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## I. INTRODUCTION

> The great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.[1]

The Takings Clause of the Fifth Amendment provides that "private property shall [not] be taken for public use without just compensation." This simple phrase reflects a profound philosophical dispute over the relationship between the individual and the state. It is a dispute that has produced much controversy but little coherence. The Supreme Court's Takings jurisprudence is frequently characterized as a "muddle."[2]

In the din of debate over the meaning of the Takings Clause, one voice has a particular claim to be heard. John Locke, as much as any other figure, has shaped the debate over the issues that underlie the Takings controversies. Locke, in his deeply influential work, *Two Treaties of Government*, provided both a coherent intellectual justification of a broad, but not absolute, right of private property and a powerful analysis of the rationale and limitations of democratic government. The *Two Treatises* thus deals with issues that are at the heart of the Takings debate.

Locke's stature as one of the major intellectual figures in American constitutional history is universally acknowledged.[3] Madison, the chief architect

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1. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT § 124 (Peter Laslett ed., Cambridge Univ. Press 1960) (1698). Locke loved italics, and, unless otherwise indicated, all emphasis is in the original.

2. This characterization of Taking jurisprudence can be traced to Professor Carol Rose. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). See *infra* notes 173-87 and accompanying text for a discussion of the Supreme Court's Takings jurisprudence and the implication of Locke's views to this analysis.

3. Hartz describes the American democracy as a "society which begins with Locke, and thus transforms him, stays with Locke, by virtue of an absolute and irrational attachment it develops for him." LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 6 (1955). *See also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 60 (1985); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 46-50 (2001); James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1025-26 (2000).

In the last few decades, there is a growing literature challenging Locke's central status, but there can be no dispute that Locke's political philosophy was deeply influential at the time of the American Revolution and the drafting of the Constitution. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967) (describing the influence of the English Enlightenment, including Locke, on the intellectual origins of the American revolution); SCOTT

of the Takings Clause, was deeply influenced by Locke.[4] Thomas Jefferson is said to have viewed Locke as one of the three greatest philosophers who ever lived.[5] Professor Richard Epstein, in his analysis of the Takings Clause, justi-

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DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 23-27 (1995).

4. Madison provided the first draft of what became the Takings Clause. Madison's draft stated that a person could not "be . . . obliged to relinquish his property, where it may be necessary for public use, without just compensation." Madison's draft was later revised, without explanation, into its current version by a Committee of the House of Representatives. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-712 (1985) (discussing the history of the adoption of the Takings Clause and discussing Madison's views).

Madison's writings reflect his deep indebtedness to Locke. In Federalist No. 10, Madison reflected Locke in his view that property interests developed from the "diversity in the faculties of men." Madison wrote that "[t]he protection of these faculties is the first object of Government." THE FEDERALIST NO. 10 (James Madison). This is an obvious, if significantly altered reference to Locke's view that the "chief end" of government is the "preservation of Property." JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 85.

In his 1792 essay "Property" in the National Gazette, Madison further expressed his Lockean views. Madison, like Locke, defined "property" to include the wide range of rights, faculties, and possessions held by an individual, and he provided a strong defense of protection of this broadly defined right to property from government intrusion. Madison's language had a Lockean ring of protection of property rights from arbitrary government impairment:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.
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> . . . .
>
> That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest.

James Madison, *Property*, NAT'L GAZETTE, Mar. 27 1792, *reprinted in* 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 266 (1983).

The National Gazette essay, although written almost a decade after adoption of the Fifth Amendment and expressing Madison's unique views, nonetheless reflects Madison's indebtedness to Locke. It is Madison's Lockean grumble.

5. *See* Robert Wernick, *At Monticello, a Big Birthday for the Former Owner*, SMITHSONIAN, May 1993, at 80, 82 (stating Thomas Jefferson considered John Locke, along with Francis Bacon and Isaac Newton, as one of "unquestionably the three greatest men the world had ever produced"). Jefferson's reference in the Declaration of Independence to "life, liberty and the pursuit of happiness" is directly linked to Locke's concern with protection of "life, liberty and estates." *See, e.g.*, Leonard W.

fies reliance on Locke since "[t]he Lockean system was dominant at the time when the Constitution was adopted."[6] Indeed, Locke has been viewed as the "patron saint of Anglo-American ideology in the eighteenth century."[7] and some would claim that America is a "Lockean nation."[8]

Although Locke's views deserve a central place in any assessment of the scope of government authority over property, serious analysis of Locke's writings have largely been confined to the field of political philosophy. Locke in the legal and political debate is generally viewed as the author of a simplistically understood "labor theory" of private property or as the exemplar of natural law and individual rights.[9] Indeed, Locke has become something of a libertarian icon who, it is claimed, provides the intellectual basis for substantial limitations on government authority.[10]

Locke, however, was a complex thinker whose ideas cannot be reduced to a slogan. Locke was no advocate of absolute property rights; he recognized that property rights were held subject to broad power of a democratic government to act for the "publick good." Locke, however, can be seen to have placed limits on the government regulation of property rights. Indeed, a challenge in understanding Locke is to reconcile his strong defense of private property rights with his equally strong advocacy of the power of democratic government. This reconciliation is possible, and the outcome is a coherent

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Levy, *Property as a Human Right*, 5 CONST. COMMENT. 169, 172-177 (1988). *See generally* A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. 657 (1946).

6. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN 16 (1985) [hereinafter EPSTEIN, TAKINGS]. In a later work, Professor Epstein claims that "Lockean thought" requires the State to "stabilize and protect" property rights that are defined by private individuals. Richard Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. CHI. L. REV. 21, 26 (1997) [hereinafter Epstein, PruneYard].

7. Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 629 (1982).

8. *See* George Mace, LOCKE, HOBBES AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE 9 (1979).

9. James V. DeLong, in PROPERTY MATTERS, recognizes that interpretation of Locke has largely been confined to political philosophers. In DeLong's view, however, some "Lockean philosophy," rather than Locke himself, is significant and thus "hair splitting distinctions about what is or is not found in Locke's own corpus of work are beside the point." JAMES V. DELONG, PROPERTY MATTERS 31 (1997). If Locke has a claim to historical legitimacy in interpreting the Takings Clause, it is odd to think that his actual views are beside the point.

10. *See, e.g.*, John Locke Foundation Home Page, http://www.johnlocke.org (last visited June 22, 2007); GEORGE M. STEPHENS, LOCKE, JEFFERSON AND THE JUSTICES: FOUNDATIONS AND FAILURES OF THE U.S. GOVERNMENT (2002). James Tully describes Locke's transformation from socialist icon to his recent rise as "spokesman" for an "unlimited property right." JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980).

view that can serve as a guide to the contemporary debate over the Takings Clause.

The purpose of this article is to provide both a detailed analysis of Locke to aid the Takings debate and a particular reading of the *Two Treatises* that provides a coherent picture of the limits of government authority over private property. Part I is an introduction to John Locke and the *Two Treatises of Government*. Part II addresses Locke's justifications for acquisition of private property in a pre-government "State of Nature" and the constraints on property reflected in a series of Lockean "provisos." Robert Nozick in *Anarchy, State and Utopia*, has suggested that the "historical shadow" of Locke's provisos can have contemporary significance.[11] Nozick is correct to suggest the continuing significance of the Lockean provisos, but incorrect in his assessment of application of the provisos. This article argues that only a Lockean "sustenance" proviso forms the basis of contemporary limitations on private property.

Part III deals with the central question of Locke's views on the scope of government authority over private property. Although Locke advocated a broad scope of government authority, he can be seen to have recognized a series of limitations on the exercise of this government power. One set of constraints arose from his view that government could not adopt "arbitrary" laws that did not serve the public good. Of equal significance is a constraint that rises from Locke's conception of the social contract. He can be read to argue that government can not regulate private property in ways that would place people in a worse condition than they would be in a pre-government State of Nature. Contract and game theory suggest some implications of this view, and the result is a weak set of "Lockean rights." Government interference with those Lockean rights would require compensation under the Takings Clause. Beyond that, Locke suggested that democratic institutions are the proper check on interference with property rights.

Part IV considers the implications of Locke's views for the contemporary Takings debate. In surprising ways, Locke's views mirror, in important ways, the outcome of the ad hoc approach to the Takings Clause employed by the Supreme Court.

## II. JOHN LOCKE AND THE TWO TREATISES OF GOVERNMENT

John Locke was born in 1632 in Somerset, England.[12] He was, in many ways, a child of revolution: a boy during the civil war that deposed Charles I, a young man and Oxford teacher during the collapse of the English Republic and the restoration of the monarchy under Charles II, and a middle aged man during the "Glorious Revolution" in which the Catholic James II was sup-

11. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 180 (1974).

12. *See generally* PETER LASLETT, Introduction, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, at 3.

planted by the Protestants William and Mary. These revolutionary times shaped his career and his thinking. His most influential writings dealt with issues relating to the proper role of government and the relationship of the governed with their government.

Locke became involved in the political affairs of his age through his association with influential political figures. Much of his intellectual growth as a political philosopher stemmed from his association with Lord Ashley, the first Earl of Shaftesbury.[13] As his secretary, Locke was involved in much of Shaftesbury's political career.[14] Locke served, in many ways, as Shaftesbury's brain trust and in his service was involved in a range of activities including work on the economic development in Shaftesbury's American holdings in the Carolinas.[15] After Shaftesbury was discredited for his alleged involvement in anti-catholic plots against James II, Locke lived, essentially in exile, in Holland. Locke returned to England following the ascension of William and Mary, and he continued his involvement with influential political figures of the time.[16]

John Locke should be an inspiration to middle-aged professors everywhere; virtually all of this writing and all of his reputation involve works that were published after he was fifty-seven.[17] In 1690, he published one of the

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13. Locke originally met then Lord Ashley in the capacity of doctor, and Locke "advised and directed" an extraordinary surgical operation, draining an abscess on the liver and inserting a drainage tube into his stomach, that Ashley credited with saving his life. *Id.* at 25-26.

14. Lord Ashley, made Earl of Shaftesbury in 1672, was one of the most influential figures of his time. His career included service in Cromwell's government, active involvement in the Restoration, and service as Lord Chancellor under Charles II. He was a central figure in the Whig movement that sought to block the succession of the Catholic James II to the throne. Shaftesbury ultimately was discredited for his alleged involvement in the plots against the Catholic monarchy and died, in exile in Holland, in 1682. In Dunn's phrase, Locke's personal fortunes "rose and fell with those of his master and, after Shaftesbury's death in 1683, with those of the broad political grouping he led." JOHN DUNN, LOCKE 4 (1984).

15. Locke, it has been claimed, was involved in drafting Shaftesbury's Fundamental Constitutions of Carolina. LASLETT, *supra* note 12, at 29.

16. After his return from Holland, Locke became associated with Lord Somers who, among other things, served as Lord Chancellor in 1697. Locke again served in the role of brain trust and was involved in the "college," a group of intellectuals and politicians formed to discuss political philosophy. *Id.* at 40. Locke was also actively involved in economic and monetary policy and served as an official on the Board of Trade. From 1691 until his death in 1704, Locke lived in the household of Robert and Damaris Marsham where Locke received a variety of visitors, including Sir Isaac Newton.

17. John Dunn notes that if Locke had died during his exile in Holland, "he would have been fifty-three, an academic expelled from his post by royal command, an expatriate hanger-on of a dead and discredited politician, a forcibly retired civil servant, a minor intellectual who had published nothing of note." JOHN DUNN, THE

most significant English works on epistemology, his *Essay Concerning Human Understanding*.[18] He also published influential works on theology,[19] education,[20] economics,[21] and the theory of natural law.[22] His work, *Letters Concerning Religious Toleration*, was a significant contribution, in an age of deep religious controversy, on the rationale and need for tolerance by the State of religious differences.[23]

In 1690, after a return from exile in Holland following the successful "Glorious Revolution," Locke published the *Two Treatises of Government*, his extraordinarily influential work of political philosophy. Although there is some dispute over when each part was drafted, the basic purposes of the *Two Treatises* – a refutation of the power of the monarchy, a description of the legitimate basis for democratic government and a justification for revolution against illegitimate government – were closely tied to the currents of revolution that culminated in William and Mary's ascension to the throne.[24]

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POLITICAL THOUGHT OF JOHN LOCKE 11 (1969) [hereinafter DUNN, POLITICAL THOUGHT].

18. JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Oxford University Press, 1975) (1690).

19. *See* JOHN LOCKE, A COMMON PLACE BOOK TO THE HOLY BIBLE (UNKNOWN BINDING–1824).

20. These included his essays *Thoughts Concerning Education* and *Conduct of the Understanding*. *See* THE EDUCATIONAL WRITINGS OF JOHN LOCKE (James L. Axtell ed.,1968).

21. *See* JOHN LOCKE, LOCKE ON MONEY (Patrick Hyde Kelly ed.,1991).

22. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE (*c.* 1663-64); *see also* A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS (1992) [hereinafter SIMMONS, RIGHTS].

23. In words that seem increasingly relevant today, Locke wrote that:

> The business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person. And so it ought to be. For truth certainly would do well enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force, to procure her entrance into the minds of men. Errors, indeed, prevail by the assistance of foreign and borrowed succors. But if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.

JOHN LOCKE, LETTER OF RELIGIOUS TOLERATION (1689).

24. Although the publication of the Two Treatises is closely associated with the revolution that resulted in the overthrow of James II, there is dispute over the relationship between the Two Treatises and the Glorious Revolution. Laslett proposes that both books of the Two Treatises were drafted well before the revolution. *See* LASLETT, *supra* note 12, at 45-46.

Nonetheless, as Tully phrases it: "Locke wrote the *Two treatises* to delegitimate James' ascension by undermining its Filmerian justification, to justify the Whigs' political aims by advancing his theory of liberty and popular sovereignty, and to jus-

In the *First Treatise*, Locke refuted certain arguments regarding the power of the monarch and claims to divine rights of ownership of property by the king contained in Sir Robert Filmer's *Patriarcha*.[25] This was an important political statement since Filmer's work had been employed by Royalist forces to justify the power of the monarchy preceding the "Glorious Revolution."

It is in the *Second Treatise* that Locke advanced his arguments on property and government that are the primary basis for his stature as a political philosopher.[26] It is important to distinguish two quite distinct components of Locke's analysis in the *Second Treatise*. First, Locke expressed a remarkably influential, if somewhat incoherent, justification for private property. Through his "labor" theory, discussed below, Locke purported to explain both how an exclusive right to private property could arise in the State of Nature, a world in which property was initially held in common by all humans.[27] Locke's justification has become what has been called "the standard bourgeois theory" of property.[28]

The second major component of Locke's work in the *Second Treatise* is his rationale for formation of Civil Society and the scope of powers conferred on government. In Locke's view, Civil Society was a consensual union formed by individuals who sought protection for their personal and property

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tify the Whigs' political activity by writing his theory of revolution." JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 290 (1993). *See also* RICHARD ASHCRAFT, REVOLUTIONARY POLITICS & LOCKE'S *TWO TREATISES OF GOVERNMENT* (1986).

