

**THE POLITICAL PHILOSOPHY OF PROPERTY
RIGHTS**

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For my grandmother, Molly,
and in memory of her husband, my grandfather,
William Allan Pyatt.

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Abstract

This thesis argues that within political philosophy, property rights deserve closer attention than has been paid to them recently because the legitimacy of a state rests upon their definition and enforcement. In this way property rights differ from the right to liberty or equality. A state may or may not have liberty or equality, but it has no meaning at all if it does not enforce the rights of property. This is not to suggest that normative arguments for property rights are ‘nonsense upon stilts’. Morality may provide many reasons for an individual to exclude other members of a political community from a property. However, the function of property rights is to enforce that exclusion and this suggests that the normative legitimacy of a state is closely bound both to its ability to enforce whatever property rights it already has granted, and its justification of decisions taken when property rights are granted within its borders. My argument is that a proper political philosophy of property rights should acknowledge that a state depends upon its treatment of property rights for justification, not as a matter of justice, but as a matter of its existence.

Chapter One

Introduction

Property is a bore. It rarely contributes meaningfully to a conversation. Its an annoying old idea that, given half the chance, will sit down besides you and maunder on about its past glory, its veneration by Locke and Blackstone, or its running battles with Marx and Proudhon. Ah, those were the days! Mention something topical though, and property will be at a loss; property suffers from a distinct collapse of self-esteem which attends any identity crisis. And not just any old identity crisis, property will be happy to inform you. Property has been on the couch for years now. It's been pulled apart and reassembled so many times it is a wonder it knows its own name.

Whatever *that* designates. 'You see', property will say, 'now I am not even my own idea. I'm just a bundle of other concepts, a mere chimera of an entity. I'm just a quivering, wavering, normative phantasm, without any home, without anything to call my own but an album full of fading and tattered images of vitality and consequence and meaning. I'm depressed.

J.C. Penner, *The idea of property in law*.¹

'right' has multiple meanings and they are so clearly entrenched in both ordinary and technical uses that the best one can hope for is to keep the various meanings distinct and see to it that the distinctions are attended to.

Lawrence C. Becker, *Property Rights: Philosophic Foundations*.²

This thesis argues that within political philosophy, property rights deserve closer attention than has been paid to them recently because the legitimacy of a state rests upon their definition and enforcement. In this way property rights differ from the right to liberty or equality. A state may or may not have liberty or equality, but it has no meaning at all if it does not enforce the rights of property. This is not to suggest that normative arguments for property rights are 'nonsense upon stilts'.³ Morality may provide many reasons for an individual to exclude other members of a political community from a property. However, the function of property rights is to enforce that exclusion and this suggests that the normative legitimacy of a state is closely bound both to its ability to enforce whatever property rights it already has granted, and its justification of decisions taken when property rights are granted within its borders. My argument is that a proper political philosophy of property rights should acknowledge that a state depends upon its treatment of property rights for justification, not as a matter of justice, but as a matter of its existence.

¹ (Oxford: Oxford University Press, 2000), 1.

² (Boston, Mass: Routledge Kegan & Paul, 1977), 7.

³ Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring, vol. II (Edinburgh: W. Tait, 1843), 501.

That property rights are integral to the functioning of many polities is not a shocking claim. From the indigenous claims of post colonial polities, to the wars of ethnic populations in the Balkans, to the battles over Palestine, property rights are regularly used as the normative justifications. Yet I have found the theoretical politics of our age are singularly ill suited to framing the rhetoric of property rights with any theoretical accuracy.⁴ As I read one after another justification of the right to property, my sense of unease grew. It seemed J.C. Penner was right: property had indeed become a bit of a bore, at least in discussions about its impact upon political theory. Writing on property seemed almost wholly concerned with justifying its separation from ‘the commons’. For instance, Lawrence Becker’s exploration of property found there were three main philosophic foundations for property rights.⁵ There were general justifications which were concerned to defend the institution of private ownership. There were specific justifications which were concerned with justifying different types of rights such as the right to lease, or manage property. Third, there were theories that justified the particular property rights of individuals. While this all made a great deal of sense, it seemed clear to me that much of this was moral, not political, philosophy. These justifications of property rights seemed to subscribe to the argument of Thomas Grey such that ‘the disintegration of property’ had no implications for political institutions beyond providing a discussion of those legal rights enforced by the state.⁶

Those scholars who do examine property, tend to defend specific property rights on normative grounds without reference to a political authority. This type of reasoning, while important, neither grants property a role in the justification of the state nor takes into account the empirical fact of property’s existence. That is, the current literature on property in political philosophy gives a political status to the moral reasoning behind specific property rights. For instance, Munzer, in one of the most comprehensive accounts of the theory of

⁴ See for example Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Bantam, 2000). De Soto argues that many ‘developing’ countries, and indeed others such as Russia, are struggling to compete with the West because their property regimes do not allow citizens to unlock the capital that they own. The property rights regimes of those governments are too ossified to allow the quick allocation of property rights e.g. procedures to formalise informal property holdings in the Philippines take between 13 and 25 years. It seems to me that contemporary writing on property in political philosophy has little to say directly on the problem de Soto identifies.

⁵ Lawrence C. Becker, *Property Rights: Philosophic Foundations* (Boston, Mass: Routledge Kegan & Paul, 1977), 10.

⁶ Thomas C. Grey, “The Disintegration of Property” in *Property*, ed. J Roland Pennock & John W Chapman, *Nomos* (New York: New York University Press, 1980), 69-85.

property in the last 30 years, *A Theory of Property* seeks a pluralist justification of property which rests on the principles of utility, justice, equality and desert.⁷ In another important work in the field, Jeremy Waldron aims at a more specific goal. He wishes to discover whether individuals have a right to private property, though like Munzer, he investigates the question with the principles of utility, justice and desert in mind.⁸ While both frame their analysis in political terms, and both are concerned about the effect of property rights on politics, neither offers a convincing account of the part property rights play in politics beyond their significance as indicators of the morality of a state. Indeed Waldron, in his conclusion, restricts himself to the point that there are some deep seated differences between the major rights based arguments for private property.⁹ Munzer concludes that, ‘most adequate foundations for a theory of property are pluralist’.¹⁰ Yet property rights, it seemed to me, played more of a role in politics than simply shaping the moral colour of justice in a particular state. After all, one of a state’s key claims is territorial integrity, a general claim to a particular property right. Also, in many states historical and modern, existing property rights do not appear to be based upon ideas of justice or liberty, yet they still served or serve a purpose which ought to be considered.

