological notion. The psychological notion of consent, as the approval of means, dates back to Saint John of Damascus's engagement with Aristotle's theory of moral acts and forward in time to Suárez. On my reading, there is an apparent connection between psychological and political consent. Psychological consent is an approval, by the will, of means, selected by the intellect, to reach an end. Political consent also relates to the means of reaching a given end: How should we apply the natural law that obligates us to institute or maintain a state within a particular context? Hence, we have a symmetry that allows us to grasp how two apparently unrelated facets of the history of consent (*consensus*)

converge in Pufendorf's *De Jure Naturae et Gentium*. Relying on Pufendorf's theory of the will, I have argued psychological consent is a component of political consent, whereby psychological consent may be present even when political consent is not expressly given, only presumed. This would be why it may still make sense to speak of a consent legitimizing political authorities.

Emphasizing this continuity brings us to an additional complementarity that links consent and natural law—namely, the specific moral value of consent. In Pufendorf's framework, obligations, as moral entities, must be fulfilled voluntarily. The agent must endorse compliance with natural obligations. In the case of the natural obligation to submit to some authority, this happens as follows: An individual acknowledges the fulfilment of this obligation as a means to an end worthy of pursuit, namely the sociability and peace sought by all natural laws, and then gives his consent to his country's authorities as a means to the fulfilment of this obligation. Thereby, his consent acquires the specific moral value pertaining to one's voluntary compliance with one's obligations.

Some of these clarifications may be merely implicit in Pufendorf's texts, yet they provide an all-encompassing view of the role of consent in his theory and, more generally, of the place that consent can occupy in a theory of natural law. To my mind, this gives us good reason to include Pufendorf among the important contributors to consent theory, along with Hobbes, Locke, and Rousseau. Further, I have shown that several of his points are made in very similar terms to those in works by Suárez. Knowing that Pufendorf's consent arguments also rely heavily on Grotius's and Hobbes's writings should prompt a reading of Pufendorf, acknowledging that early modern proponents of consent arguments did not regard consent as a self-sufficient moral standard. Rather, the scope of consent lies between what is forbidden by natural law and what is commanded by natural law.

Last, but not least, the interpretation offered in the present paper provides a plausible response to one of Hume's classical objections to consent arguments. Hume argues that both the institution of promises and that of the state must be promoted due to their utility. Given this common foundation, it actually suffices to claim that the state must be obeyed because it is useful to

everyone.[98] However, this paper allows us to see that the function of consent is not to provide the whole foundation for the establishment of political authority. Rather, it shares this task with natural law; political authority is, indeed, a moral necessity irrespective of consent, but its contingent specificities are shaped by consent and regulated by consensual obligations. Thus, consent is not redundant, but it has an undeniably well-defined place of its own.

[98] 'What necessity, therefore, is there to found the duty of *allegiance* or obedience to magistrates on that of *fidelity* or a regard to promises, and to suppose, that it is the consent of each individual which subjects him to government, when it appears that both allegiance and fidelity stand precisely on the same foundation, and are both submitted to by mankind, on account of the apparent interests and necessities of human society?' Hume, 'Of the Original Contract', p. 455. Hume's position is taken up by Bentham in his Fragment of Government (in J. H. Burns and H. L. A. Hart (eds.), A comment on the commentaries and A fragment on government (Oxford, 2008), Ch. I, §42-43).