25. In 1680, Filmer published PATRIARCHA, a defense of the power of the monarchy based essentially on the divine right of kings. ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS (1680). Filmer argued on theological grounds that, just as a father has powers over his family, the king has powers over his subjects. A central element of Filmer's argument was a view that all property was the monarch's by virtue of descent from Adam. PATRIARCHA was taken up by the Royalist forces in England and was a significant work of its day. In the first book of the TWO TREATISES, Locke undertakes a direct and explicit refutation of Filmer. Indeed, the Title page to the TWO TREATISES states that in the first book "the False Principles and Foundation of Sir Robert Filmer, and his followers, are Detected and Overthrown." The first book is of limited interest today because the ideas it seeks to refute – Filmer's theological views of property and monarchic power – seem so odd and anachronistic. Nonetheless, Locke's views in the *First Treatise* were important in undercutting a philosophical basis of Royalist forces. In the first book, Locke also identifies certain of his premises that underlie many of his arguments in the *Second Treatise*.

26. The title pages to the *Two Treatises* varied in publication, and it has been characterized as having two alternative and correct titles: either "The Second Treatise of Government" or "An Essay Concerning the True Original, Extent, and End of Civil Government" generally abbreviated "Of Civil Government." LASLETT, *supra* note 12, at 284.

27. *See infra* notes 31-63 and accompanying text.

28. RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 151 (1951).

rights from the uncertainty that existed in the State of Nature. Indeed, securing those private property rights acquired through labor in the State of Nature was a chief purpose of the formation of government in Civil Society. Government exercised authority delegated by the people and could legitimately act only to serve the public good. As discussed below, both of these components form a part in understanding Locke's views on the scope of government authority over property.

Locke was apparently frightened and proud of this work. The *Two Treatises* were published anonymously with no express attribution of authorship, and, during his lifetime, Locke never acknowledged authorship.[29] The revolutionary climate, and the fate of his patron Lord Shaftesbury, perhaps counseled caution in admitting to the revolutionary views expressed in the *Two Treatises*. He was, however, apparently also proud of his work. Locke, in 1703, advised a "young gentleman" that "Property I have nowhere found more clearly explained, than in a book entitled Two Treatises of Government."[30] More disinterested figures have subsequently agreed.

## III. THE SCOPE OF PROPERTY RIGHTS ACQUIRED IN THE STATE OF NATURE

John Locke is perhaps most widely known for his justification of private property through the "labor theory." In understanding Locke's views on the scope of government authority over private property, however, it is important to recognize that his "labor" theory plays a limited role. As discussed below, the labor theory served to justify the *initial* acquisition of private property in the State of Nature. On entering Civil Society, individuals delegated authority to the State, and it is this delegation, and the limits of government authority that stem from this delegation, that form the key to understanding Locke's relationship to the Takings Clause.[31]

Nonetheless, Locke's views on initial acquisition of property have significant implications. First, Locke's justification of private property is based on certain premises derived from Locke's views of theology and natural law. These premises are relevant to understanding the nature of property rights in the State of Nature and the scope of authority delegated to government in Civil Society. Further, although Locke clearly thought that individuals held extensive, albeit uncertain and fragile, property rights in the State of Nature,

29. Only in a codicil to his will signed a week or two before he died did Locke publicly claim ownership. LASLETT, *supra* note 12, at 16.

30. *Id.* at 3.

31. One area where Locke's views on initial acquisition of property are of direct relevance is that of intellectual property; in many respects, acquisition of property rights in cyberspace mimics acquisition the State of Nature. *See, e.g.*, Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 741-45 (2003); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

he also identified a series of "provisos" that potentially acted as constraints on the full acquisition of property. To the extent that individuals in the State of Nature held property subject to these provisos, those same constraints followed property into Civil Society. In Nozick's phrase, current property ownership may be subject to the "historical shadow" of the Lockean provisos on appropriation.[32]

### *A. The Initial Acquisition of Private Property*

Locke's contribution to the understanding of private property arose from a simple question: in a world that is post-Eden but pre-government, how can an individual justify an exclusive right to possession and use of property? The question was not new, but prior to Locke no philosopher had advanced arguments that created a rational basis for private property that conformed to Locke's theological premises and satisfied reason and natural law. Locke's labor theory created a justification for private property that resolved some of the failings of earlier theories.[33]

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32. *See* NOZICK, *supra* note 11, at 180. Nozick in this phrase was specifically referring to the continuing applicability of the "enough and as good" proviso. *See infra* Part II.B.3.

33. Locke's views were an extension of the writings of Hugo Grotius and Samuel von Pufendorf. Both Grotius and Pufendorf viewed the world as originally held in common by all humans, and both Grotius and Pufendorf solved the problem of private property by basing it on a pre-government compact or agreement among all humans. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 149-53 (1988); LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 25 (1981); TULLY, *supra* note 10, at 82. The right to individual and exclusive possession, in their view, could be justified only by a consensual agreement to recognize and respect the property rights of others.

The rationale for such a consensual compact was clear; all humans would be better off if individual rights to possession were accepted. *See* Karl Olivecrona, *Appropriation in the State of Nature: Locke on the Origin of Property*, 35 J. HIST. IDEAS 211 (1974). Such an initial compact would also address the ethical problems of deriving private property from initial common ownership since a compact would be a voluntary relinquishment of communal claims for the advantages of private ownership.

Given the equality of humans and an initial state of communal ownership, a justification based on compact would, however, require essentially universal acquiescence. This was hard for many, including Locke, to accept. *See id.* at 222. Filmer, among others, ridiculed the concept of property based on universal compact. *See* WALDRON, *supra*, at 151; LASLETT, *supra* note 12, at 100-01. Phrased in modern terms, the "free rider" problem would impede, if not preclude, a universal, voluntary agreement. In the absence of a compact or agreement, justification for property rested on "first possession." While first possession may work as a positive statement of acquisition, it does not successfully address the normative issue of why common property can be made exclusive by the act of possession. *See* BECKER, *supra*, at 30-31; Chander, *supra* note 31, at 733 ("First possession is less a theoretical justification for the distribution of private property than an assertion of power.").

A satisfactory justification for property must, in Locke's view, satisfy what are essentially theological premises about the nature of humans and their relationship to the world; in Locke's view, a theory of property was inadequate if it did not satisfy these fundamental premises.[34] First, all humans, created by and subject to God, are created equal and with equal rights.[35] Since humans are created equal, political theories premised on some natural right or authority of one group or class were invalid.[36] Second, the earth and its resources were held in common by all humans and each human had an equal claim to these resources.[37] Laslett phrases Locke's premise neatly: "the goods of nature were originally common, both because the Bible says so, and because universal freedom and equality must mean original communism."[38] Third, humans have a duty to survive that includes not only an obligation of self-preservation but also a duty to ensure that other humans

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Locke's goal was to establish essentially a unilateral right to exclusive possession of property that had previously been held in common without resort to a fictitious and unrealistic universal compact. Locke states that his goal is "to shew, how Men might come to have a *property* in several parts of that which God gave to mankind in common, and that without any express Compact of all the Commoners." JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 25.

34. *See* WALDRON, *supra* note 33, at 141-47. Although one need not accept the theological basis of these premises to accept the Lockean argument, one must accept the premises themselves, for whatever reason, or Locke's logic fails. In other words, one can accept a duty of provide sustenance to the needy without appeal to a God; one cannot claim to apply Locke, however, without including something like his theologically based sustenance proviso discussed below. *See* John T. Sanders, *Justice and the Initial Acquisition of Property*, 10 HARV. J.L. & PUB. POL'Y 367, 373-74 (1987). The "sustenance proviso" is discussed *infra* notes 46-47.

35. *See* JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 5.

36. Thus Locke, rejecting Filmer, believed that no divine right justified one group's authority over others. *See, e.g.*, LASLETT, *supra* note 12, at 92-93.

37. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 25. The view that the world and its resources were originally held in common by all humans was a fundamental premise of most property theorists before Locke, and it was this claim to original common ownership that created the logical challenge to justification of private property. Richard Epstein, recognizing the conceptual problem that arises from a premise of common ownership, simply defines the problem away. Although he purports to premise his view of the Takings Clause on Locke, he would simply reject Locke's premise and substitute a premise that treats unoccupied property as available to the first possessor who supports a claim by labor. *See* EPSTEIN, TAKINGS, *supra* note 6, at 11. This leaves Epstein, but removes Locke. The entire fabric of Locke's arguments relating to property and government are based on his views of God and natural law. Pick at a thread and Locke unravels. Epstein's replacement smacks of a "first in time/first in right" or "first occupier" theory. One may start with this premise, but as many have noted, the normative justification for this view has never been satisfactorily articulated. *See supra* note 33.

38. LASLETT, *supra* note 12, at 100.

survive. Locke's view of the scope of a natural obligation to humanity, in addition to the individual, is the crux over which much of the implications of Locke's view to Takings rest.[39] Fourth, humans have been given by God the tools and capacities to survive and an obligation to exercise these faculties. This includes dominion over the world and other non-human creatures.[40] Finally, and perhaps most important, God has given humans the power of reason and thus the power to identify these obligations from natural law.[41] In other words, even without a government of laws, natural law exists that is accessible to all humans.[42]

Given these premises – a world of communal property to which each individual had an equal claim – the justification of private property was difficult. Locke solved this problem, in a way no predecessor had, through his "labor" theory. According to Locke, individuals, by mixing their individual labor with common property, could unilaterally assert a claim to private and exclusive possession of the "mixture" of property and labor.[43] Why this is so is not immediately obvious. Why, as some have noted, do you not lose your labor rather than gain the mixture?[44] Nonetheless, Locke's labor theory has served as a powerful justification for private property.[45]

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39. *See infra* notes 122-161 and accompanying text. It is clear that Locke considered the law of nature as mandating a human concern beyond individual survival. In the *Second Treatise*, Locke describes the power held by individuals in the State of Nature as doing "whatsoever he thinks fit for the preservation of himself and others, within the permission of the *Law of Nature*: by which Law common to them all, he and all the rest of *Mankind are one Community*." JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 128.. Elsewhere he describes "the Law of Nature, *i.e.* to the Will of God, of which that is a Declaration, and the *fundamental Law of Nature* being the *preservation of Mankind*." *Id.* § 135. Suffice it to say that Locke viewed individuals as having an affirmative duty to ensure the survival of themselves, other individuals and society, indeed humanity, as a whole.

40. *Id.* §§ 25,.26.

41. *Id.* § 6. In the *Two Treatises*, Locke provides only a limited discussion of his view of natural law. But Locke viewed natural law as an expression of divine will that is discoverable by humans through the use of reason. *See* SIMMONS, RIGHTS, *supra* note 22. *See also* LEO STRAUSS, NATURAL RIGHT AND HISTORY 202-51 (1953) (discussing Locke's conception of Natural Law and its relationship to others, including Hobbes and Hooker).

42. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, §§ 61-63.

43. *Id.* §§ 26-27.

44. *See* NOZICK, *supra* note 11, at 174-75. Waldron describes the labor theory as "fundamentally incoherent." Jeremy Waldron, *Two Worries about Mixing One's Labour*, 33 PHIL. Q. 37 (1983).

At various places in the *Second Treatise* Locke gave several different justifications. Central is the premise of "self-ownership." If individuals own themselves, then they own their labor. If they own their labor, they "own" unappropriated items with which their labor has mixed. Second, since private claims are based on private labor, Locke's justification has been seen as one based on "moral desert." In other

### B. The Lockean Provisos

Although labor could justify a presumptive claim to private property, Locke's initial premises could not be satisfied by an unlimited claim of appropriation through labor. Possession, even if backed by labor, was not consistent with, among other things, the equal communal claims of all humans and a natural duty of sustenance to other humans. Thus, Locke's theory of property required certain essential "provisos" without which his justification for acquisition of property would not satisfy God and natural law.

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words, one is entitled to a claim for property because one has earned it. In Locke's view, labor was an obligation of God, and use of resources to satisfy human needs was in conformance with moral obligation. Thus, the labor theory can be said to be based on recognition, not of the efficiency of the act of labor, but on the moral legitimacy that the act of labor itself confers. Finally, Locke also at times seems to ground his labor theory in a justification that has a particularly contemporary ring. In Locke's view, the acquisition of private property results in extraordinary efficiency. A person who has a private claim to an acre of property will produce one hundred times more on that acre than would be produced by communal ownership of the same acre. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 40. Thus, some part of the justification for private property arose from Locke's view that labor will increase the productive capacity of resources in excess of that which would be achieved if the property were left in common.

Although Locke seemed to ground his labor theory on claims that reflect contemporary views of efficiency, Locke should not be seen as making a modern economic argument for the efficiency of private property. There is no smell of "pareto" about him. His justification of private property is not premised on a claim that it results in "optimal" productive capacity; private property, the private cooption of common resources, is defensible even if the appropriator makes poor use of the resources. The opportunity for trade and the ability to alienate previously acquired property may, in a more contemporary rationale, lead to economically efficient outcomes, but this was not a premise from which Locke operated. Adam Smith and his "invisible hands" did not appear for almost one hundred years after publication of the *Two Treatises*. Labor, in Locke's view, increased value, and this was enough of a rationale for justifying private property.

Indeed, this argument seems secondary to Locke's primary focus on justifications based on self-ownership. Locke's sections describing the efficiency gains from private property were not originally in the *Two Treatises* but were added by Locke in the Third Edition. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 211 (1962).

45. It is important to stress that Locke's theory of initial acquisition was just that: a theory of "initial" acquisition. Subsequent labor on previously acquired property is not a basis for legitimate appropriation. A laborer who appropriates property from the employer is not engaged in "initial acquisition," he or she is engaged in theft. *See* WALDRON, *supra* note 33, at 176. Much as Marxists might have wished to rely on Locke, Locke was no Marxist. Indeed, in MacPherson's view, the result of Locke's arguments was to justify the power of a propertied class over the unpropertied. *See* MACPHERSON, *supra* note 44, at 221.

Locke can be seen to have identified three distinct provisos: spoilage, "enough and as good," and sustenance. As discussed below, Locke "solved" the spoilage proviso in a way which eliminates its applicability to property in Civil Society. Locke's "enough and as good" proviso is essentially incoherent, and although some have claimed a basis for satisfying the proviso, whether satisfied or not, it does not serve as a contemporary constraint on property rights. Only the "sustenance" proviso is relevant to understanding the scope of authority of government in Civil Society.

### 1. The Sustenance Proviso

First, a fundamental premise of Locke's work was his view of a theologically-based obligation of self-preservation. In part this involved an obligation on the individual to make use of the resources of the world not only to ensure the individual's survival but also to satisfy a broader class of needs and wants. This obligation fit neatly within the rationale of the labor theory: not only *may* individuals labor and use the resources of the world, individuals *must* labor to satisfy their obligations to God.

Locke also, however, saw the duty of self-preservation as containing a duty to preserve other humans. In Locke's view, individuals had a duty to provide resources to preserve the life of other humans. Thus, individuals had a duty to provide "sustenance" to others, and they had a duty to prevent others from experiencing "extreme want."[46] This was not an issue of virtue to the individual. Rather, it was an affirmative duty on property owners which placed a concomitant right or claim with humans in want. One acquired property with a limitation that the owner must provide resources to other humans in extreme need and subject to a claim by others who were in extreme want.