The idea of property used in political philosophy today is the classic jurisprudential account of property as a bundle of rights. This shapeless bundle is a grouping of rights so wide as to make the rights of property needlessly complicated for the purposes of political theorizing. So bound has political thought become by this bundle picture of property that both normative political philosophy and the wider field of political theory have adopted it various descriptions of property rights as though these were readily transferable, universal, and able to cope with political situations where it is quite clear that legal remedies are not easily available. In itself, an examination of the process by which this has happened would be an interesting study of the way in which political theorists and political scientists continue to

⁷ Stephen R. Munzer, *A Theory of Property*, *Cambridge Studies in Philosophy and Law* (New York: Cambridge University Press, 1990), 3.

⁸ Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 1-3.

⁹ *Ibid.*, 443-44. Waldron characterises these differences by looking at the general rights based arguments associated with Hegel, which views private property as a right of individuals ‘as part and parcel of respect for them as free moral agent’, and the specific rights based arguments associated with Locke that view ‘private property as a right that someone may have...in the way that he has certain promissory or contractual rights; he has it because of what he has done or what has happened to him.’

¹⁰ Munzer, *A Theory of Property*, 11.

adopt legal frames, even where these have repeatedly failed to resolve political conflict. When political philosophers take up the ‘bundle’, contemporary conceptions of property at law are invoked in such a way as to presume unconsciously the particular theories of political authority. This means political theories of property are always circumscribed by contemporary jurisprudence.¹¹ In Chapter One I defend this critique of the bundle-of-rights picture of property, arguing that the bundle takes law for granted when structuring property rights and in so doing presumes the enforcement of law. In turn, enforcement of law assumes that political authority has a justification for such enforcement. The trouble with the bundle picture of property, I conclude, is that it structures the concept of property in such a way that it can be considered in politics only via moral or legal philosophy. Debate over property rights is forced into legal or moral defences of specific or particular property rights, and only then does it consider the political frame in which conflicts over property arise. That is, the political philosophy of property tends to produce policy prescriptions for political authorities, and take their general right to regulate property for granted. This is rather like examining how a cake is made by conducting a multitude of chemical experiments in a lab. Such a process might be useful, interesting and scholarly, but ultimately would not provide a cake recipe. In order to find the recipe for the justification of how political authority should regulate property, an idea of rights is needed that could accommodate the many different moral accounts of property but is singular enough to be separable from other general rights, such as individual liberty, or equality. Fortunately, J.C. Penner’s recent work summarises the legal and moral idea of property so that a single norm of property provides an excellent starting point for such an investigation. Penner’s thesis is that property is a right of exclusion, *in rem*. This idea of property as a single norm simplifies matters sufficiently to allow one to imagine that, contrary to the theoretical conclusions implicit in the bundle of rights idea, it is possible to construct a justification of an authority’s general right to regulate property.

After defining property in Chapter One, the thesis explores the question of the ways in which a normative defence of a general right to exclude might be included in theorising a legitimate political authority. This thesis does not pretend to answer that question in total,

¹¹ See, as a demonstration of this, Chapter Six, where I point out that legal conceptions of property right are framing historical conceptions of indigenous property, and therefore colonial conflict in hopelessly anachronistic ways. The section on the use of the legal doctrine of aboriginal title is especially pertinent.

but indicates that an answer needs to consider the role of property in the normative structure of political authority. The method of the thesis is to show the failures of various political philosophies when those philosophies are pressed for a justification of the right of a political authority to regulate property. Pointing out these failures inevitably involves much criticism of contemporary political philosophy and wider political theory, so the thesis has a reasonably negative flavour. That flavour is unfortunate, but the inability of contemporary political theory to take property rights seriously when considering the basis of political authority, has placed the burden of proof on scholars who insist otherwise.

Thus far, I have used the term ‘political philosophy’ as though it has a determinate meaning when, like all scholarly fields, its boundaries are porous and vague, and its methods and concepts much debated. In the next section I discuss the field of political philosophy and the particular methods and concepts which have I selected to use in the thesis.

As a basic query, as Nozick pointed out, political philosophy should provide reasons why there should be a political authority, or state. Answering the question, ‘involves showing ... [the state] to be prudentially rational, morally acceptable or both’.¹² In Bernard Williams’ conception of political philosophy, Nozick’s question is ‘the “first” political question’ of providing ‘order, protection, safety, trust, and the conditions of cooperation’.¹³ Only once such a justification is made, as Williams’ pointed out, can other political questions be raised, such as what should be the moral colour - the particular morality - of a state. A justification of political authority in this sense provides compelling reasons why it is better for citizens to be ordered by a political authority than to live in an anarchical society. This places some emphasis on the authority not to create problems for its citizens that outweigh their fears of anarchy. Justificatory theory thus calls for normative reasons why an authority has coercive power. If the justification was simply an argument that all individuals are better off when they accept coercion by a political authority, the justification would not make much sense. As Locke wrote long ago, the argument that authority was better than anarchy in any situation, is to think ‘that Men are so foolish, that they take care to avoid what Mischiefs may

¹² A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 123.

¹³ Bernard Williams, *In the Beginning Was the Deed*, ed. Geoffrey Hawthorn (Princeton; NJ: Princeton, 2005), 3.

be done them by *Pole-cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.¹⁴

Williams's argument then, is that a political authority's legitimacy turns initially on whether it solves the first political question without becoming part of the problem. Williams calls this the 'Basic Legitimation Demand' (BLD).¹⁵ For Williams, being able to meet a BLD defines a state - or more accurately, provides an argument for the justification of state - as legitimate. Whether the state also meets the demands of a form or morality like the liberal justice of Rawls, is another matter. That second question can only be answered once the BLD is met. So, a state may be legitimate (i.e. one that meets the BLD), without conforming with principles that are in some way liberal. That is, a state may be legitimate but non-liberal.¹⁶ Williams is determined to allow political philosophy to separate the BLD from other normative tests of legitimacy because historically states have not seen themselves as liberal, but have nevertheless been given political authority by their subjects. They were legitimate, in that they had normative justifications, but they were not liberal in our sense of the word.¹⁷ The BLD, in this sense, is the justification of coercive power by a state, prior to a particular morality of government. With the rise of liberal questions about equality and freedom, so that traditional hierarchies such as racism and gender are no longer possible normative 'rationalizations of disadvantage', the BLD is normally met by states justifying themselves on liberal principles.

In putting forward the idea of the BLD, Williams is attempting to produce a less context-specific, and so a more historically accurate, normative account of legitimacy. His account seeks to make sense of the reasons for political authority, yet to separate out the particular principles, moralities and historical contexts on which modern political philosophies seek to ground legitimacy. He wants to separate out modern political practice of liberalism from

¹⁴ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 328, (Second Treatise, paragraph 93).

¹⁵ Williams, *In the Beginning Was the Deed*, 4.

¹⁶ For instance, Hobbes could be thought of producing a theory of a state that meets the BLD, but is not necessarily liberal in our eyes, since there seem to be few constraints on the Leviathan's action. As William's points out though, Locke was unsure that Hobbes's solution to the first political question would actually meet that test. Ibid.