This proviso is not a trivial aspect of Locke's views. Significant criticisms of the work of Grotius had focused on the moral consequence of a right of acquisition of private property from the commons which allowed humans to die from want.[47] Why would individuals acquiesce in an arrangement which resulted in some people being deprived of basic sustenance through limitations on access to previously communal goods? Why would God allow an alteration of the right of access to communal property if it resulted in death and want?

The sustenance or charity proviso ensured that private property would not result in the most extreme conditions arising from private property. Since

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46. JOHN LOCKE, *The First Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 42. Locke states in the *First Treatise*:

> As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise . . . .

*Id.*

47. *See* TULLY, *supra* note 24, at 131-34.

this "sustenance" proviso existed as a component of the initial acquisition of property in a state of nature, it was an obligation that was compelled, not by government, but by natural law. As an inherent component of private property, it follows property into the formation of Civil Society, and, as discussed below, as an aspect of the rights and duties delegated by individuals to the State, it becomes a source of authority to government.

### 2. Spoilage and the Significance of Money

Second, Locke recognized that the initial acquisition of property should be limited to amounts that could be used to satisfy the needs of the individual acquiring the property.[48] In other words, individuals could not acquire more property than they could use. At its simplest, this proviso meant that one could not labor to acquire more food than could be eaten and that would otherwise go to waste. To allow broader rights of acquisition would result in spoilage and waste of resources in a way that did not satisfy any theological obligation to labor to satisfy needs or wants.

This "spoilage" proviso would seem to limit the absolute amounts of property that any individual could initially acquire. It would initially seem to place significant limitations on the distributional consequences of the labor theory: individuals can only acquire property that they can personally put to use and all other property must remain in the commons for use by others.

Locke, however, "solved" the problem of the spoilage proviso in a way which justified unequal, indeed vastly unequal, holdings of private property. The problem of "spoilage" was just that: a problem of perishable property. If property could be transformed into a non-perishable and productive form, then the spoilage proviso would be satisfied. And what alternative form of property is both productive and non-perishable? The answer, of course, is money. By creating systems of currency, humans could transform property into a form that would never spoil but could still be put to productive use in satisfying the wants of individuals.[49] If you have labored to produce more food than you can individually consume, simply sell the surplus to others who

48. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 31.

49. Where does "money" come from? It comes from voluntary agreement among individuals to recognize the value of money. Where does the agreement come from? It does not come from government. Rather, in Locke's view, the institution of money was developed in the pre-government State of Nature. Therefore unequal and unlimited claims to property existed as a function of natural law and individuals had unequal claims to property prior to entering into Civil Society. Note that the "spoilage" proviso was not a limitation on the amount of needs or wants you could satisfy by acquiring property, it was only a limitation on the acquisition of property that satisfied no needs or wants. Unequal and potentially unlimited claims to personal property would satisfy the "spoilage" proviso through the mechanism of money. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 50.

can use the food and receive money in its place. After the development of money, no property would go to waste as long as someone was willing to pay you for it.

### 3. Enough and as Good

Locke also recognized a provocative limitation on the initial acquisition of property; an individual, through labor, could acquire private property in communally owned property but only so long as "enough and as good" was left for others.[50] In other words, the initial acquisition of property could not prejudice the rights of late comers to their fair claim to the commons.[51] The "enough and as good" proviso implies, among other things, that persons are restricted in their right to private acquisition if their actions result in the worsening of the non-appropriators situation by the loss of the "opportunity" to acquire.[52]

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50. Locke implies an "enough and as good" proviso at several points in the *Second Treatise*. In § 27, he states: "For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others." Elsewhere, Locke describes initial property acquisition as posing no problem where there was "enough, and as good," "as good" or "as large" left after appropriation. *See id.* §§ 33, 34, 36.

51. Jeremy Waldron acknowledges that the "enough and as good" language has almost universally been read as a distinct proviso that implies a limitation on the right of initial acquisition. In Waldron's view, however, this language does not create an absolute prerequisite to a right of initial acquisition; rather, this language describes one, but only one, possible justification for initial acquisition. In Waldron's view, Locke intended the "enough and as good" proviso to constitute a "sufficient" but not "necessary" condition for valid appropriation. *See* Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319, 319-28 (1979). *See also* Clark Wolf, *Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations*, 105 ETHICS 791, 795 (1995) (describing the "enough and as good" proviso as a seeming "afterthought" that implies a sufficient but not necessary condition of acquisition.)

Nozick, at least, sees some form of the "Enough and as Good" proviso as necessary for any proper justification of private property. Nozick states that "[a] process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened." NOZICK, *supra* note 11, at 178. Nozick, in this case, is addressing a certain "weak" form of the proviso that deals with limitations on previously available rights of use, not acquisition.

52. Robert Nozick and Carol Rose point out that, in addition to the lost opportunity personally to appropriate resources, prior acquisition by others reduces the possibility to enjoy access to resources in the commons. *See* NOZICK, *supra* note 11, at 176; Carol M. Rose, *'Enough, and as Good' of What?*, 81 NW. U. L. REV. 417, 428 (1987). In other words, acquisition by others creates a scarcity that deprives you of your prior opportunity for non-exclusive use of property remaining in the commons.

As noted above, however, Locke's property views were premised on a natural law obligation to make productive use of resources and a belief in the efficiency of

In a world of unlimited resources, the "enough and as good" proviso imposes no limits on acquisition of private property; there are always unclaimed resources available to other humans. In a world of finite resources, however, the "enough and as good" proviso raises difficult questions about the legitimacy of Locke's theory of initial acquisition.

Robert Nozick has famously and neatly expressed the "zipping" problem associated with the "enough and as good" proviso.[53] If the presumptive last appropriator of a finite resource, Z, does not leave enough or as good of a resource for others, then he cannot legitimately acquire property. But in that case, the next to last appropriator, Y, has limited Z's rights and Y's acquisition is therefore not legitimate. But in that case, W (Y's predecessor) has limited Y's rights and W's acquisition is therefore not legitimate. The problem of "enough and as good" zips back to the very first appropriator, A, even though there was "enough and as good" remaining at the time of A's first acquisition. Philosophers, since Nozick, have been searching for the zipless Locke.[54]

Unlike the "spoilage" proviso, Locke never directly solves the problem created by the implications of the "enough and as good" proviso. Rather, Locke avoids the implications through slight-of-hand and tricks. Locke simply assumes that property available for acquisition is essentially limitless.[55] If the amount of property is effectively infinite, then the proviso will never have to be confronted. In the beginning, as Locke saw it, "all the world was America" and America is really, really big.[56]

Locke further implies that the increased value associated with private property, the hundred-fold increase in productivity, somehow solves the problem of the proviso. He states:

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private acquisition. The "enough and as good" proviso does not seem to be directed at preserving others ability to maintain their existence in an unproductive "America." Rather, Locke's concern seemed to be directed at ensuring that equal humans having equal claims to the commons had equivalent rights of private acquisition.

53. *See* NOZICK, *supra* note 11, at 176.

54. *Cf.* ERICA JONG, FEAR OF FLYING (1973).

55. Locke, describing the state at the time of initial acquisition noted:

> Nor was this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of his inclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the Case of Land and Water, where there is enough of both, is perfectly the same.

JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 33. *See also id.* § 31.

56. *Id.* § 49.

> he, that incloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind.[57]

In other words, Locke implies that the pool of resources available for initial acquisition expands through private property and therefore the proviso is never violated.

Locke's position has one obvious flaw. If private and exclusive property means anything, it means that the increased value has not "truly" been given to others; it remains the exclusive right of the first possessor. Later non-appropriators do not have access to this increased value in the way they would have to an unappropriated commons. Under Locke's logic, the efficiencies associated with private property simply do not satisfy the proviso unless the increased wealth associated with private property is held in common by all humans and thus available for appropriation by all humans. *Voila*: Locke as Marxist. That, however, was not Locke's view, and his argument of increased efficiencies simply does not address the distributional implications of the enough and as good proviso.

Subsequent to Locke, others have advanced serious arguments that attempt to "solve" the problem of the proviso.[58] Nozick suggests a solution based on the economic benefits associated with private property and trade.[59] He implies that if the condition of all members of a market economy is superior to the "baseline" position they would have in a State of Nature without private appropriation, then the proviso is generally satisfied. It is not the increased wealth created, and held, by the private appropriator that supplies the implicit compensation for appropriation; rather, Nozick implies that the non-appropriator receives individual compensation arising from the benefits of a social system in which everyone is better off.[60] Carol Rose quite cleverly solves the distributional implications of the proviso by noting that the value of the labor retained by non-appropriators rises in a market economy, thus providing the reciprocal compensation to non-appropriators necessary to sat-

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57. *Id.* § 37. In this passage, Locke acknowledges that scarcity can arise from the development of money which allows acquisition beyond the immediate needs of the individual. He is less clear on how this relates to the "enough and as good" proviso.

58. Most arguments are premised on the view that the proviso can be satisfied by compensation to non-appropriators through value other than through access to the initial resource itself. *See, e.g.*, Rose, *supra* note 52, at 424 n.34. Others have viewed the proviso as capable of being satisfied only by access to the property resource, generally land, itself. In Tully's view, failure to satisfy the "enough and as good" proviso through land scarcity results in land reverting to some form of common ownership. *See* TULLY, *supra* note 10, at 165.

59. NOZICK, *supra* note 11, at 177.

60. *Id.* Nozick's explicit focus is not phrased in terms of implicit compensation but on whether persons can be said to be "worsened," as compared to an appropriate baseline condition, by their condition in a system that allows private appropriation.

isfy the proviso. For others, the "enough and as good" proviso simply remains unsolved.[61]

The "enough and as good" proviso, however, has continuing relevance *if and only if* it imposes some contemporary constraint on private ownership. Nozick apparently thinks it does; he would extend the proviso not only to initial acquisition but to property acquired through transfer after initial acquisition. Thus, in Nozick's view, if it would be impermissible under the "enough and as good" proviso initially to appropriate all potable water, it would be equally impermissible to appropriate a limited amount of water in conformance to the proviso and then purchase all other water rights from others who had themselves appropriated their limited interests in conformance with the proviso. In either case, Nozick states, the appropriation of water has placed individuals in a worse situation, and it is this condition that violates the proviso.[62] Nozick therefore imposes a general proviso that property ownership is subject to a continuing limitation on possession of resources that place others in certain types of worsened situations.[63] Thus, in Nozick's view, current property ownership is subject to continuing application of the "enough and as good" proviso.[64]

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61. *See, e.g.*, Sanders, *supra* note 34.

62. David Gauthier, interpreting Nozick interpreting Locke, claims that the Lockean proviso "prohibits worsening the situation of another person, except to avoid worsening one's own through interaction with that person." In other words, Gauthier converts Locke's proviso on private acquisition of commons property into a general moral obligation. This is necessary for Gauthier since he then uses this proviso as a constraint that justifies his theories of morality derived from contract. Applying this concept of the proviso, Gauthier then claims the following:

> Suppose that in [a] state of nature I cultivate a plot of land, intending to consume its produce. Here my exercise of my powers is quite independent of any other person, and so I do not better myself through interaction. Even if I worsen the situation of someone who would otherwise have cultivated the land, this worsening is incidental to the benefit I receive. My activity cannot violate the proviso.

DAVID GAUTHIER, MORALS BY AGREEMENT 210 (1986).

Assuming cultivation of the plot implies permanent, private acquisition of otherwise unappropriated property held in common by all and "worsening the situation of someone else" means that there is no other land available to cultivate, it is hard to see how this does not implicate the Lockean proviso.

In Gauthier's view, acts violate the proviso only if the benefit an individual derives stems directly from the act worsening another's condition. In other words, stealing the fish someone has caught violates the proviso, but fishing upstream and depleting the stock of fish before another goes fishing would not. Interesting points, but hardly Locke.

63. For reasons associated with the operation of a free market, Nozick believes that situations in violation of his expanded proviso will rarely occur. NOZICK, *supra* note 11, at 179, 182.

64. Given his view that the proviso will rarely be violated in a market economy, Nozick states that "the proviso will not play a very important role in the activities of

This expanded limitation seems to be imposed by Nozick, not Locke. Locke viewed the "enough and as good" proviso as a limitation on initial acquisition, and subsequent transfers of validly acquired property interests are nowhere said to be subject to the proviso. Indeed, Locke's treatment of the "spoilage" proviso and his view of the consequence of money indicate that Locke thought extensive and unequal holdings of property acquired through purchase were permissible. The only constraint that continues after the initial acquisition on the holding and use of property is contained in his "sustenance" proviso, and in Locke's writing, it is this proviso that may address the result with which Nozick was concerned. If a person acquired all of a resource by purchase from others, it was not the "enough and as good" proviso that limited the individual's property rights. Rather, the sustenance proviso would place a duty on the individual to provide sufficient access by others so that they would not starve or be placed in extreme want.

Thus, the "enough and as good" proviso has limited relevance to understanding the limitations on private property and the power of the State. If the proviso is generally solved by the market system, it has no continuing significance as a separate constraint on property rights and therefore on the scope of legitimate state action. If the proviso is unsolved and unsolvable, the entire basis for Locke's rationale for private property is placed in question. But since our purpose is to praise Locke, not to bury him, one must assume that Locke fundamentally "works" if his views are to have any significance to current debates on the relationship between private property and the State.

## IV. THE REGULATION OF PROPERTY WITHIN CIVIL SOCIETY

### *A. The Rationale for Civil Society*

John Locke, together with Thomas Hobbes, was a major intellectual source for English theories of the social compact: theories which grounded the legitimacy of government in some hypothetical general agreement among humans to be subject to government. The key element of a social compact theory is the presumed advantages which people derive from trading the anarchy of the State of Nature for the constraints of government regulation.[65]

Locke, however, was no Hobbesian, and Locke's view of the State of Nature differed from Hobbes's.[66] Hobbes saw the State of Nature as inher-

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protective agencies and will not provide a significant opportunity for future state action." *Id.* at 182.

65. *See generally* JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION (1988).

66. Although Locke does not expressly refer to Hobbes, the shadow of LEVIATHAN pervades the *Second Treatise*. In LEVIATHAN, Hobbes espoused a justification of government based on a social compact. Hobbes saw the State of Nature as an anarchic, lawless state of "all against all," in which life was "solitary, poor, nasty, brutish and short." THOMAS HOBBES, LEVIATHAN Ch. XIII. To avoid this condition,

ently anarchic which justified surrender of absolute power to the State. Locke, in contrast, saw the State of Nature as one governed by certain inherent moral limitations since people could exercise their capacity for reason to identify proper natural law constraints on conduct. People in a State of Nature could function. Property could be acquired; institutions of money could be developed. In the State of Nature, humans also had certain inherent power. They could take whatever actions that they thought necessary to protect themselves and others "within the permission of the *Law of Nature*."[67] They also had the authority to punish those who violated natural law.[68] Locke himself stated his was a "strange Doctrine" in which "*every one has the Executive Power* of the Law of Nature."[69]

But, like Hobbes, Locke saw the State of Nature as subject to limitations which justified a voluntary association to form government or "Civil Society." Although individuals in the State of Nature could define and enforce law, humans were weak and inevitably there was "corruption and vitiousness of degenerate Men" who would not conform to the requirements of natural law.[70] The result was uncertainty and limited protection of fundamental rights and material possessions.

Specifically, Locke identified three problems that existed in the State of Nature that warranted formation of Civil Society: First, there was no "establish'd, settled, known Law" by which to judge controversies. Although there is a Law of Nature that is capable of being identified "yet Men, being biased by their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases."[71] Second, in the State of Nature there is no "*known and indifferent Judge*" able to determine differences according to established law. Bias and self-interest make persons unreliable when serving as their own judge and

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persons would voluntarily form a social compact in which they surrendered authority to the absolute power of government. Hobbes was no constitutional liberal.

Locke shared certain views with Hobbes, but he fundamentally rejected an argument that led to absolute power in the State. Locke's view of natural law and the State of Nature led to a social compact in which the government was democratic and constrained. Much of the *Second Treatise* can be seen as Locke's attempts to justify both limits on the authority of government and a rationale for revolution against absolute and arbitrary authority. See LASLETT, *supra* note 12, at 79-91 for a discussion of the relationship between Locke and Hobbes. Dunn states that "[t]he worthy, if slightly bumbling Locke we all used to know . . . wrote to answer the terrible, if undeniably clever Hobbes." Dunn finds a more direct connection between Locke and Hobbes than does Laslett. DUNN, POLITICAL THOUGHT, *supra* note 17, at 77.

67. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, §128.

68. *Id.*

69. *Id.* § 13.

70. *Id.* § 128.

71. *Id.* § 124.

enforcer.[72] Third, in the State of Nature there is no safe way for an individual to enforce the Law of Nature against those who violate its requirements. Thus, the imposition of punishment, the right of the individual in a State of Nature, is "dangerous, and frequently destructive to those who attempt it."[73]

It was this uncertainty in defining and protecting rights derived from natural law that warranted formation of government.[74] Locke expressed this view repeatedly. The limitation of the State of Nature was not the absence of law, but the "uncertainty" associated with the absence of a mechanism for the clear definition and enforcement of law. Voluntary association would reduce this uncertainty by conferring on the government formed in a Civil Society certain specific powers.

### *B. The Scope of Government Authority*

Government, in Locke's view, exists by virtue of this voluntary union in which individuals have transferred to the government the inherent powers that they, as individuals, possessed in a state of nature. Since authority derived by delegation from the people, Locke viewed the legislative body as the core of government. The legislature constituted the "supream power" of society.[75] Only laws adopted by a properly constituted legislature had the legitimacy conferred through the civil union.[76] Only executive power, the act of "prerogative," that served the public good was legitimate based on acceptance and acquiescence by the public.[77]

The function of government was to address the specific infirmities that plagued the State of Nature, and government was, therefore, responsible for developing specific and certain laws to serve the "public good," for providing

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72. *Id.* § 125.

73. *Id.* § 126.

74. At one point, Locke seems to say that social needs, in addition to concern with the certainty and security of property, led to the formation of Civil Society. He charmingly suggests that some inherent "love, and want of Society" also drove humans to form Civil Society. *Id.* §101.

75. *Id.* § 134.

76. *See infra* notes 112-121 and accompanying text.

77. Although the executive had certain inherent powers of "prerogative," these powers could only be exercised if in the public good and were justified through express or implicit ratification by the people. In Locke's view:

> *Prerogative* can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good; and their acquiescing in it when so done.

JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 164.

"impartial" and disinterested judges of the law, and for enforcing the law.[78] In part, this meant that government had the right, indeed the duty, to adopt positive laws of property that specifically defined the relationships within Civil Society.

Locke was explicit that it was government, formed out of the uncertainty of the State of Nature, which defined the rights to property. In language which is echoed throughout the Second Treatise, Locke states "in Governments, the Laws regulate the right of property, and the possession of land is determined by positive constitutions."[79] Describing the stage at which organized communities arise from the State of Nature, he states:

> the several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, *by Compact* and Agreement, *settled the Property* which Labour and Industry began.[80]

Thus, the positive laws of government defined the set of rights existing in Civil Society.[81]

Locke also explicitly recognized that there was a cost associated with this social compact, and the legislature in adopting laws for the public good could restrict the scope of rights that individuals possessed in the State of Nature. As Locke noted, "Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the

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78. *Id.* § 131. Further, government had some authority to acquire property itself. Locke acknowledges the power of government to levy and collect taxes, and it is the responsibility of citizens to pay their "proportion" of maintenance of government. Such taxes, however, can only be imposed through the consent of the governed. *Id.* § 140.

79. *Id.* § 50.

80. *Id.* § 45.

81. *See also id.* §§ 30, 38, 129. Waldron has disputed that these passages imply that Locke recognized an unlimited and essentially unconstrained right of the government to define property through conventional law. Among other things, Waldron distinguishes Locke's references to the power of government to define property that involve unappropriated resources and commerce with other commonwealths. Jeremy Waldron, *Locke, Tully, and the Regulation of Property*, 32 POLITICAL STUD. 98 (1984). In this same analysis, however, Waldron identifies an expansive and inherently unlimited right of government to regulate property among citizens as long as there is no confiscation of the property to serve the special ends of government itself. Discussing below what I describe as limits on the exercise of "arbitrary" power, Waldron states, "[i]t is important to see that Locke's contrast here is between the regulation of property by the legislature and its confiscation, again by the legislature. The former is a proper discharge of legislative power; the latter, Locke suggests, can never be legitimate." *Id.* at 108. See *infra* notes 122-61 for a discussion of the limits of government authority to adopt laws other than for the "public good."

good of the Society shall require."[82] This created something of a paradox that Locke recognized as a problem of surrendering rights to protect rights. He quite bluntly asks:

> If Man in the State of Nature be so free, as has been said; If he be absolute Lord of his own Person and Possessions, equal to the greatest, and subject to no Body, why will he part with his Freedom? Why will he give up this Empire, and subject himself to the Dominion and Controul of any other Power?[83]

The answer, as discussed above, was to avoid the uncertainties and insecurity associated with defining and protecting rights in a State of Nature.

In exchange for accepting the certainties of civil law and civil enforcement, individuals were required to part with certain liberties they previously possessed.[84] Locke states the terms of the agreement:

> For being now in a new State, wherein he is to enjoy many Conveniencies, from the labour, assistance, and society of others in the same community, as well as protection from its whole strength, he is to part also with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require: which is not only necessary but just; since the other Members of the Society do the like.[85]

Government is formed by compact, and compacts require consideration; certainty comes with a cost.

### *C. The Limits of Government Authority over "Property"*

Government authority was not, in Locke's view, limitless. How could it be? If the purpose of formation of government is protection of uncertain rights and resources held in a State of Nature, why would individuals form a

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82. JOHN LOCKE, *The Second Treatise, in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 131. As discussed below, Locke qualified this statement by recognition that there were limits on the government's ability to take that property which person's entered into society to protect.

83. *Id.* § 123.

84. Locke states that the inherent power to do whatever an individual determines is necessary to protect himself and mankind is relinquished "to be regulated by Laws made by the Society, so far forth as the preservation of himself and the rest of that Society shall require; which Laws of the Society in many things confine the liberty he had by the Law of Nature." *Id.* § 129. The power to enforce and punish is also relinquished to government and the individual's obligation is now "to assist the Executive Power of the Society, as the Law thereof shall require." *Id.* § 130.

85. *Id.*

union that could deprive them of the very rights that they formed the union to protect?

Locke notes that while individuals "give up the Equality, Liberty, and Executive Power they had in the State of Nature," they do so

> only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good*; but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the State of Nature so unsafe and uneasie.[86]

Thus, in Locke's view, government is subject to some obligation to protect the property interests of members of Civil Society. This is not an isolated statement by Locke; he repeatedly indicates that property is subject to protection in Civil Society.[87] This is the basis for a philosophical tradition that views Locke as the quintessential individualist who demands protection of private rights from government confiscation.[88]

In addressing the scope of the limits on government's power over "property," it is important to understand that Locke used this word in several ways. Clearly, when Locke is discussing his theory of initial acquisition of private property, he is using the word in our conventional sense to describe material possessions, the natural resources of the world. In his discussion of the scope of Civil Society, Locke, however, is explicit that he is using the word "property" in an expansive sense to describe not only material possessions but also natural rights held by an individual in the State of Nature. In his discussion of the rationale for formation of Civil Society, Locke states that people are willing to part with certain freedoms "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*."[89] Or, as he elsewhere states, "By *Property* I must be understood here,

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86. *Id.* § 131.

87. *See infra* notes 132-33 and accompanying text.

88. *See* Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 417 (1986) ("The origins of individualism are often traced back to the contractarian political philosophy of John Locke."). *See also* 1 C. E. VAUGHAN, STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY BEFORE AND AFTER ROUSSEAU: FROM HOBBES TO HUME 134, 156 (1925) (describing Locke as "the prince of individualists"); HARTZ, *supra* note 3.

89. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 123. Locke's views might be more clearly understood if he had continued to use his initial term "propriety" to describe the set of rights protected within civil society. Propriety was the then commonly understood seventeenth century term to represent that what was due or belonging to a person. *See* Olivecrona, *supra* note

as in other places, to mean that Property which Men have in their own Persons as well as Goods."[90] Thus, when Locke indicates limits on the authority of the State over property, he is to be understood as referring to a set of rights far broader than mere loss of material possessions.

What limitations does Locke recognize on the authority of Civil Society over this broad class of "property?" On the one hand, Locke is clear that we relinquish some rights to enter into Civil Society. Therefore, it cannot be the case that one never faces restrictions that limit the rights that the individual held in the State of Nature; entering into Civil Society implies some loss of rights. Further, it is clear that, to some extent, the scope of property in Civil Society is defined by conventional law enacted by the legislature. By and through laws, government defines the very rights, and therefore, the value claimed cannot be reduced by government. On the other hand, Locke is also clear that there are limits on the exercise of government power and that these limits constrain a loss of some set of "property" rights.

In the *Two Treatises*, Locke suggests four limitations on the scope of government's authority to regulate private property. First, Locke, using the social compact theory, implies that society has established its social contract with a baseline set of core "Lockean property rights" that cannot be taken by government without compensation. Second, although Locke assumed that individuals broadly "consent" to be subject to government regulation, there are limits on the scope of such consent. Third, Locke suggests limits on government action derived from the requirement that legislation promote the "public good." It is this purpose, rather than the extent of government regulation, that serves as a core constraint on the legitimacy of government action. Finally, Locke implies limits derived from the structure of government itself.

### 1. Limitations through Contract

Locke, at several points in the *Two Treatises*, indicates that government cannot deprive persons of property in ways that "worsen" their situation from that existing in the State of Nature. Locke stated that government cannot deprive persons of property without consent since "no rational Creature can be supposed to change his condition with an intention to be worse."[91] He states the social contract that forms the basis of Civil Society:

> necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by en-

33, at 218; LASLETT, *supra* note 12, at 115-16. Locke, however, substituted the word "property" to represent the full range of personal and material rights held by individuals. Olivecrona, *supra* note 33, at 219.

90. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 173.

91. *Id.* § 131.

> tring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.[92]

Citizens would not give the government "*absolute Arbitrary Power* over their Persons and Estates" since "[t]his were to put themselves into a worse condition than the state of Nature."[93]

This limitation, so critical to Locke's views, is fundamentally a limitation arising from the logic of contract formation. Locke is claiming some limitation on government to act in ways that would be inconsistent with a rational decision by individuals to form the social contract. Understanding Locke's "contract" limitation involves an inquiry into the rational constraints on contract formation, and this, perhaps unfortunately, takes us into the realm of economic analysis of contracts, game theory and bargaining solutions.[94]

In addressing this issue, consider the three sets or states of property rights implicit in Locke's writing that may be involved in the rational formation of a social compact. First is the set of rights possessed by individuals with respect to the universal commons that existed prior to the initial acquisition of private property. Second is the set of rights possessed by individuals with respect to private property that they have acquired in the State of Nature. Third is the set of property rights, defined by the positive laws of government, to which persons are entitled within Civil Society.

Consider these sets of rights as a series of concentric circles.[95]

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92. *Id.* § 138.

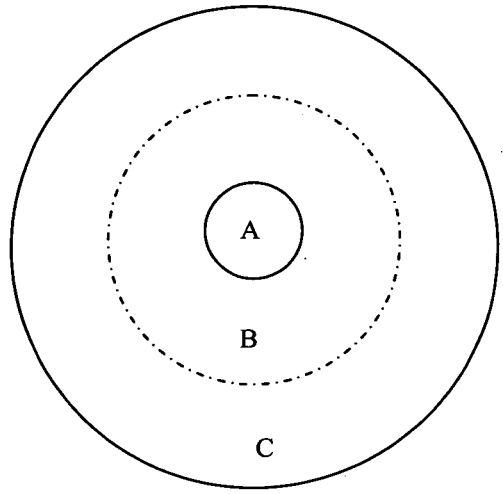
93. *Id.* § 137.

94. Indeed analysis of theories of the social compact may inherently involve the sets of issues addressed by bargaining and game theories. As Brian Barry has stated:

> One way of looking at bargaining problems is to see them as representing in microcosm the kind of issues to which social contract theory was addressed. That is to say, we start from a "state of nature" in which people acting independently, frustrate the satisfaction of another's desires. We then argue that everyone could gain from a move to a situation in which behavior is authoritatively coordinated, and say that what has to be allocated is the surplus from cooperation- the amount left over when all have been given resources yielding the same amount of utility as they would have had in the "state of nature."

BRIAN BARRY, 1 A TREATISE ON SOCIAL JUSTICE: THEORIES OF JUSTICE 56 (1986).

95. The use of these circles to define the set of possible baseline property rights is adopted with more than a nod to Professor Epstein who begins his discussion in TAKINGS with a similar graph. *See* EPSTEIN, TAKINGS, *supra* note 6, at 4. His discussion ignores, with certain consequences discussed below, the set of rights existing in common prior to the initial acquisition of private property.




The central circle, A, represents the scope and value of rights in the unappropriated commons in the State of Nature. This set of rights, although limited, is not valueless. Persons have a right of use and possession of property held in common of others.

The middle circle, B, represents the scope and value of rights to private property that persons may acquire in a State of Nature. The value of these rights represented by the dotted line are defined by natural law and protected by individual authority in the State of Nature. Locke, as discussed above, assumed that private property rights increased by orders of magnitude the value of property above that which existed when it was held in common.[96] Although such rights are dramatically greater than the value of rights held only in common, the dotted line represents the fact that, to Locke, they have an uncertain scope and value given the uncertainty and insecurity associated with the State of Nature.

The outer circle, C, represents the scope and value of rights to private property that persons hold in Civil Society. The overall area defined within circle C, the overall increase in value of property in society, must also be substantially greater than the value of private property to individuals in a State of Nature. The certainty, stability and enforcement by government lead to advantages to the value of property that warrant formation of government. This gain is the "cooperative surplus" generated by formation of the social compact.

Formation of the social compact involves bargaining with respect to some class of these rights. What are the inherent constraints that operate on a rational actor negotiating the formation of the social contract? Again, we consider things in threes since there are three possible issues in which questions of "rationality" will affect the bargained outcome. First, no rational bargainers will accept an agreement which places them in a position inferior to

96. *See supra* note 57 and accompanying text.

their position in the absence of an agreement. In other words, bargainers have a "non-agreement" point from which they begin negotiations and this represents their baseline position.[97] Any rational agreement will represent an improvement from this baseline position. Let us call this the "non-agreement point" issue.