¹⁷ For example, the history of political thought contains many justifications of the state that are less liberal than those put forward today, but nevertheless those earlier theories were thought by their authors to present a justification of legitimate political authority e.g. Machiavelli's *The Prince* or Locke's *Two Treatises of Justice*.

justifications of the state, since, as he puts it, modern advances in liberalism belong ‘to the level of fact, practice, and politics, not one that lies beyond these in the very conditions of legitimacy.’¹⁸ In making this claim, William’s is attacking the views of scholars, such as Joseph Raz, who take the state (or some form of it) as a fact of life, but ask questions about the normative structure of the state’s claim to be the final authority to regulate all aspects of life.¹⁹ William’s calls such an approach ‘political moralism’ because it is scholarship ‘where political theory is something like applied morality.’²⁰ The seminal modern example of this type of study of politics is Rawls’s text, *A Theory of Justice*.²¹ This tradition of scholarship attempts to demonstrate what should be the moral constraints of power, or more precisely, the moral constraints on politics and political institutions. In Rawls’s argument, the principles (or goals) upon which moral side-constraints rest are fairness and equality. Nonetheless whatever goals other scholars in this tradition choose to defend, their theories always justify the holding of political authority on the basis of the principles of their choosing. Critics of this approach, such as Williams and A. John Simmons, have identified its method with a Kantian approach to the task of political philosophy because it seeks to derive political legitimacy from an account of individual morality.²² The political authority of a state is justified insofar as it acts according to those moral principles. This means, a particular act of a state is justified if the use of its powers in that action can be shown to be just or right or reasonable (within the particular scholar’s defence of those terms). This type of political philosophy conflates political obligation (and its correlate, legitimacy) with the justification of the state. In other words, it assumes that the reasoned justification of a state is both a necessary and sufficient reason for citizens to obey, on the basis that the institutions (and principles on which those institutions act) are just or right or reasonable from an individual citizen’s point of view. Since, in this type of theory, the citizen’s behaviour arises from a particular morality, so the citizen is bound to obey the commands of an authority that follows that particular morality.

¹⁸ Williams, *In the Beginning Was the Deed*, 17.

¹⁹ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 4.

²⁰ Williams, *In the Beginning Was the Deed*, 2.

²¹ As William’s is at some pains to point out, Rawls’s later work, *Political Liberalism*, is also a work of political moralism, *Ibid*.

²² Simmons, *Justification and Legitimacy*, 140-1; Williams, *In the Beginning Was the Deed*, 9.

The tradition of political thought from which Williams derives his account of the BLD, is identified predominantly with Locke's approach in *Two Treatises of Government*. This tradition suggests that the justification and legitimation of a political authority are quite different tasks. This tradition suggests that while the justification of the state is a necessary condition for a legitimate government, it is not sufficient. As we have seen, for Williams, legitimacy is a contextual notion, a feature of which is important because it allows us to judge governments not on an (imagined) timeless, and ahistorical morality, but on the basis of the views of those whom it governs. Williams's language is a little problematic here. The more usual terminology is to talk of justifying political authority against anarchy as 'justification', while legitimacy is the demonstration that an actual state has 'morally unobjectionable' relations with its citizens.²³ For instance, Simmons's takes justification to be the task of providing reasons to be coerced by state against the non-state alternative, whereas legitimacy, is about a particular authority justifying its actions in a particular historical and moral context.²⁴ Williams dubs this approach, 'political realism' because it posits morality and the normative theorising of politics as making sense of political action, rather than attempting to constrain politics within a particular morality.²⁵

For this thesis, separating out the justification (BLD) from contemporary moral liberal conceptions of legitimacy is critically important both in making sense of historical property rights, and in making sense of property theory in political philosophy. At the historical level, many property rights around us today have been forged by political authorities that were not liberal, but were accepted as legitimate enough to decide on property right issues: in William's language, property rights around us today were often created by non-liberal states that nevertheless must have met the BLD. Otherwise, the coercive power used in making

²³ Simmons, *Justification and Legitimacy*, 128.

²⁴ I think there are differences between Simmons's use of concept of justification and Williams's idea of the BLD, especially as applied to political philosophy in the modern era. For example, Williams acknowledges that liberalism may be the only correct BLD, given the progression of ideas about what it is to be a citizen. While for Simmons's it is an important point of his method that a judgement on the justification of a state may not necessarily involve liberal principles.

²⁵ Williams, *In the Beginning Was the Deed*, 9-14. Hence the title of the book, since Williams' view is that in politics as elsewhere, especially in the creation of political order, the deed is first, and normative theorising follows.

such property determinations would not have been accepted.²⁶ At the philosophic level, accurately reflecting the empirical fact of property is vital to understanding the salience of property to political theory, and more especially the trouble it creates for contemporary liberal theories of the state that seek to ground legitimate political authority in principles of justice. Baldly and a bit too simply, the trouble is that arguments for property rights that rest on the justification of political authority, are almost by default in antagonism with arguments for property rights that arise from theories of what constitutes a legitimate political order. In justificatory theory, conflict over property has been used by political philosophy, most especially by Hobbes and Locke, as part of the BLD for political authority. The BLD is provided through the creation of stable society by determining whose property is whose. To prefigure the use of the language this thesis will invoke, justification is provided by an institution solving the indeterminacy over property and then enforcing determinate property rights. In this type of justificatory theory of political authority, the state cannot alter property rights without the agreement of the rights-holders. If a state did not have such agreement it would undermine its normative justification, since it would become part of the problem it was supposed to solve – the indeterminacy of property. Removing property without agreement would therefore render the state illegitimate in the eyes of those who have lost property. Most commonly this type of argument is associated with libertarian or natural rights thinkers. Against such a view, various recent distributive justice theories, such as those produced by Rawls and Dworkin, attack the historical patterns of individual holdings of property because of their lack of normative defence in the world today. Property rights, as a defence of inequitable property holdings, are seen to undermine the justice and thus the legitimacy of the relationship between citizens and the state. If we are to follow the prescriptions of distributive justice, we are supposed to take property rights from some, and give them to others. We are in a quandary then; political philosophy suggests that property has justificatory purposes that mean government must leave it untouched (excepting agreement) for fear of losing legitimacy, and that same philosophy suggests that some existing property rights are unjust.

²⁶ Williams notes the argument that the coercive power of the state might be used to coerce acceptance of its that power. This forms part of his proof that a political authority must be able to justify its use of coercive power to everyone over whom it has authority in order to meet the BLD. *Ibid.*, 6.

As I have remarked, the use by Williams of the term 'legitimacy' in the BLD, while appropriate for his purposes, presents some confusion. In the chapters that follow, for instance, I examine the place of property in political philosophies that theorise about the shape of legitimate political authorities in both political realism (Locke) and political moralism (Rawls). So I discuss theories that examine justification and legitimacy separately and theories that combine those concepts. It is helpful therefore, to tighten the definitions so far used.

First, legitimate political orders justified by the BLD should not be confused with a political moralist's idea of legitimate political authority. In Rawls's theory of justice, for instance, citizens are morally obligated to obey the particular shape of an authority because of its attitude toward justice. Justification then, for Rawls, presumes the legitimacy of the political authority. Oppositely, the political realist, such as Locke, does not presume the legitimacy of a political authority, and so the BLD is analogous to the sense in which I so far have been using justification. It is the idea that political philosophy should be able to provide the reasons that a political authority meets the BLD, in ways that provide a 'justification of its power *to each subject*' to the extent that a citizen is not worse off being inside, rather than outside, the power of that authority.²⁷ Second, and following from that first point, examining the legitimacy of a political authority presumes it has met the BLD, because one cannot have an unjustified but legitimate state (though, as I shall argue in reviewing the liberal egalitarian thought in Chapter Five, one can get perilously close). Williams makes this simple and practical conclusion clear by pointing out that answering the first political question with the BLD provides the necessary order that allows questions of legitimacy, such as the moral colour of the state, to be considered. Theoretically, at least from the political realist perspective, constructing a normative evaluation of legitimacy is only possible in a situation where individuals need to consider their political obligations and decide upon what form their government should take. The form of the relations between citizens, and between citizens and the state, can only be considered once a state has provided order, stability and safety (the BLD) to enable such discussions to take place.

²⁷ Ibid., 4.

It follows from these definitional points that what counts as normatively justified and legitimate political authority, depends upon the type of political philosophy one does. For Rawls, for the purpose of this thesis, justification and legitimacy are one and the same. For Locke, one must provide a justification for individuals to be part of a political order and then provide reasons why they should accept one form of political authority over another. On either use of legitimacy described above, citizens obey political authority because its use of coercive powers is morally unobjectionable. Legitimacy, on this reading, is achieved by a political authority if citizens agree to owe it political obligation. That is, citizens consent to be governed.²⁸ Political moralism, as described above, circumvents problems with this notion of consent, because consent is a logical product of such philosophy. Indeed, only morally unobjectionable relationships between ruler and ruled can be produced by plausible theories of political moralism since those theories are based upon the idea ‘a rule is justified if ideal agents in ideal circumstance would have agreed to it.’²⁹

For political theorists such as Locke, who take the initial justification of political authority more seriously, the relationship between consent and political obligation and its correlate, legitimacy, is more complicated. Since such theorists do not presume that an individual agent will act in accordance with ideal morality, consent must come from individual agents themselves.³⁰ However, an examination of the general grounds of political obligation is unnecessary for the purposes of this thesis. It is enough to examine the problem of consent as it arises in regard to property rights, and in particular in the Lockean tradition of consent the thesis must deal with in Chapter Four. This approach is supported by John Dunn’s interpretation of Locke’s theory of political obligation and consent in the *Two Treatises*. According to Dunn, Locke is not attempting to identify the general grounds for political obligation. Rather, he is identifying ‘certain limits on the possible extent of political obligation.’³¹ So, in the *Two Treatises* one of the particular limits on the legitimacy of a political authority is its ability to enforce individual property rights. Where property rights are not defended by a political authority the individuals who owned those properties are not

²⁸ Hannah Pitkin, “Obligation and Consent: Part 1”, *American Political Science Review*, vol. 59, no. 4 (1965), 990.

²⁹ Cynthia Stark, “Hypothetical Consent and Justification”, *Journal of Philosophy*, vol. 97, no. 6 (2000), 315.

³⁰ See for instance Chapter 8 ‘“Denisons” and “Aliens”: Locke’s Problem of Political Consent” in Simmons, *Justification and Legitimacy*, 158-78.

³¹ John Dunn, “Consent in the Political Theory of John Locke”, *The Historical Journal*, vol. 10, no. 2 (1967), 156.

longer obligated to obey because they have no reason to consent to be governed by the political authority. As Dunn puts it, in Locke's *Two Treatises*, 'consent cannot simply be understood as a subjective fact, ... It has to be understood primarily as a legal fact about the divine order of nature.'³² That is to say, Locke thinks of consent as obtainable by reason. There is much more to be said about the consent, and its evaluation, in wider political theory.³³ However, for the purposes of the examination of the political philosophy of property, consent is produced by a political authority acting in accordance with the principles upon which it was justified. That is, if a political authority is able to justify 'the establishment of [property] rules or decisions that affect personal action' on the basis of reason, it attains the consent of those over whom it has political authority.³⁴ So the question of consent, for this thesis, revolves around whether or not normative theories of property rights produce morally unobjectionable relationships between the holders of those rights and political authorities.

A last definitional issue worth mentioning is that I apparently use the terms 'state' and 'political authority' and 'government' as synonyms. To the extent that their alternate employment allows for less repetition in an already dense text, they are synonyms. However, I use examples of historical political groupings, such as indigenous peoples, where identifying them as a 'state' could be seen as highly anachronistic. This is not dismissive of issues such as the political organisation of indigenous peoples. Rather my strategy is adopted because I use political authority with the hope of jettisoning the baggage that the use of the term state might otherwise pack into readings of this thesis. For instance, political authority is simply indicative of a political institution meeting its BLD, howsoever that might be obtained. This is a good example of the fruitfulness of the BLD: it allows a context dependent justification of coercive power but can still be theorised in normative ways. For example, one can theorise about the justification of colonial rule, as I do in Chapter Six, while noting that its attachment to racial hierarchies is antithetical to our modern liberal ideals. Political moralism, on the other hand, has simply no notion of how a colonial

³² Ibid.

³³ See for instance Simmons, *Justification and Legitimacy*.

³⁴ Jurgen de Wispelaere, "The Morality and Heuristics of Consent: Comment on Andreas Suchanek" in *Deliberation and Decision : Economics, Constitutional Theory, and Deliberative Democracy*, ed. Anne van Aaken, Christian List, and Christoph Luetge (Aldershot: Ashgate, 2004), 191.

situation could exist. So my use of the phrase ‘political authority’ or the term ‘state’ has no necessary descriptive power, excepting what I may offer at the time. It merely implies that political institutions I am discussing at the time attempt to, or actually do, meet the BLD. It may imply a comprehensive bureaucracy of the kind found in a modern western state, or it may not. It may imply a traditional hierarchy of rule or it may not.³⁵

With the key concepts in the thesis delineated, the central argument of the thesis, and its development in the thesis can now be set out. The thesis argues that political philosophy cannot provide a plausible argument for the role of property in a legitimate political authority. That is, we have no normative justification of a legitimate political authority that makes sense of the empirical fact of property rights as they exist. We have explanations of how property rights have arisen such as Locke’s account in *Two Treatises of Government*, or as it should be as in Rawls’s *A Theory of Justice* and later works. The thesis demonstrates that neither of those theoretical explanations of property in a legitimate political order are plausible expositions of the justification for government regulation of property rights in the present day. It is an obvious and banal point that we have difficulty theorising many political constructions, and I do not mean to suggest that property is exceptional—nationalist or identity politics can be quite as tricky. However, so much of current political philosophy is built on the assumption that we *are* able to theorise property within a normative argument that something needs to be said about why such views are wrong. Following the redefinition of property in Chapter Two, the rest of the thesis is a set of related studies into the failure of political philosophy to provide plausible theories of property. The different chapters build upon each other, but not necessarily in an obvious narrative, and this latter part of the introduction is an attempt to make explicit the connections between them.