Second, rational bargainers will reach an agreement which maximizes the total possible utility produced by the agreement. In other words, the final agreement will represent some "pareto optimal" condition in which there is no alternative which will make one party better off without adversely affecting the other. If such preferable alternative exists, rational bargainers will accept it as a possible negotiated outcome.[98] There is no one specific or unique pareto-optimal outcome; rather there is generally an array or set of possible negotiated outcomes which are Pareto-optimal.[99] Economic theories of contract formation and game theory indicate, however, that a rationally negotiated agreement will fall within the range of Pareto optimal options, and a rational, voluntarily reached agreement will move the bargainers from their non-agreement point to some point of pareto-optimality.[100] Let us call this the "efficiency" issue.

Finally, negotiated outcomes that fall along the Pareto-optimal curve will represent different allocations between the parties of the cooperative surplus generated by the agreement. In other words, different negotiated solutions may each maximize the total possible utility between the parties, but

97. *See* BARRY, *supra* note 94, at 12-13, 31-33. The definition of the non-agreement point is of central concern in applying bargaining solutions to resolve issues of distributive justice. Bargaining involves a move away from this baseline and thus the fairness or otherwise the legitimacy of the baseline affects the conclusions that can be drawn from the outcome of bargaining.

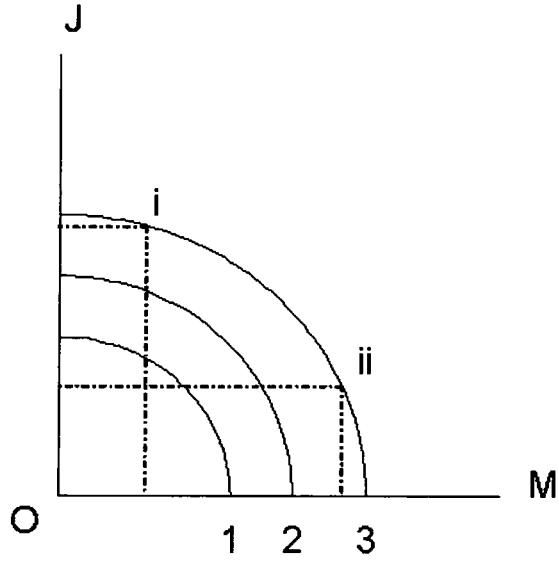
98. *See* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 102-03 (1988) (describing the move of rational, knowledgeable persons engaged in voluntary exchanges to outcomes that are Pareto-optimal); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 293 (2004).

99. A negotiated agreement may, for example, have the potential to increase wealth by 100 units, but there may be a number of different agreements that can result in this increase. Rational bargainers will not accept any agreement which produces less than the potential of 100 units. This is required by the concept of pareto-optimality since even if all of the increase goes to one party, that party is better off and the other not worse off by the move. The set of possible outcomes that are Pareto-optimal outcome is sometimes called the "contract curve."

100. *See* SHAVELL, *supra* note 98, at 293.

distribute different amounts of the gain among the bargainers.[101] Let us call this the "distribution" issue.[102]

Let us represent these three sets of "rationality" issues with another graph:




101. Using our previous example, a Pareto-optimal set of arrangements may produce an increased wealth of 100 units, but different negotiated outcomes between the parties may result in different allocations of the increased wealth. Party A may get 10 and Party B get 90; Party A may get 25 and Party B get 75; Party A may get 50 and Party B get 50, etc.

102. Traditional economic analysis of contracts and early game theory work suggested that there was no "rational" solution to the distribution issue; no one distribution among the parties could be said to be the only rational outcome. There were several reasons for this conclusion. First, there are conceptual difficulties in assigning a cardinal ranking to interpersonal preferences; the conventional view has been that such interpersonal preferences could only be represented by ordinal preference rankings. This is the basis for the Arrow Impossibility Theorem which addresses the difficulties of producing optimal social allocation of resources. Additionally, the distribution issue also may include contentious issues of distributive justice and fairness in which there is no agreement on appropriate resolution. Thus, it has been the general view that there is no specific, rational solution to the distribution issue.

A variety of theories, mostly stemming from the work of John Nash, have developed into methods that purport to define a unique solution to a rational or "just" distribution in bargaining situations. The class of "Nash Bargaining Solutions" involves an array of different assumptions resulting in different solutions. *See* BARRY, *supra* note 94, at 33-41 (describing different approaches and solutions to a two person fair bargaining problem advanced by Nash and R.B. Braithwaite). Thus, it is not appropriate to say that there is one "rational" approach to distribution based on bargaining solutions. Additionally, the normative legitimacy of using these solutions to resolve issues of distributive justice remains contentious.

The axes of the graph, J and M, represent the utility functions for the two bargainers, John and Mary. The point 0 represents the initial positions of John and Mary. A move up from point 0 on the J axis represents an increase in utility to John; a move right from point 0 on the M axis represents an increase in utility to Mary. Definition of point O represents the "non-agreement point" issue. The curves 1, 2, and 3 represent the possible sets of alternative outcomes that reflect different and increasingly efficient bargaining options. Selection of the appropriate curve implicates the "efficiency" issue. The points i and ii on the curves represent the different allocations among John and Mary that are possible along the curves. A solution at point i will allocate a greater amount of the cooperative surplus to John; a solution at point ii will allocate a greater amount of the surplus to Mary. Selection of these points represents the "distribution" issue. Assessing the "rationality" of an agreement reached between John and Mary would thus require an assessment of whether the agreement 1) moves the parties from their initial position at point O, the "non-agreement point" issue, 2) moves the parties to the appropriate curve, the "efficiency" issue, and 3) properly allocates the gains between the parties, the "distribution" issue.

Evaluation of the each of these issues has produced an array of interesting theories. Economists, philosophers and curmudgeons have expressed views on the proper economic and ethical outcomes that can be derived from an assessment of contract rationality. John Rawls's classic work has frequently been described as a method for deriving just social institutions through a form of contractarian analysis. Buchanan and Gauthier have each reached conclusions about the scope of government authority over property based on "contractarian" assessments involving their views of rational and efficient decision-making in the context of the Social Contract.[103]

Fortunately, we need only consider Locke's views, and Locke's "contract rationale" was limited to issues related to the non-agreement point.[104] Locke is quite explicit that his concern is the "gross absurdity" of an arrangement that placed individuals in a "worse" position than they would be in the State of Nature. Locke implies that government formed by voluntary social agreement cannot act to place parties in a position inferior to their initial, non-agreement point: the State of Nature. Nothing in this contract rationality argument, directly or indirectly, addresses issues either of efficiency or distribution. As discussed below, Locke addressed those issues, if at all, through his constraints based on consent and the purpose of government.[105]

To say that Locke's contract argument addresses only the issue of "non-agreement point" is not to minimize its significance. Locke's argument leads

103. *See* JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (1975); GAUTHIER, *supra* note 62.

104. Locke, writing one hundred years before Adam Smith and almost three hundred years before Von Neumann and Nash, can be forgiven if he did not address the increasingly sophisticated evaluation of contract formation and bargaining.

105. *See infra* notes 112-60 and accompanying text.

to the view that there is a set of baseline or core "Lockean property rights" that the government cannot invade without undercutting the rationale for the social compact itself.[106]

Definition of this set of baseline Lockean rights is itself complex, but certain conclusions are possible. First, the set of property rights defined by conventional law in Civil Society (Circle C in our previous figure) is not an immutable set of baseline rights that cannot be limited without compensation. This set of rights defined by government arose subsequent to the formation of Civil Society and were not the non-agreement point for rational negotiation of entry into the social compact.[107]

Under Locke's logic, it would not be absurd to enter into a social arrangement in which one might lose some portion of the increased property rights and values represented by Circle C that are generated by formation of Civil Society. The allocation of the cooperative surplus created by an agreement may raise complex issues of distributive justice, but in no obvious sense is it absurd to enter into an agreement in which an individual gains even if the individual does not gain the full share of the surplus. Although it may be that no person would willingly part with their individual baseline property to join Civil Society, persons should rationally be willing to share the cooperative surplus if they are no worse off than they would be without agreement.[108]

Second, the set of rights included within the baseline is defined by the rights of an individual held in the State of Nature after their initial acquisition of property. In other words, the core set of rights is defined, in our earlier figure, by Circle B. These are the set of rights that individuals bring to Civil Society, the base state which they are trying to improve by formation of Civil Society.[109]

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106. Thus, in this view, Locke does not recognize an unlimited right of majority control over the property of individuals. *See infra* notes 135-40 and accompanying text.

107. The limits, if any, on the government's ability to reallocate the gains of Civil Society (the increase in value associated with the move from Circle B to Circle C) must arise from some argument other than the "gross absurdity" of entering a contract that makes you worse off than you were before. The issue of redistributive authority of government is discussed below. *See infra* notes 149-61 and accompanying text.

108. This is not to say that persons engaged in bargaining will accept any offer that improves their position over their non-agreement point. Issues of strategic behavior will lead to strategies in which they seek to maximize their share of the cooperative surplus. With that said, it is still not a "gross absurdity" for individuals to accept an agreement which improves their position even if it does not maximize their utility.

109. Nozick addresses the significance of a "baseline" set of values existing in the absence of initial appropriation; the set of value defined by Circle A. *See* NOZICK, *supra* note 11, at 177. He compares this to the set of value following acquisition: the set of value defined by Circle B. His discussion does not, however, deal with protection of some core set of property rights from invasion by the state. Rather, his analysis is used to address the scope and implications of the "enough and as good" proviso. He is highlighting the fact that acquisition by individuals may not be said to worsen the

Locke's views on the state of rights held by individuals in a State of Nature are inferable, in part, by contrast with Hobbes. Hobbes viewed the State of Nature as not only anarchic, but inherently hostile. In the absence of authority, individuals would preemptively strike at other individuals to protect themselves. The State of Nature in Hobbes view was one of deep peril that warranted a rational surrender of absolute authority to the State.

Locke identified a "kinder, gentler" State of Nature. As discussed above, individuals were subject to and had the executive authority to enforce natural law. They could acquire property in conformance with Natural Law, and they could cooperate to reach agreement, for example, on the use of money. The State of Nature, in Locke's view, was more one of uncertainty and insecurity than anarchy and active peril. Thus, Locke, unlike Hobbes, would not view the "non-agreement point" as absolutely devoid of value such that it would be rational to surrender all rights to the sovereign.

But just as clearly, Locke did not view individuals as securely possessing the full rights inferable from natural law. If there were perfect protection in the State of Nature of the rights inherent in natural law, civil government would not be necessary. Rather, the set of rights and values that exist as the baseline "non-agreement point," the set of rights and values that are the predicate for the decision to form Civil Society, is the set of natural rights *reduced* by the uncertainty existing in the State of Nature.[110] Thus, property rights in Civil Society may be less than the full set of rights identifiable in the State of Nature without undercutting the rationale for the formation of Civil Society.[111]

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condition of other individuals from the situation they would be in without a right of appropriation. This, in Nozick's view, ensures that the "enough and as good" proviso is satisfied in the State of Nature even following the private acquisition of a finite resource.

110. Thus, in this view, a baseline set of Lockean property rights would not be defined by common law nuisance. *See, e.g.*, Epstein, PruneYard, *supra* note 6, at 23-26; Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988). Even if nuisance could be said to be coextensive with rights deduced from Natural Law, they would not, as discussed above, be entitled to full protection under the Lockean contract rationale. Further, the scope of nuisance law is defined by the class of "known authorized judges" that did not exist in the State of Nature, and thus they do not reflect the unsettled, undefined rights existing in the State of Nature.

111. As MacPherson states it:

> Locke's astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right.

MACPHERSON, *supra* note 44, at 199.

This is not, I think, a fair characterization of Locke. In Locke's view, the authority of civil government to define property rights originated in the delegation of personal rights to the state in exchange for certainty. It was the right inherent in natural law to protect the public good and mankind as a whole that define the scope, and

## 2. Limitations through Consent

Locke states another somewhat problematic constraint on legislative authority. In Locke's view, legislative acts of government, including regulation of property, are justified only through the consent of citizens. Similarly, Locke states that taxation, the direct exhortation of property, can only be justified through consent.[112] If regulation is authorized only if consensual, there is little concern with arbitrary exactions or taking of property.

Locke's view of consent, however, is extraordinarily broad. In his view, consent can arise not only by explicit means but also by implicit or "tacit" consent.[113] And what, in Locke's view, is evidence of tacit consent to legislative activity? The answer essentially is participation in society and accepting the advantages of civil society. As Locke states:

> every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week.[114]

Taken to the extreme, this view of consent would eliminate any constraints on government. Richard Epstein, for example, quite simply rejects this aspect of Locke.[115]

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hence limits, of legitimate government regulation. *See infra* notes 122-60 and accompanying text.

112. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 140.

113. As Locke states:

> it is to be considered, what shall be understood to be *a sufficient Declaration of* a Mans *Consent, to make him subject* to the Laws of any Government. There is a common distinction of an express and a tacit consent, which will concern our present Case. No body doubts but an *express Consent*, of any Man, entring into any Society, makes him a perfect Member of that Society, a Subject of that Government. The difficulty is, what ought to be look'd upon as a *tacit Consent*, and how far it binds, *i.e.*, how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it at all.

*Id.* § 119.

114. *Id.*

115. In Epstein's view, Locke's claim of "tacit" consent does not reflect obligations based on agreement but rather on acceptance of a benefit and some requirement of restitution. This, to Epstein, is not a proper foundation for a consensual basis for government regulation. Rather, Epstein would create a contractual obligation premised upon a requirement of just compensation:

But tacit consent to be subject to some government regulation is not equivalent to consent to be subject to all government regulation. It would be its own "gross absurdity" to read Locke's view of consent as eliminating all constraints on government action. Locke does not simultaneously suggest limitations on government action and then eliminate those same limitations through the logic of unlimited consent.[116]

In Locke's view, consent seems to serve both as a justification and restriction on government action. It acts as a justification because tacit consent provides the conceptual legitimacy for a government that is premised on the consensual union of its citizens.[117] If government only obtains authority from the consent of the governed, "tacit" consent supplies the justification of government without the need for universal and express agreement, and, through the mechanism of tacit consent, citizens are obligated to comply with valid acts of government.[118]

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> To make the Lockean conception viable, it is necessary to abandon the idea of tacit consent as a source of contractual obligation. . . . The categorical command that property shall not be taken without tacit consent must therefore be rewritten to provide that property may be taken upon provision of just compensation.

EPSTEIN, TAKINGS, *supra* note 6, at 15.

In other words, to satisfy Epstein, Locke must be rewritten to require payment of just compensation.