In Chapter Three, in order to demonstrate the current lack of a plausible political philosophy of property, I analyse Jeremy Waldron’s historical supersession thesis. Waldron’s thesis is an attempt to come to grips with the claims of historical injustice made by indigenous peoples about the loss of their land. The intellectual frame that Waldron places upon that situation of historical injustice is Nozick’s familiar characterisation of ‘historical’ and ‘end-state’ theories of justice. Historical theories of justice argue that the legitimacy of a political authority is

³⁵ Williams, *In the Beginning Was the Deed*, 7.

derived from the moral character of any property acquisition within its territory, whether it be acquisition from the original common or acquisition by transaction. If a political authority does not protect its subjects' property rights, that authority would lose at least part of its normative justification for existence. The subjects who had lost property would also have good reasons to question the legitimacy of their relationship with the authority. Oppositely, end-state arguments suggest that the justice of individual property rights rest on the 'moral character of the structure (or pattern) of the set of holdings of which they are a part.'³⁶ End-state arguments are those that seek to redistribute property holdings according to an overall goal or principle. It is arguable whether end-state arguments necessarily require a redistribution of property rights (as opposed to some other form of wealth distribution). However, since Waldron's purpose with the thesis is to investigate the loss of indigenous property rights that point can remain mute until Chapter Five's discussion of contemporary end-state theories of justice. The supersession thesis put forward by Waldron allows Chapter Three to frame the dispute between the two theories of justice as an argument over the proper place of property rights in normative theories of a legitimate political authority.

I have made mention that Waldron's supersession thesis arose from his examination of indigenous peoples' claims of injustice. Since I wish to adopt his examples as significant examples of a certain type of philosophising, and since I also use examples involving indigenous peoples in Chapter Six, it is perhaps best that I frame that use at this juncture. Otherwise, I might be seen as joining a rather large debate in political philosophy about the rights and wrongs involved in indigenous peoples' claims of injustice. I use Waldron's article because it carefully outlines where distributive theories of justice undermine historical theories of justice. It is Waldron's attack on historical theories of justice that is of interest to this thesis, not its application to indigenous peoples' claims. Since I note in that chapter my disagreement with Waldron's characterisation of indigenous claims, examining his supersession thesis on the basis of its attitude toward justice for indigenous peoples would be pointless, unless I meant to assess his thesis in order to correct his misrepresentations. I do not. So Chapter Three does not provide an evaluation of the normative structure or power of indigenous claims. I have my own view of these matters, and since I am indigenous these views are necessarily coloured by my family's history. However, as a political theorist,

³⁶ A. John Simmons, "Historical Rights and Fair Shares", *Law and Philosophy*, vol. 14, no. 2 (1995), 150-51.

I have attempted to move the scholarship of this thesis beyond the narrow and constricting identity politics of political philosophy on indigenous rights. Enough scholars have attempted to produce defences of the rights of indigenous peoples already, and in Chapter Six I suggest that those scholars are often doing great injustice to both the history and agency of indigenous peoples. Not only because, like Waldron, they misrepresent the actual claims that have been made public through the twentieth century, but because identity politics necessarily places boundaries on the behaviour of those groups it purports to help. It makes their identity central to the politics they encounter. This is unhelpful since it is political authorities, not indigenous identities, that require normative justification. I use indigenous peoples' history and contemporary claims as examples in this thesis because they frame so well the ideas of legitimacy, property, and political authority I wish to explore. I could use any instance of large scale dispossession of property rights.

I conclude that Waldron's supersession thesis demonstrates that the historical ordering of property has no relation to, or purchase upon, contemporary theories of justice. It does so by showing that contemporary theories of justice must be involved, or co-opted, by historical theories in order that the latter are plausible in the face of changing circumstances. I explore this idea through an explication of Simmons's theory of historical shares. Simmons attempts to rescue historical theory from Waldron's dismissal by altering the political theory of property rights within historical theory. He suggests that political authorities have an interest in protecting property rights because they protect an individual's particularised share of societal resources, rather than an individual's ownership of a particular property. Changing circumstances in a society are thus reflected in that particular share being made greater or smaller by a political authority. However, Simmons fails to appreciate that his changes undermine historical theory's normative justification of a political authority's right to regulate property. Simmons's approach relies on a particular theory of property, his historical shares theory, being part of the justification of the state. Simmons's thinks his approach is plausible because he uses a Lockean theory of political authority such that the state is justified by its resolving conflict over property and this produces a plausible political theory of property. In Chapter Four, I explain that this is a conceit of Lockean scholarship.

Contrary to the views of many commentators I find it difficult to place a construction upon the *Two Treatises* that provides a normative stance on the right to regulate property rights in political society. Locke is famous for the labour theory, and that theory's justification of property, yet I conclude that the labour theory only gave definition to property in the state of nature. So, individual property rights as arising from the labour theory are only defended by Locke in a state of nature. Property is justified by Locke, but not in such a way that what I label the 'indeterminacy problem' of property in a state of nature is given a clear normative solution by Locke. I argue that Locke intended property rights to be defined by consent government. I demonstrate that in order to suggest Locke meant property rights justified by his labour theory would continue within civil society one would need to suggest that Locke produced normative arguments solving the indeterminacy problem.³⁷ That is, normative arguments about 'who should get what?' Such statements would, however, be anachronistic³⁸ because Locke is gloriously silent on who should get what. In the context of his time, Locke's question was not 'who should get what?', but 'Who Heir?' and he specifically rejects the idea that property rights can answer this question (in the larger sense), suggesting instead in the second of the *Two Treatise* that the answer was whoever achieves legitimate government.

The conclusions of Chapters Three and Four raise serious questions, not least about the liberal-egalitarian project. If historical entitlements are superseded by theories of distributive justice, then property is only a bundle of rights distributed by an appropriate model of justice. Yet, the implicit suggestion that a state has absolute control over the distribution of property rights, and that normative justification of this control is unnecessary, does not strike me as sufficient representation of a state's interaction with property rights. For instance, it suggests that a state's legitimacy might rest on retaining a just distribution of property rights. This poses difficulties for the stability of property rights, especially across generations. Also, I am unsure how contemporary justice theory actually produces the normative guidance on property rights that would be necessary for a government to distribute property rights in accordance with the theory of justice that was selected. Such

³⁷ A point of clarification. I use civil or political society to mean the society formed after individuals have created a polity based on consent. In Chapter Four on Locke, I use the terms to differentiate such a society from one which is still in a state of nature, without a government.

³⁸ A point I defend in Chapter Four.

difficulties seem to me to raise some first order questions about the role of the state in the regulation of property, and the justification for its doing so.

In a manner analogous to Locke's use of property, contemporary political philosophy leaves property rights to government to solve without providing the normative principles to make that solution possible. I argue in Chapter Five, via an examination of the theories of Rawls and Dworkin, that contemporary political philosophy leaves property rights without justification, and therefore indeterminate.³⁹ Property rights, for reasons I find inexplicable, are imagined to be clear and obvious enough that they can be dealt with outside the confines of the justice theory itself. The assumption that contemporary theorists seem to have made is that a state's interaction with property rights neither needs normative justification, nor has normative implications, beyond those associated with the concerns of the liberal egalitarian project. I show this to be misleading. Distributive justice, as Waldron shows, disrupts historical entitlements to property rights. In so doing, distributive justice theory begs the question of how it is to order the distribution of property. Also it fails to justify how political authority can regulate the structure of its distributive ideal. That is, distributive justice needs to justify a state's ability to grant and enforce property rights in order to see its distribution enacted.

In the last of the six chapters, I turn from the difficulties that arise when property rights are neglected in ideal theories of political philosophy, to the way in which our theoretical understanding of political events is compromised by such neglect. Specifically, I focus on Locke's insight that property only became secure through the creation of government. Through a variety of illustrations drawn from the colonial era, I argue that the lack of a clear normative role for property rights helped shape the course of political events in the colonies and their successor states. In particular, I show that, as is the case today, neither law nor political thought could solve the problem of the indeterminacy of indigenous property rights. Therefore, the indeterminacy of property rights that arose from the conflicts over property between indigenous peoples and settlers, begged the same questions for colonial and indigenous political authorities as for Locke: 'Who Heir?' I demonstrate in this last chapter

³⁹ By indeterminate, I mean that they are empirical facts which distributive theories of justice avoid thus leaving any property rights subject to such theories without determinate status in those theories construction of legitimate political authority.

the implications of political philosophies failure to understand the regulation of property. I show for instance, that contemporary attitudes to indigenous claims are forced into historically anachronistic attitudes that do not explain indigenous agency or colonial intention. The anachronism arises because our current theories of politics do not allow for the indeterminacy of property. On current political theories we can hold both, as Waldron does, that indigenous people had historical entitlement to their property and that the concerns of contemporary justice may supersede it. Alternatively, like Simmons, we may attempt to combine both in order to produce proposals for the amelioration of indigenous peoples. Yet such principled approaches fail to appreciate that the problem lies not in the conceptions of justice, of morality, but in the ability of property to jump outside those normative boundaries. Our determination to moralise property while it was defined by two political authorities, colonial and indigenous, compels us to adopt anachronistic views of the relationship between indigenous property and colonial administrations. In fact, indigenous and colonial political authorities recognised only too well that determination of property rights was a BLD. That is why there was political conflict. Unfortunately, colonial administrators found the solution to that indeterminacy in the modern idea of sovereignty, where property rights had no normative implications and were completely the prerogative of the state. Such a solution demonstrates that property can easily escape the confines of morality. Political philosophy needs to consider the role of property in creating legitimate political authority because only that type of philosophy can theorise the role of property in political order. As it exists as an empirical fact, property will continue to break the boundaries that law and morality attempt to impose upon it. In order that we might reduce the violence of the political reaction at that breaking point, we need principled guidance on the political actions that are justified. Only a political philosophy of property rights can deliver such guidance.

The conclusion to be drawn from these chapters is that the neglect of the idea of property rights in political philosophy is a very dangerous state of affairs. Especially for those concerned with equality, property rights are the apocryphal 'bull in the china shop' since the indeterminacy of property rights has the ability to silence the claims of justice. The state, for better or worse, enables the claims of justice to be acted upon, and without determinate property rights there is no state. Property is not a bore. It is the start of politics.

Chapter Two

Seeking the pith: the idea of property in political philosophy

To tell a poor man that he 'has' property because he 'has' arms and legs, that the hunger from which he suffers, and his power to sleep in the open air are his property, is to play upon words, and to add insult to injury.
 Pierre-Joseph Proudhon, *What is Property*.¹

Introduction

The modern political philosophy of property rights contains a number of concepts borrowed from law that place mental straitjackets on the subject, and ensure that property is no longer a category of substantive political theory. Instead property has been reduced to an analytical cipher – commonly known as the bundle-of-rights picture of property - of no significance in itself, which can be used only as a legal aide-memoire in the analysis of a society's other political principles. This chapter argues that the bundle-of-rights picture of property presents an inadequate norm for property, and in so doing precludes a complete investigation of property by political philosophy. As I have already suggested this task has been made much easier by the work of the legal theorist, J.C. Penner. I sketch his criticisms of the bundle of rights and discuss the implications of those criticisms for the field of political philosophy. As part of that discussion, I detail the various mistakes of intentionality and logic that comprise the history of political thought of the bundle-of-rights picture of property. The conclusion of the chapter is that the bundle theory focuses political thought on the moral claims of individuals to specific property rights rather than on the prior question of who has the justification to regulate those rights. Moral philosophy can provide various defences of various rights of ownership, and so provide normative languages in which to claim certain rights over property. However, when there is a conflict between those moral claims to property, the final decision and enforcement of that decision will lie

¹ ed. Donald R. Kelley and Bonnie G. Smith (Cambridge: Cambridge University Press, 1994), 50.

with a political institution, not a moral philosophy of ownership. In political philosophy of a normative kind that decision-making and coercive power over property rights should have justification. Since the bundle is a creature of law, it takes for granted that political authority has a right to make those laws. It is uninterested in whether or not a political authority is justified in claiming that right and so cannot be used to investigate a political theory of property. Indeed, as I argue in this chapter, the theory of the bundle positively rejects the idea that it is possible for property to be theorised in this manner.

Fortunately, in his jurisprudential investigations of property J.C. Penner has isolated a norm of property that is amenable to the speculations of political philosophy. He defines property as a right *in rem* of exclusion. That norm has the benefit of generality while still being able to be interrogated as an ownership right for purposes of the moral philosophies of ownership. For instance, one could use labour theory to examine the morality of individual's particular right to exclude others from his or her property, while at the same time discussing the justification of a political authority's general right to regulate that right of exclusion. Thus, it allows the idea of property in this thesis to remain agnostic on the morality of ownership. By agnostic I mean that an individual right to exclude others could be defended on any of the various moral theories of property ownership, but does not presume any of them. That means property is not bound to any particular moral view, and this allows the thesis to escape the political moralism into which political theory of property is forced by the bundle-of-rights picture of property. This thesis, then, defends the ability of political philosophy to have a pluralist conception of ownership. This is particularly important if a political philosophy of property is to be part of the justification of the state, and not a creation of the particular moral hue of that state's relationship with its citizens.