116. MacPherson notes that this view of consent derived by majority vote "seems difficult to reconcile with the strong individualist position Locke had just asserted." MACPHERSON, *supra* note 44, at 253. MacPherson reconciles this tension through his idiosyncratic view that Locke intended voting representation be limited to persons with property who, voting their self-interest, would be able to assert their majority will over the unrepresented landless. The landless, through the conceit of "tacit consent" would thus be obligated to comply. In MacPherson's view "we can now see there that there is no conflict between Locke's two assertions, of majority rule and of property right, inasmuch as Locke was assuming that only those with property were full members of civil society and so of the majority." *Id.* at 252. As discussed below, Locke viewed the concept of "consent" as a meaningful limitation on the obligation to comply with "arbitrary" laws. Locke recognized the problem of arbitrary laws arising from entrenched voting interests, and he addressed this concern, not through limiting representation, but by advocating rotating legislators and "fair representation." *See infra* notes 161-71 and accompanying text.

117. Locke clearly understands that consent is central to the legitimacy of legislation. *See, e.g.*, JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, §§ 97-98, 134. But he also relies on tacit consent to justify that legitimacy without unanimous approval. *Id.* § 98.

118. The role of "tacit" consent as a justification for the formation of Civil Society has been a subject of considerable dispute. *See generally* A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY (1993) [hereinafter SIMMONS, EDGE OF ANARCHY]. It is easy to understand how tacit consent can operate to bind an immigrant who joins an existing political society. It is less clear how tacit consent can operate as the basis for the initial formation of political society.

Second, the need for consent, tacit or otherwise, serves as a constraint or limitation on some government actions: citizens only consent to be subject to legitimate acts of a properly constituted legislature. Laws adopted by legislatures that are not formed through illegitimate means need not be obeyed.[119] Further, laws adopted for reasons other than the "public good," laws which serve the arbitrary ends of legislators, are invalid.[120] "Tacit" consent is not a universal imprimatur that justifies all acts of government. Locke's justification for rejection of arbitrary royalist power, his rationale for revolution, lies in his view that illegitimate and arbitrary exercise of authority are not within the range of consent provided by its citizens.[121] Thus, Locke's view of consent may compel compliance with otherwise legitimate laws but begs the question of the scope of legitimate government regulation.

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*See* DUNN, POLITICAL THOUGHT, *supra* note 17, at 130-34. MacPherson makes the claim that Locke, in the Two Treatises, was attempting to ratify the authority of bourgeois propertied interests. As MacPherson sees it, Locke included only the propertied interests among the class of persons who legitimately form the legitimate group entitled to representation in the legislature, and it is by the mechanism of tacit consent that Locke imposed an obligation of compliance on the unpropertied and therefore unrepresented class. *See* MACPHERSON, *supra* note 44, at 252-58.

Others have noted the conceptual limitations of implying tacit consent when the option of non-consent, essentially leaving the political commonwealth, is not credible. *See, e.g.*, DAVID HUME, ESSAYS: MORAL, POLITICAL AND LITERARY 452-473 (2006); JOHN RAWLS, POLITICAL LIBERALISM 286-88 (1993).

119. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 212 ("When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make Laws without Authority, which the people are not therefore bound to obey . . . .").

120. *Id.* § 222. Siegan, for example, notes that Locke limits the authority conferred through consent to those acts that are adopted for the purpose of advancing the public good. SIEGAN, *supra* note 3, at 48.

121. Locke suggested one specific context in which it would be improper to assume consent. In his *Letters ConcerningToleration*, a portion of his justification for limitations on the government's authority to impose religious obligations, was a view that persons would not have consented to delegation of such authority to government. *See* ALEX TUCKNESS, LOCKE AND THE LEGISLATIVE POINT OF VIEW: TOLERATION, CONTESTED PRINCIPLES, AND THE LAW 61 (2002). Although there has been extensive debate about the legitimacy and scope of Locke's theory of consent, Locke does not otherwise suggest selective application of consent to some, but not other, classes of laws.

Phrased another way, Locke never identifies a specific class of "inalienable" rights that persons cannot "consent" to delegate to the government. His general reference to limitations on government actions with respect to "property" reflect, as noted above, a general reference to the range of liberty and property interests inferable from Natural Law; the constraints on government are not, in Locke, selective and right specific. *See* SIMMONS, EDGE OF ANARCHY, *supra* note 1188, at 110; LASLETT, *supra* note 12, at 116.

### 3. Limitations through the Purpose of Law

In Locke's view, government authority in Civil Society extended to the adoption of laws that promote the "public good."[122] He describes political power itself as:

> a Right of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, *and all this only for the Publick Good.*[123]

The legislative power "in the utmost Bounds of it, is *limited to the publick good* of the Society."[124] This view is repeatedly stressed throughout the *Two Treatises* in a variety of characterizations. In his view, the "end of government" is the "good of the Community."[125] Power is to be exercised to ensure the "*Peace, Safety* and *publick good* of the People,"[126] for the "preservation of the Community,"[127] and to benefit "all Mankind in general."[128]

This characterization of the scope and purpose of law comes from two sources. First, government power comes from the delegation of the powers that individuals held in the State of Nature, and government has no more authority than that originally possessed by individuals.[129] Individuals in the State of Nature had not only a power but a duty of self-preservation. Locke also recognized that part of an individual's obligations in the State of Nature was the preservation of mankind in general. When Locke states that government in Civil Society acquires the powers of the individual, his primary emphasis is on this explicit duty to secure the welfare of the public as a whole: of mankind in general. Second, Locke viewed the government as a fiduciary acting to benefit the interests of the citizens. Government which acted other than to serve the public interest breached this duty and violated the trust that

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122. *See, e.g.*, JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, §§ 89, 134, 135, 143, 147, 165. Simmons notes that in his *Essay on Education*, Locke writes that "the preservation of mankind" is "the true principle to regulate our religion, politics and morality by." SIMMONS, *supra* note 22, at 48.

123. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 3 (emphasis added).

124. *Id.* § 135.

125. *Id.* § 163.

126. *Id.* § 131.

127. *Id.* § 149.

128. *Id.* § 171.

129. *Id.* § 135.

existed as an aspect of government authority.[130] For both reasons, government must act in ways that promote this general public interest.

Locke had an expansive view of the authority of government to act generally in the public interest. Locke states that a limitation to act in the "public good" is not a restriction on the extent of power; power may be "absolute" even when limited to certain ends. He gives as an example the power associated with military discipline. A soldier may legitimately be subject to absolute commands, even commands that lead to his death, so long as those commands serve the legitimate military purpose: preservation of the army and the whole commonwealth. In furtherance of this purpose, a soldier is obligated to comply with orders, even, in Locke's view, those that are dangerous or unreasonable. In contrast, no soldier can be required to give his property to his superior solely for the personal advantage of the superior. Orders must be unquestionably followed when they serve legitimate ends, *e.g.*, the preservation of the army or society, but not those orders which "have nothing to do" with this objective.[131] Thus, the obligation to act for the "public good" serves as a limitation on the purpose, rather than the extent of legislative authority.

Although Locke states an expansive authority for government to act to further the public good, he also seems to limit the scope of this authority. He repeatedly matches the scope of authority to act in the public good with caveats that this power must be exercised to preserve the property of its citizens.[132] Indeed, Locke states that the "end or measure" of government power is "to preserve the Members of that Society in their Lives, Liberties, and Possessions."[133]

This contrast between acting for the "public good" and the obligation to protect property is the source of perhaps the greatest inherent tension and ambiguity in Locke's view of the scope of government power. He is ultimately quite coy about the relationship between government power and private rights in Civil Society. Locke states, for example, that the purpose of government "is *the preservation of the Society*, and (as far as will consist with the publick good) of every person in it."[134] Pity the poor individual entitled to preservation only "as far as will consist with the public good."

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130. *Id.* §§ 149, 240.

131. *Id.* § 139.

132. In many of the passages where Locke claims limits of government authority over property, he is making the contractual argument discussed above. *See id.* §§ 135, 138. However, Locke elsewhere, implies that there is an inherent limit on government authority arising from the obligation to act in the public good. *See id.* §§ 171, 222.

133. *Id.* § 171.

134. *Id.* § 134. As discussed below, Locke did not place material property in a preferred position over life or other personal liberties held by the individual. If the person not consistent with the public good can be sacrificed, one presumes that material possessions are also in the same, potentially fragile, position.

Some have viewed Locke as justifying any government action that is adopted by majority rule.[135] Leo Strauss reflects this view, stating that Locke's view of Civil Society produced an "unqualified democracy."[136] Although Strauss recognized that, in Locke, this unqualified democracy is ultimately constrained by "a right of revolution," this right of revolution "does not qualify the subjection of the individual to the community or society."[137] More emphatically, MacPherson has stated that "[n]o individual rights are directly protected in Locke's state."[138] Tully also claims that, in Locke's view, a person had no entitlement to property other than that which is created by the laws of the majority.[139] Given Locke's view on the supremacy of the legislature and the scope of "tacit" consent, Locke certainly suggests his endorsement of an unqualified power of the majority in Civil Society.

Unlimited power in the majority, however, seems inconsistent with fundamental elements of Locke's writings in the *Two Treatises*. Locke may, perhaps must, be read as containing a limitation on government authority based on the "contract rationale." Government cannot act to place individuals in a position substantially worse than they would be in the State of Nature. As discussed above, however, this is a relatively weak constraint.[140]

Locke, however, can be read as placing an additional limitation on government action through his restriction of legislation to those acts which further the "public good." In other words, private property is protected by the limitation that any positive act of the legislature must be justified as furthering the "public good." The legislature in Civil Society simply has no authority to limit property in ways that do not serve legitimate ends.

In this view, Locke's understanding of the legitimate scope of government action is critical to understanding what, if any, limits he would place on the regulation of property through conventional law. Locke, as always, is cryptic, and he never directly defines his concept of the public good. It is, I think, permissible to draw several critical conclusions about Locke's view of the legitimate ends of government. First, and perhaps most clearly, Locke viewed appropriation of private property to serve the self-interested aims of the government itself, acts by which the government sought to amass wealth for itself, was an illegitimate action that did not serve the public good. In Locke, the antithesis of laws adopted for the public good are "arbitrary" laws. Describing the fundamental constraints of legislative power, Locke states: "*First*, It is *not* nor can possibly be absolutely *Arbitrary* over the Lives and

135. *See, e.g.*, WILLMOORE KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE (1941). MacPherson states that "[i]mpressive evidence can be shown for this reading of Locke." MACPHERSON, *supra* note 44, at 195.

136. STRAUSS, *supra* note 41, at 232.

137. *Id.*

138. MACPHERSON, *supra* note 44, at 257.

139. TULLY, *supra* note 10, at 168.

140. *See supra* note 107 and accompanying text.

Fortunes of the People."[141] Locke refers repeatedly, if not obsessively, to his concern with arbitrary exercise of power. In his view, people could not have intended to give anyone "an *absolute Arbitrary Power* over their Persons and Estates, and put a force into the Magistrates hand to execute his unlimited Will arbitrarily upon them."[142] The extent of government authority to deprive citizens of property is constrained by this restriction.[143] Locke states that "[i]t is a mistake to think, that the Supream or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure."[144]

Arbitrary laws, in Locke's view, were those that had the purpose of transferring wealth from members of society to the powerful within government itself. He states that:

> the Prince or Senate, however it may have power to make Laws for the regulating of *Property* between the Subjects one amongst another, yet can never have a Power to take to themselves the whole or any part of the Subjects *Property*, without their own consent: For this would be in effect to leave them no *Property* at all.[145]

Tyranny, the opposite of legitimate government, is in Locke's view:

> *the exercise of Power beyond Right*, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage.[146]

Locke viewed this limitation on arbitrary redistribution of wealth as perhaps the central constraint of government regulation of property.[147]

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141. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 135.

142. *Id.* § 137.

143. As discussed below, Locke found the constraint on arbitrary exercise of government authority largely implemented through the structure of government itself and ultimately by the right of revolution, the right of citizens to dissolve an existing government. *See infra* notes 162-72 and accompanying text.

144. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 138.

145. *Id.* § 139.

146. *Id.* § 199. *See also id.* § 201.

147. Professor Epstein finds certain constraints on government action inherent in Locke's concept of the "public good." Acknowledging that Locke never formally analyzed his view of the "public good," Epstein nonetheless infers that Locke's

> articulation of the public good issue was part of his effort to ensure that the surplus created by the formation of a political union did not inure solely (or even largely) to the benefit of the discrete individuals vested with sovereign power.

A prohibition on arbitrary redistribution is not the same, of course, as a prohibition on all redistribution.[148] For example, government regulations which seek to maximize the overall wealth in society, regulations that serve aims of distributive justice, and regulations that seek to protect the environment may impose costs on individuals without the obvious conclusion that they are adopted to transfer wealth to an entrenched sovereign.

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EPSTEIN, TAKINGS, *supra* note 6, at 15.

This statement seems consistent with a Lockean view of the constraints on arbitrary redistribution of wealth discussed above.

However, Epstein also makes an extraordinary leap of logic when he concludes that any surplus generated by government coercive regulation must be "divided among individuals in accordance with the size of their original contributions." *Id.* at 5. He states that any cooperative surplus derived from the social compact (gains associated with moving from Circle B to Circle C in our previous example) must go to individuals "in proportion" to their initial holdings. Therefore, government cannot redistribute the gain generated by Civil Society within the group of members of society.

Epstein's articulation of Locke's "public good" requirement does not lead to this conclusion. If the "public good" requirement prohibits government from allocating wealth to "the benefit of the discrete individuals vested with sovereign power," it hardly follows that wealth generated by "coercive regulations" may not be regulated to further a view of social welfare that does not result in selective and arbitrary accumulations of wealth to the powerful. The issue of redistribution among groups within society raises far different concerns than those raised with respect to a monopolistic government restricting property values for its own self-interested purposes. It is the difference between government restricting property rights in order to feather its own nest rather than the nest of an endangered species.

Nor is Epstein's conclusion supported by his own premise. Epstein states that "Locke sought to create a sovereign that could maintain good order without extracting monopoly rents . . . ." *Id.* at 10. Epstein illustrates this claimed objective as follows:

> if the sum of all happiness in the state of nature is 100, and that in civil society is 150, the task of government is to ensure that all of the surplus, save that necessary to govern the state, is retained by individual members of the union.

*Id.*

This reflects a fair reading of Locke. What Locke does not state, and Epstein simply asserts without support, is that Locke intended that none of the gain from Civil Society, the 50 surplus, could be redistributed among individuals within society if no one is put in a worse position than they would have held in the State of Nature.

148. Some may view the concept of government acting to further the "public interest" as something of an oxymoron. Those committed to a "public choice" view of self-interested government action would presumably conclude that any redistribution of wealth inherently serves the purpose of those vested with sovereign power. Locke, although writing long before an analytical conception of public choice decision-making arose, nonetheless, would be sympathetic to the concern. Indeed, Locke implied that concerns relating to self-interest and self-dealing by majority power were best addressed through the institutional structure of government. *See infra* notes 162-72 and accompanying text.

And that leads to the second strongest statement that can be made about Locke's view of the "public good:" Locke does not reject the legitimacy of government actions that redistribute wealth within society. Although Locke, as previously discussed, presumably would prohibit redistribution of some core set of "baseline" property rights and values held by individuals, he nowhere indicates any specific constraint on the government's ability to redistribute the gains associated with Civil Society if such redistribution is not "arbitrary" and is adopted to serve a broadly conceived concept of the public good. In other words, Locke would authorize the government, in appropriate circumstances, to redistribute the cooperative surplus embodied in the move from Circle B to Circle C in our previous example.

Locke could hardly be more explicit that society can, in fact must, serve a redistributive function.[149] First, society, delegated the authority possessed by individuals in a State of Nature, also acquires the basic "sustenance" obligation imposed on individuals. Society, at a minimum, could be viewed as having an obligation to transfer wealth from some to others who are in extreme want.

Second, Locke is also explicit that persons lose some property and personal liberty as a consequence of entering civil society.[150] Locke simply did not believe that entry into Civil Society was a "no lose" situation in which all property, both individual rights and material possessions, were entitled to some "highest and best" use that could be defined by conventional law. If Locke did not guarantee protection of all rights found in the State of Nature, he can hardly be said to have guaranteed protection of the full gains associated with the formation of Civil Society.[151]

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149. Tully, in fact, reads Locke as affirmatively requiring government to ensure some just distribution of resources. TULLY, *supra* note 10, at 162-68. Simmons describes the argument as follows:

> Locke seems to believe that the rules of morality aim at insuring a decent, comfortable existence for all persons (period), without allowing for tradeoffs between persons designed to maximize total happiness. While some who threaten mankind may have to be eliminated, more mundane utilitarian tradeoffs seem to have no place. The common good is conceived of not additively, but distributively: society's laws must be "made conformable to the laws of nature, for the public good, i.e., the good of *every particular member* of that society, as far as by common rules, it can be provided for."

SIMMONS, RIGHTS, *supra* note 22, at 57.

It is not clear whether these arguments lead to some Rawlsian "minimax" rule for distribution of resources in this view of a Lockean state.

150. In Locke's view, individuals certainly lost the "executive authority" to punish violations of Natural Law. He is also quite explicit, however, that individuals lose a broader range of liberties and subject themselves to regulation by standing laws defined by Civil Society. *See supra* notes 75-85 and accompanying text.

151. Although Locke expressly states in § 140 of the *Second Treatise* that individuals may be required to pay taxes to support the operation of government, he no-

Third, as noted, Locke used the term "property" to refer not only to material possessions but also to personal rights and liberties: an individual's "life, liberty and estate." Thus, whatever limitations Locke would find on the exercise of government power applies equally to restraints on some broad class of individual rights as property rights. Nothing in Locke suggests that he was placing material possessions in any preferred possession over other personal rights or liberties. In other words, to the extent that government regulatory constraints over personal actions are accepted as serving the public good, it is hard to accept that Locke would preclude restrictions on the use of material possessions that are directed to the same end. If government can restrict an individual from directly killing an endangered species, there is nothing in Locke that suggests that government is precluded from limiting the use of real property in a way that results in the same outcome.

Finally, the very nature of legislative authority, the right to adopt laws for the "public good" and the good of "mankind," inherently involves *some* authority to trade-off some individual's interest to promote that of another. Locke clearly distinguishes between the natural rights and obligations associated with protection of individual interests and the broader set of rights and duties associated with protection and preservation of "mankind at large."[152] By delegating authority to government to exercise the individual's natural rights, the government obtains authority to regulate broadly to protect and preserve the society as a whole even at the expense of some loss to the individual.[153] Again, Locke could not have been more explicit. In entering Civil

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where indicates that this is the only loss that individuals are required to accept as the cost of entry into Civil Society.

152. Tully notes the distinction between the duties to the self and the inherent duties to preserve mankind. This leads, in Tully's view of Locke, not to a limited role of government to preserve the individual:

> For Locke, natural law also enjoins the preservation of others, and so government is entrusted with the positive duty of regulating the means of preservation, property relations (50, 128, 138). Distributive justice is thus a role of government and so, in this sense, Locke is a follower of Aquinas and Suarez and precursor of the version of liberalism represented today by John Rawls' *A theory of justice* and democratic socialism.

TULLY, *supra* note 24, at 300.

Waldron, who otherwise would reject Tully's reading of the scope of authority delegated to the government in Civil Society, nonetheless recognizes a broader right of "regulation" through associated with protection of the public good. *See* WALDRON, *supra* note 81, at 108.

While Locke, in my view, has stronger protections on property than accepted by Tully, Locke's view that Natural Law included a broader class of obligations to protect and preserve "mankind in general" and the public good implies an authority for government to adopt some class of "non-arbitrary" redistributive laws.

153. Despite his individualistic reputation, Locke also seemed to view Civil Society as itself a new, distinct entity imbued with authority:

Society, an individual parts "with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the Society shall require."[154] Regulation to promote some broader good in society can come at the expense of an individual.[155]

There are two closely related lines of argument that have been advanced to argue that Locke flatly prohibits any redistributive acts by government. First, some have argued that the Lockean concept of the "public good" is simply coextensive with the natural law rights of individuals in the State of Nature.[156] Thus, in this view, the government cannot deprive the individual of the fullest possible rights to property inferable by natural law; any act which diminishes the right of the individual in ways inconsistent with natural law is invalid as contrary to the public good. First, in some respects this is correct. Locke did view the government as limited to the exercise of the rights of natural law.[157] As discussed above, however, Locke viewed the conception of

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> For when any number of men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only by the will and determination of the majority.

JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 96. *See also id.* §§ 89, 212.

Again he implies that majority power can define the scope of rights and obligations within the single community.

154. *Id.* § 130.

155. Some have seen Locke as ascribing a utilitarian function to government generally to improve the condition of society as a whole. Consider, for example, what Simmons states:

> The superstructure of Locke's moral theory, then, is a kind of rule-consequentialism, with the preservation of mankind serving as the "ultimate end" to be advanced. The fundamental law specifies this end, and all of the specific rules of natural law are members of that set of rules obedience to which best promotes the preservation of mankind.

SIMMONS, RIGHTS, *supra* note 22, at 50-51. Locke may not have recognized an unconstrained authority of government to trade some interests for others, but he also did not claim that all such trade-offs were absolutely prohibited. Thus, Locke if not descending to the floor of pure majority authority, is certainly on a fragile slippery slope constrained largely by his "contract rationale."

156. *See, e.g.*, Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 482 (2004). Epstein, in part, rejects redistribution based In part on conclusory statements about the meaning of Locke's views of the "public good." *See supra* note 147.

157. Simmons reads Locke as authorizing the government to exercise authority in areas – such as morality or the economy or "regulatory conduct of all sorts" – that cannot be identified as obligations of Natural Law. Simmons, based in part on other writings by Locke, suggests that there is an additional basis of authority in government to adopt laws with respect to conduct to which Natural Law is "indifferent" so long as the laws are at least "consistent" with Natural Law. *See* SIMMONS, EDGE OF ANARCHY, *supra* note 1188, at 63-64.

natural law rights as broader than protection of individual interests.[158] Further, Locke's "contract rationale" limits the issue of redistribution to the cooperative surplus, those gains individuals experienced as a result of Civil Society. The "contract rationale" suggests protection of the individual's actual, rather than maximal, position in the State of Nature.

In a more subtle, but closely related argument, Professor Epstein reads Locke as flatly prohibiting any government redistribution of wealth within society, in part, based on the limits of the government's delegated authority.[159] Since, in Epstein's reading of Locke, individuals do not have a right to deprive others of property, the government, limited only to the authority delegated by individuals, is also limited in its authority to deprive its citizens of property without equivalent compensation.[160]

As discussed above, Locke's view of the scope of delegated authority was not so constrained. In Locke, the rights and duties of individuals in the State of Nature included furtherance of the public good and mankind as a whole, and it is this authority too that was delegated to the State. If an individual in the State of Nature did not have the inherent authority to command redistribution of another's property to serve these ends, the formation of Civil Society made a fundamental change. Upon delegation of authority to government, the individual extended express and tacit consent to comply with non-arbitrary legislation that served these legitimate ends of natural law. Although Professor Epstein simply rejects the concept of tacit consent, Locke did not.[161]

If Locke viewed government as having so restricted a delegated authority, his repeated references to the end of government being the public good would be senseless; he would need only say that the interest of government was the individual good and each individual, a discrete entity within the State, was entitled to that full and absolute protection that they claimed, but could not ensure, in the State of Nature. This is simply not Locke. Indeed the basic thrust of Locke's arguments imply some redistributive role for government regulations at least where they do not substantially worsen the condition of the individual beyond that which exists in an uncertain State of Nature, if they

158. This is not to deny the potential legitimacy of claims to Natural Law as a limitation on the scope of government regulatory authority; it is, however, to deny a Lockean pedigree to such claims.

159. Professor Epstein also seems to assert a distinct limitation on government authority based on his view of Locke's meaning of the term "public good." *See supra* note 147.

160. EPSTEIN, TAKINGS, *supra* note 6, at 12. Epstein states that his claimed interpretation of Locke "forms one of the pillars of the subsequent analysis in this book." *Id.* Indeed, it is not far-fetched to say that Epstein's entire analysis of the Takings Clause rests on his reading of Locke that since individuals could not "take" others property in the State of Nature, the government therefore cannot "take" property without providing comparable "just compensation."

161. *See id.* at 14-15.

are not "arbitrary," and if they are adopted to advance a concept of the "public good."

### 4. Limitations through the Institutions of Government

In Locke's view, the risk of arbitrary laws, self-interested laws that are designed to transfer wealth without regard to the public good, always exists. If the majority could, through the conceit of "tacit consent," assert its will over the minority, how could individual property be protected from arbitrary confiscation by the powerful?[162] The problem of the "tyranny" of a majority legislature over the rights, property and otherwise, of its citizens is the classic concern of democratic institutions. It is the fundamental concern which motivated much of Madison's concerns for the protection of property.[163]

Locke's response to this concern does not seem to lie in any specific limits on the laws that legislatures may adopt, but rather through the institution of government itself. First, he requires that government act through "standing" pre-established laws, rather than extemporaneous decrees, and through "*known Authoris'd Judges.*"[164] Through these institutions, individuals will obtain greater certainty as to their property rights and there will be constraints on persons who through "Passion or Interest" may seek to "miscite or misapply" the law.[165]

More significantly, Locke implies that the risk of "arbitrary" self-dealing by legislators can be minimized and presumably made tolerable by a government structure in which no one class within society held exclusive power.[166] The risk of arbitrary and confiscatory redistribution, in Locke's view:

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162. One answer, of course, was the ultimate response of revolution. A basic purpose of the Second Treatise was to justify the revolutionary rejection of established authority, and Locke spends a considerable amount of the Second Treatise explaining the circumstances and consequences of the "dissolution" of government. *See, e.g.*, JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, §§ 211- 43.

163. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 25-28 (1990).

164. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 136.

165. *Id.*

166. Strauss states:

> According to Locke, the best institutional safeguards for the rights of the individuals are supplied by a constitution that, in practically all domestic matters, strictly subordinates the executive power (which must be strong) to law, and ultimately to a well-defined legislative assembly. The legislative assembly must be limited to the making of laws as distinguished from "extemporary, arbitrary decrees"; its members must be elected by the people for fairly short periods of tenure and therefore must be "themselves

> is not much to be fear'd in Governments where the *Legislative* consists, wholly or in part, in Assemblies which are variable, whose Members upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest. But in Governments, where the *Legislative* is in one lasting Assembly always in being, or in one Man, as in Absolute Monarchies, there is danger still, that they will think themselves to have a distinct interest, from the rest of the Community; and so will be apt to increase their own Riches and Power, by taking, what they think fit, from the People.[167]

Locke views corruption of the democratic process as the vice that leads to actions that do not serve the "public good." Locke's language has a particularly contemporary ring when he describes the actions of the executive that will breach the trust owed to the public:

> He *acts* also *contrary to his Trust*, when he either imploys the Force, Treasure, and Offices of the Society, to corrupt the *Representatives*, and gain them to his purposes: or openly pre-ingages the *Electors*, and prescribes to their choice, such, whom he has, by Sollicitations, Threats, Promises, or otherwise won to his designs; and imploys them to bring in such, who have promised beforehand what to Vote, and what to Enact.[168]

Similarly, Locke stresses that the legislature is to consist of "fair and *equal Representative*" to ensure that "salus populi suprema lex," the "heath of the people is the supreme law."[169] The will of the people can be secure

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> subject to the laws they have made"; the electoral system must take account of both numbers and wealth.

STRAUSS, *supra* note 41, at 233.

MacPherson views this in a slightly less positive light. MacPherson claims that no individual rights are protected in Locke's state, and

> [t]he only protection the individual has against arbitrary government is placed in the right of the majority of civil society to say when a government has broken its trust to act always in the public good and never arbitrarily. Locke could assume that this supremacy of the majority was a sufficient safeguard of the rights of each, because he assumed that all who had the right to be consulted [those who held property] were agreed on one concept of the public good, ultimately the maximization of the nation's wealth , and thereby (as he saw it) of the nation's welfare.

MACPHERSON, *supra* note 44, at 257.

167. JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT, *supra* note 1, § 138.

168. *Id.* § 222.

169. *Id.* § 158.

"whenever the People shall chuse their *Representatives upon* just and undeniably *equal measures*."[170]

In his contrast between the "public good" and "arbitrary" regulation and his focus on the institutional structure of government, Locke foreshadows the contemporary debate between "public interest" and "public choice" models of legislative action.[171] Locke obviously was not familiar with contemporary analysis of the motivations of government actors or the consequences of institutional structure on the outcome of government action. Nonetheless, Locke's focus on the legislative structure and the corruption of the legislative process seems a direct, if faint, reflection of public choice concerns.[172]

Locke recognized that one could not rely on legislators inherently to act to promote the public interest; he understood that self-interest motivated government action. The protection of property, both personal rights and material possessions, however, best lay in ensuring that legislators did not continuously represent some entrenched and narrow interests. Although individual laws may on occasion restrict property rights, rotating legislatures and a fair representation of the public in democratic institutions would mean that the tyranny of the majority was "not much to be feared." Locke, in this view, would be at least as interested in term limits and campaign spending reform efforts as in judicial controls through the Takings Clause.

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170. *Id.*

171. The Public Interest and Public Choice models define two competing views of the purpose and motivation of legislative action. In general, the "public interest" model views legislative actions as attempts to improve the general social welfare and focuses on the role of ideology and public policy. In contrast, "public choice" models view legislative and regulatory action as a form of economic activity in which the legislative and regulatory actors are motivated by the same wealth or utility maximizing motives of other economic actors. Rather than ideology and public service, "public choice" analysis focuses on the institutional motives and the role and power of interest groups. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). *See also* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

These competing visions are reflected in Locke's support for legislative action that serves "mankind" and the "public good" and in his concerns for self-interest and self-dealing that may be constrained through institutional structure.

172. Mueller cautions against too great an emphasis on the relationship between contemporary public choice theory and earlier political philosophers. He places public choice within the stream of political philosophy that includes, among others, Hobbes and Madison, and states that much of their work "anticipates later developments." Nonetheless, he is clear that "modern public choice literature employs the analytic tools of economics. To try to review the older literature using the analytical tools of its descendents would take us too far afield." DENNIS C. MUELLER, PUBLIC CHOICE III, at 2 (2003).