Property in modern political philosophy

The dominant idea of property in modern political philosophy can be spelt out with some ease.² 'Property' is a bundle of rights; rights that exist as part of a legal system between persons over a certain 'thing'. To put it another way, individuals have no real rights in

² More correctly, I am delineating here the idea of property in modern legal philosophy, but as both Becker and Penner have commented the 'bundle of rights' approach is the dominant language of property in legal, moral and political philosophy. Lawrence C. Becker, "Too Much Property: Review of Books on Property by Munzer and Waldron", *Philosophy and Public Affairs*, vol. 21, no. 2 (1996), 198; J. E. Penner, "The 'Bundle of Rights' Picture of Property", *UCLA Law Review*, vol. 43, no. 3 (1996), 712-5.

property, no rights to a ‘thing’, only rights and duties with other individuals over that property. As Penner describes the idea, ‘any standard right in property is properly treated as a bundle of rights the owner holds against others.’³ That the bundle of rights paradigm dominates the political philosophy of property is without doubt. Indeed, Becker, suggests that ‘that the actual nature of property has been satisfactorily explained by the Hohfeld-Honoré bundle of rights analysis’.⁴ The bundle of rights thesis is now viewed as such a well tested paradigm that Becker ends his review article by asking that further thought on property move into the particular problems of law and property.⁵ The move from a satisfactory explanation of property in moral and legal philosophy to the suggestion that it is adequate for political philosophy, however, should not be taken for granted. Even the language of that claim is suggestive, for in political philosophy or theory, first and foremost it would be property *rights*, not the object itself, that needed examination, since it is the rights which structure the relations of property with institutions and society. Against Becker’s view, this chapter asserts that the actual nature of property in political philosophy is not so well understood as to be passed over lightly. The next section sets out the dominant idea of property, the bundle of rights thesis, in order to provide the reader with some context, before the chapter moves on to question whether the strength and position of that thesis is assured as Becker would have it.

The bundle of rights thesis starts with the breakdown of all legal relationships through the prism of Hohfeld’s analytical vocabulary⁶ of the basic legal concepts. There are four basic legal elements in Hohfeld’s vocabulary which describe the basic legal relationships possible with other people: claim rights, liberties, powers and immunities. From this analysis of legal rights we understand that property rights are no more than legal relationships with other people rather than a legal relationship with the property. The actual rights that are usually

³ Penner, “The ‘Bundle of Rights’ Picture of Property”, 712.

⁴ Becker, “Too Much Property”, 198.

⁵ I owe the chapter title to Becker’s comments on this point. Noting the amount of work on Hohfeld and Honoré, he states ‘Two sorts of things have now been done enough (perhaps even overdone). One is the extensive recapitulation and dissection of the now standard conceptual apparatus of property theory.... The other... is the detailed recapitulation of certain substantive arguments that are known to be dead ends... Robert Nozick’s memorable comments on the “mixing of one’s labour” notion from Locke are exactly what is needed: *the pith.*’ Ibid., 198 (Italics added).

⁶ Following Munzer I refer to Hohfeld’s categorisation as an analytical vocabulary rather than the ‘Hohfeldian analysis of property rights’, as ‘his vocabulary is as applicable to tort and contract and civil procedure as it is to property’, Munzer, *A Theory of Property*, 22. Later I shall show also that Hohfeld’s intention in applying his framework to property is not clear.

seen as property rights – such as the right to transfer property – are then provided by Honoré’s list of the elements in the notion of ownership. The elements described by Honoré can be categorised into the four basic categories of Hohfeld. Munzer describes well the interrelation of Hohfeld and Honoré when he suggests that the

...idea of *property* – or if you prefer, the sophisticated or legal conception of property – involves a constellation of Hohfeldian elements, correlatives and opposites; a specification of standard incidents of ownership and other related by less powerful interests; and a catalogue of ‘things’ (tangible and intangible) that are the subjects of these incidents. Hohfeld’s conceptions are normative modalities. In the more specific form of Honoré’s incidents, these are the relations that constitute property. Metaphorically, they are the ‘sticks’ in the bundle called property.⁷

The Hohfeldian vocabulary

The Hohfeldian vocabulary concerns basic legal relationships, and has been used by writers on property as an analysis of both moral rights around property (Munzer) and as the basis for a more fundamental overturning of thinking about property rights as a rights to a ‘thing’ as they have been considered from Locke to Blackstone. Displayed below are Hohfeld’s legal conceptions⁸ as conceived by Munzer:

Elements	Correlatives	Opposites
Claim-Right	Duty	No-Right
Privilege (Liberty)	No-Right	Duty
Power	Liability	Disability (No-Power)
Immunity	Disability	Liability

The fundamental legal conceptions are the eight items in the elements and correlatives columns.⁹ A claim-right is rather obvious; if I have a legal claim right to \$100 from another individual, I may claim money. A privilege is a liberty from interference in doing whatever that privilege enables me to do or not do; that is, there is no correlative duty. A power is the ability to change my own or someone else’s legal status, but is not ‘liability’ in the strict legal sense. Liability is a susceptibility to having one’s legal position altered but it need not be harmful. For example, becoming a beneficiary of a trust changes one’s legal position. Immunity means that someone cannot alter your legal position. For example, a buyer cannot

⁷ Ibid., 23.

⁸ Ibid., 18.

⁹ See also David Lyons, “The Correlativity of Rights and Duties”, *Nous*, vol. 4, no. 1 (1970), 45-57.

usually force a homeowner to sell his or her property and so the homeowner is immune from any changes to his or her legal rights in that relationship.

Hohfeld developed the analysis to aid legal reasoning in courts. It is, in its intention and in its method, a frame into which lawyers may slot particular laws and find where they contradict.¹⁰ Hohfeld states explicitly that he repudiates the connotation in advance that the article is a ‘philosophical inquiry into the nature of law and legal relations. Rather, his main purpose is to ‘aid in the understanding and in the solution of practical, everyday problems of law.’¹¹ Given this intention, it is necessarily a grab all – it has no explicit moral intention, no theory of what rights should be accepted. Indeed it is hardly a definition at all. Rather it is a pacifier of complication, a coin-sorter of legal relationships. One should not be too hasty to negate it; the point that Hohfeld made with his framework – that legal rights are actually with other individuals and do not belong with the property itself – is a worthy point and one which radically changed writing on property. My point, however, is that such sorting of rights, seemingly so helpful for analysis, should not be expected to carry the analysis of property for the purposes of moral or political philosophy.