## V. WHAT WOULD LOCKE DO? LOCKE AND THE TAKINGS CLAUSE IN THE TWENTY-FIRST CENTURY

The Supreme Court's Takings jurisprudence has, it is commonly stated, been a "muddle."[173] In *Kelo v. City of New London* a deeply divided Court argued over both the proper scope of government authority to exercise its power of eminent domain and the extent to which the Court should defer to a claim of public purpose advanced by a democratically elected legislature.[174] Since *Pennsylvania Coal Co. v. Mahon*, the Court has held that the Takings Clause limits the government from regulating the use of property without compensation if the regulation goes "too far."[175] Although the Court has carved out a limited class of *per se* "regulatory takings," in most cases the Court has fallen back on an *ad hoc* balancing of numerous factors in assessing the legitimacy of a regulatory limitation on the use of private property.[176]

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173. As Professor Sterk states: "Conventional wisdom teaches that the Supreme Court's takings doctrine is a muddle. And the Supreme Court's opinions have given conventional wisdom considerable ammunition." Steven E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) (footnote omitted). *See also* Rose, *supra* note 2.

174. 545 U.S. 469 (2005).

175. 260 U.S. 393, 415 (1922). Justice O'Connor has described the significance of *Pennsylvania Coal Co. v. Mahon* as follows:

> Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster--and that such "regulatory takings" may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The rub, of course, has been--and remains--how to discern how far is "too far."

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537-38 (2005) (citations omitted).

176. *See, e.g., id.* at 540-43. The "per se" categories of regulation that require compensation include those that compel a "physical invasion" of the landowner's property and regulations that deny "all economically beneficial or productive use of land." *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (holding that a regulation that leaves property with no economic value is a per se taking unless the activity regulated would have constituted a nuisance at common law); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a per se taking in regulation that required apartment owners to allow access for placement of television cables). Regulatory limits of property that do not fall within these classifications are evaluated on an "ad hoc" basis in which the Court balances a variety of factors including, among others, the magnitude of the diminution of value, the extent of reciprocity of benefits conferred by the regulation, and the extent of "investment-backed expectations." *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

What the Court has failed to do is articulate a coherent philosophy of the Fifth Amendment to guide its analysis.[177]

Although the Supreme Court has itself, directly and indirectly, acknowledged the relevance of Locke to the Takings debate, the Court has never engaged in any serious consideration of his views.[178] The Locke that emerges from the *Two Treatises of Government*, however, can help to develop the missing coherence to the Takings analysis. Indeed, Locke's views support an approach to the Takings Clause that is perhaps surprisingly close to that recognized by the Court.

### *A. Government Authority, Including the Power of Eminent Domain, Can Legitimately Be Exercised to Serve a Broadly Defined Public Good*

If anything is clear from Locke, it is his view that government has the authority to act for the "publick good." This power generally arises by delegation of both the rights and obligations of individuals under natural law to preserve themselves and mankind. There is, to be sure, a series of implicit constraints on the exercise of this power, but the scope of a power when operating to achieve this end is broad.

The inherent authority of government to exercise the power of eminent domain reflects this view. No one, certainly no member of the Supreme Court, disputes the authority of government to compel individuals *in appropriate circumstances* to surrender their property by order of the state in exchange for just compensation. Thus, any set of Lockean protected property rights is held subject to the overriding power of government to compel sale as long as equivalent "just compensation" is provided.

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177. *See, e.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I --A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989) (stating that "it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.").

178. In both *Monsanto v. Ruckelshaus*, 467 U.S. 986, 1003 (1984) and *Nolan v. California Coastal Commission*, 483 U.S. 825, 860 n.10 (1987) (Brennan, J., dissenting) members of the Court have analyzed the scope of the Takings Clause in terms of Lockean labor theory. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), Justice Kennedy, referred to the "Lockean bundle" of property rights. In *Kelo v. City of New London*, 545 U.S. 469 (2005), a central predicate of both the majority and dissents arose from an essentially Lockean premise. All parties in *Kelo* relied on a statement taken from the 1798 case of *Calder v. Bull* that a law is invalid if it "takes property from A and gives it to B." In *Calder*, Justice Chase gave no support for this proposition other than his view that no positive law of the legislature can "take away that security for personal liberty, or private property, for the protection whereof of the government was established" since such and act would be "contrary to the great first principles of the social compact." Calder v. Bull, 3 U.S. (3 Dall.) 388, 388 (1798). These views are a direct echo of Locke.

The issue in *Kelo*, and the issue implicitly answered by Locke, is the proper objectives of such power. The majority in *Kelo* held that eminent domain authority could be exercised if done to serve a broadly conceived – and democratically defined – conception of the public good. The majority did not find any unique constraint on government power inherent in the Takings Clause itself.[179]

This is consistent with Locke's view of the power of government. Nowhere does Locke suggest that the exercise of authority by government, if otherwise acting to further the public good, is constrained with respect to any specific goal or category of action such as eminent domain. Locke speaks generally of the authority to serve the public good. In effect, like Locke, the majority in *Kelo* concluded that individuals hold property subject to a delegated authority to the State to take or regulate their property if legitimately acting to serve the public good.

If, in Locke's view, government action is legitimate if taken to serve the "publick good," the reverse was his rejection of "arbitrary" laws that serve the specific ends of vested power. Thus, constraints on government power, whether eminent domain or regulation, should, in Lockean theory, focus on whether a regulation seeks "arbitrarily" to transfer wealth to vested power

179. Justices O'Connor and Thomas each wrote dissents in *Kelo*, and both placed significant weight on the term "public use" in the Takings Clause. The term "public use," in both of their views, was not equivalent to "public purpose" and thus the scope of the eminent domain authority was uniquely limited to situations involving either direct acquisition by government or acquisition of property in which the public had some broad right of access such as for common carriers. Thus, in their view, eminent domain authority was narrower than state police power authority to regulate for a legitimate public purpose. In their view, the Takings Clause must do more than merely duplicate the constraints in the Due Process Clause that would invalidate government regulation if not rationally related to a legitimate "public purpose."

The dissents' unique limitation under the Takings Clause is, however, inconsistent with the Court's traditional conception of regulatory takings. At least since *Pennsylvania Coal*, the Court has equated regulatory takings with the exercise of the power of eminent domain. Extensive regulation of the use of property at some point is equivalent to the physical appropriation of property through eminent domain and therefore can be justified only if compensation is provided. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005). Therefore, regulatory takings are an appropriate exercise of government power but if the go "too far" require compensation under the Takings Clause.

The dissents in *Kelo*, however, rejected the idea that the power of eminent domain could be exercised solely because it could be said to further the public good. In the dissents' view, compensation does not legitimize the use of eminent domain authority if justified only by the public good. But if acquisition of title for the public good cannot be legitimized by providing just compensation, it is hard to understand how regulatory limitations, equivalent to the acquisition of title, are now legitimate. If carried to its conclusion, the dissent in *Kelo* would fundamentally alter the basic conception and rationale of regulatory takings. The majority, in contrast, is fully consistent with the prior rationale of the Supreme Court in regulatory takings cases.

without a legitimate purpose to serve the "public good." This is also consistent with the majority's approach in *Kelo*. Both Justice Steven's majority opinion and Justice Kennedy's concurrence recognize the possibility that eminent domain power may be invalid if exercised to serve individual, rather than the public, interest.[180] Thus, the exercise of government power would not be legitimate, even if accompanied by compensation, if the invocation of the pubic good was used as a "pretext" to serve special interests.

Locke's views also lead to a property reconciliation of the Due Process and Takings Clauses. The Takings Clause is textually linked with the Due Process Clause. The relevant full sentence of the Fifth Amendment reads:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.[181]

As written, the Takings Clause and the Due Process Clause express two distinct, but related, limitations on the government power, and a proper reading of the text of this sentence should find a unique role for each of these limitations. The Supreme Court, however, substantially confused the relationship between these sections when it introduced, as part of its Takings analysis, the question of whether a regulation served legitimate state objectives.[182]

In *Lingle v. Chevron U.S.A. Inc.*, Justice O'Connor, writing for a unanimous court, removed this inquiry as an aspect of Takings jurisprudence. The Court concluded that an analysis of whether a regulation substantially advanced a legitimate state interest was properly an issue of Due Process. In contrast, the Takings Clause ensured that, in appropriate circumstances constituting a Taking, an otherwise valid government action would require compensation. While the Due Process Clause constrains arbitrary government action, the Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'"[183]

Locke, writing in the 1600's, was not parsing the relationship between clauses of the U.S. Bill of Rights. Nonetheless, his writings reflect the two concerns underlying the Court's approach to the Due Process and Takings Clauses: an absolute prohibition on arbitrary government action that does not serve the public good and, as discussed below, a requirement of compensation if action, otherwise in the public interest, interferes with a core set of protected rights.

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180. *Kelo*, 545 U.S. at 487, 490-91.

181. U.S. Const. amend. V.

182. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980).

183. *Lingle*, 544 U.S. at 543 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987)).

### *B. Compensation is Required if an Otherwise Valid Act of Government Interferes with the Weak Set of Protected "Lockean Property Rights"*

Locke implies that there is some core set of property rights which government may not invade without compensation. Thus, Locke is consistent with the Court's view, held at least since *Pennsylvania Coal*, that some class of regulatory requirements may constitute a Taking. The question thus becomes the definition of the baseline set of "Lockean property rights" that may not be invaded by the state. As noted above, Locke's contract rationale leads to the conclusion that this baseline is defined by the set of rights and values that the individual brings to Civil Society from the State of Nature.[184] And this baseline is the set of natural law rights *reduced* by the uncertainty and insecurity existing in the state of nature.

Definition of some set of "diminished State of Nature" rights is obviously problematic. Nonetheless, three conclusions of immediate relevance to the issue of regulatory takings are possible. First, Locke does not support a general view that any regulation adopted through legitimate majority process cannot, through the fiction of "tacit consent," be a Taking. There are Lockean limits. Second, total deprivation of property rights without compensation would obviously place the individual in a position inferior to that existing in the State of Nature. Thus, Locke supports the basic proposition of eminent domain, and compulsory transfer of title to the government is impermissible without compensation. Further, regulations equivalent to total loss of dominion over property can be said to invade these baseline rights. Thus, the *per se* takings rules adopted by the Supreme Court – regulations that result in loss of all value and the regulations which require physical access to property by others – can be justified through this limited view of Lockean baseline rights. Indeed, the Court's class of *per se* rules has been justified by claims that they represent the equivalent of physical appropriation of land.[185]

The majority's position in *Kelo* is consistent with these conclusions. Ms. Kelo received "just compensation" for her forced transfer of property. What she lost was their subjective valuation of her property and the "demoralization" costs associated with the involuntary transfer of property which she valued and to which she was attached.[186] In effect, what she lost was what she perceived as the certainty and stability of settled law, the protection afforded by Civil Society, but she retained the core, if incomplete, value of the property. One may not be said to have "worsened" one's position from that existing in the State of Nature if the social compact assures that any appro-

184. *See supra* notes 104-11 and accompanying text.

185. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).

186. Ms. Kelo had made "extensive improvements" to her home and particularly "prize[d]" the view of the water from her home. *See Kelo*, 545 U.S. at 475. Each of the plaintiffs "wished to remain in their homes for a variety of personal reasons." Kelo v. City of New London, 843 A.2d 500, 511 (Conn. 2004).

priation of property is reasonably, if not fully, compensated. In other words, "just compensation" for total loss of title or dominion to property may adequately define the diminished set of Lockean property rights.

Whether, and in what circumstances, there are other government actions that place property owners in a situation worse than they found themselves in a State of Nature is yet to be resolved. The Lockean contract rationale, however, would serve to focus the Court's inquiry on whether regulations that otherwise promote the public good are so intrusive as to undercut the very rationale for formation of a social compact. Locke thus suggests, but does not resolve, the basic question of how far is "too far" in assessing government regulations.

### *C. The Protection of Material Possessions is not Entitled to a Privileged Position as a Class of Fundamental Rights*

Locke, in describing the limits of government control of "property," is referring to property in the broad sense of "life, liberty and estates." In other words, whatever limits we are willing to infer from Locke regarding government regulation of material possessions must apply as well to regulation of private conduct. Locke did not distinguish between liberties and estates when he discusses the obligation of government to preserve "property."

To read Locke as imposing some absolute (or at least strong) constraint on government regulation of private property may be to elevate concerns with such property over concerns for individual freedom. Certainly, this is not a hierarchy of values that is found in Locke. Phrased another way, is there a difference, in a Lockean sense, in the government's regulation of the use of real property to prevent the death of an endangered species from regulation of a private individual's freedom to kill an endangered species? If a government regulation of private conduct is valid because it legitimately serves the "public good," it is hard to find in Locke any special prohibition on the regulation of use of property to serve the same end.

### *D. Property Rights are Primarily Protected through the Establishment of Proper Democratic Institutions*

Locke clearly rejected the establishment of "arbitrary" laws that did not serve to protect the broad class of "life, liberty and estates" that constituted property. Although Locke required government to implement its standing laws by "known authorized judges," the legislature was the "supreme law" that had ultimate authority to define those laws. Locke's constraint on arbitrary legislation resided largely in institutional issues that ensured that a legislature would not be subject to "capture" by special interests. A proper Lockean analysis on the limitations on arbitrary government action involves an institutional focus on the structure of government itself. Institutions that limit arbitrary self-serving dealing by legislators should result in laws that do not constitute Takings.

Justice Thomas's expressed the concern in *Kelo* that the consequences of a broad power of eminent domain will be felt by the poor and less politically powerful in society.[187] The concern finds an echo in Locke.[188] In part, Locke's response would be to require an inquiry into the purpose of appropriation; whether the true objective of appropriation was the "public good" as opposed to arbitrary redistribution of wealth to serve special interest. Locke, however, seemed to rely on the democratic process itself to prevent arbitrary exercise of government power.

## VI. CONCLUSION

John Locke, political philosopher and all around polymath, stands as a central figure in the development of Western conceptions of property rights and democratic institutions. If not the sole voice that is echoed in the American revolution and the Constitutional Convention, he clearly influenced the founders, particularly James Madison, and he thus represents an intellectual force that is a legitimate part of the current debate over the relationship between government power and individual property rights.

Although it is possible to infer a limited set of "baseline Lockean property rights," Locke is no absolutist. In most respects, he restates, but does not resolve, the tension between protection of individual property rights and regulation in the public interest. In his focus on the institutions of government to protect against arbitrary government action, he anticipates current debates over the implications of institutional structure to government action. Locke's views of government authority have a contemporary feel that are remarkably consistent with the existing approach of the Supreme Court to the issue of regulatory takings.

And the Lockean views that are entitled to be heard are Locke's views themselves, not his views distorted through selective reading or modified by selective acceptance. And Locke has much to offer in interpreting the relationship between property and power that is the core of the Fifth Amendment.

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187. Justice Thomas noted that "extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful." *Kelo*, 545 U.S. at 521.

188. At least some have argued that Locke was only concerned with protection of the propertied class, not the poor and disenfranchised who were unable to seek protection through the political process. *See* MACPHERSON, *supra* note 44. Locke's logic of political constraints on arbitrary appropriation or regulation of property still represents Locke's primary method of control on government and it applies with even greater force in a democracy that purports to ensure greater representation by all members of society.