Honoré’s influence

After Hohfeld’s vocabulary of legal rights it was a further sixty years before any attempt was made to elucidate how his fundamental legal conceptions would be used when looking at property rights. A.M. Honoré took up the challenge by offering a conception of ownership that set out ‘an account of the standard accounts of ownership: i.e. those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system.’¹² Honoré identified eleven of these elements in the notion of ownership. Each of the elements is capable of variation, both in definition and in the range of things to which it applies. Full ownership is the holding of all the eleven elements, in whatever way they may be defined.

¹⁰ A point made explicitly by Munzer in his discussion of how one needs to understand the laws of a country in order to use the Hohfeldian analysis with any accuracy: ‘the point is that people cannot employ it accurately without a grasp of the relevant law. Munzer, *A Theory of Property*, 20-22, esp. 20. Penner also makes some interesting comments on the way in which the bundle thesis has hindered the development of property definitions. See Penner, “The ‘Bundle of Rights’ Picture of Property”, 719-22.

¹¹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, 3 ed. (New Haven: Yale University Press, 1964), 27.

¹² A.M. Honoré, “Ownership” in *Oxford Essays in Jurisprudence*, ed. A.G. Guest (Oxford: Clarendon Press, 1961), 112.

Becker suggests that ‘the test of success in what he [Honoré] has done is not the discovery of immutable atoms of the concept of ownership, but rather the ability of the analysis to advance understanding.’¹³ In this statement, perhaps inadvertently, Becker is offering his most explicit acknowledgement that his own understanding of property is vague and uncertain. If a thing is not clearly known, but viewed through the frame of the bundle is more clearly known than before, it must at the start be very unknown indeed. Becker’s reconfiguration of the elements is most helpful as he used Hohfeld’s work to name the type of legal relations involved in each of the incidents of ownership (Hohfeld’s categories are in the brackets). Becker having split one of Honoré’s element into three, puts forward a list of thirteen:¹⁴

1. the right (claim) to possess – that is, to exclusive physical control of the thing.
Where the thing is non-corporeal, possession may be understood metaphorically
2. the right (liberty) to use- that is, to personal enjoyment of the benefits of the thing (other than those of management and income)
3. The right (power) to manage – that is, to decide how and by whom a thing shall be used
4. The right (claim) to the income – That is, to the benefits derived from foregoing personal use of a thing, and allowing others to use it.
5. The right (liberty) to consume or destroy – that is, to annihilate the thing.
6. The right (liberty) to modify – that is, to effect changes less extensive than annihilation.
7. The right (power) to alienate – that is, to carry out *inter vivos* transfers by exchange or gift, and to abandon ownership.
8. The right (power) to transmit – that is, to devise or bequeath the thing
9. The right (claim) to security – that is, to immunity from expropriation
10. The absence of term – that is, to indeterminate length of one’s ownership rights.
11. The prohibition of harmful use – that is, one’s duty to forbear from using the thing in ways harmful to oneself or others.
12. Liability to execution – that is, liability to having the thing taken away as payment for a debt.

¹³ Lawrence C. Becker, “The Moral Basis of Property Rights” in *Property*, ed. John William Chapman and J. Roland Pennock, *Nomos* (New York: New York University Press, 1980), 190.

¹⁴ Adapted from *Ibid.*, 191-2.

13. Residuary rules – that is, the rules governing the reversion to another, if any, of ownership rights which have expired or been abandoned. This category includes rules as various as those for determining the reversion of rights upon the expiration of leases, for determining the heirs in cases where the power to devise or bequeath does not exist, for determining the disposition of the property left by inter-estate deaths, and for determining the disposition of abandoned property.

This list is most interesting for a lawyer, or a property owner faced with competing claims in a property dispute. The question of who has the most in the bundle may help decide to whom the property belongs. Yet it precludes the normative question of whether those interests are right or fair or just. For instance, is liability to execution more compelling an ownership right than the right to security?

The descriptive quality of Honoré's elements of ownership produces more questions than can be answered: possibly a good thing in an initial research question – but of what use as a frame for political philosophy? Can one, for example, reduce all instances of ownership to these relatively simple points? Honoré obviously thought not given the qualifications he put on the list; he was all too aware that the concept of property could be cut in a number of different ways and that a person could be called an owner of property without having all the rights listed.¹⁵ After all, given the slight analysis he provides of how he produced the list, how is one to ensure that reconstituting one element does not change the list entirely? And on what basis is one to judge Becker's attempt at refining the list? We have no basis for evaluating the probity of the list, except to examine whether existing laws can be placed in one of the elements or not. This type of test begs the larger question – is it an empirical experiment which attempts to place all laws into the categories provided (which in turn begs many normative questions), or a normative theory of property? Unfortunately, one also then encounters boundary problems: which laws are about property and which are not? Which brings us back to the original problem of what is property? This problem has been left unresolved by the bundle of rights schema.

In essence, we have a list of *some* elements that *may or may not* comprise *some* parts of ownership.¹⁶ While this might be helpful to lawyers looking at particular cases, there is some

¹⁵ Honoré, "Ownership", 113.

¹⁶ A point Waldron makes: 'It would be a mistake to think that Honoré intends this list of standard incidents to be taken as necessary or jointly sufficient conditions of ownership. It is intended more as an elucidation of certain common features of ownership along the lines of a Wittgensteinian 'family resemblance' analysis. The

difficulty in understanding its relevance to modern political philosophy. One has neither a definition of property as a thing – since the traditional interpretation of Hohfeld dismisses this – nor does one have an explicit definition of the relations around property. The Hohfeld-Honoré combination is simply too vague to provide such definitions. It is all too relative. In the place of moral principles, laws are to be used to define the principles of property rights in politics, and jurisprudence has so far offered little insight into the connection between the production of law and moral theory. As Munzer states the problem of property, ‘in political theory...[it is]...a normative problem to show what things should be open to ownership’.¹⁷ Yet the bundle of rights offers no normative guidance on property. Having set out the basic bundle thesis and some general observations about the problems associated with it, some more detailed analysis is needed to spell out the problems in a way that can be defended.

Property as a bundle of rights

One critic of the bundle of rights thesis, J.C. Penner, argues at length against the bundle’s position as a dominant paradigm on the grounds that it is nothing more than a simple categorisation exercise for lawyers in property cases; the thesis he suggests does little more than create an image, while providing no clarity. He likens the bundle thesis to a slogan, and comments that ‘like all good slogans, [the bundle]... rhetorically assuages the unease that results from our knowing that there are real problems which, if plainly articulated, would demand serious consideration.’¹⁸ Penner bases this disparaging view, in essence, on two points. First, that the bundle of rights thesis has no ‘canonical formulation’. Second, that no methodology is given by the thesis for dealing with property issues. The first point is not at first glance, a particularly damning argument; after all, there is no canonical formulation of twentieth century liberal political theory – post Rawlsian theory at least. Further, one would

idea of family resemblance enables us to accommodate a certain amount of variation here and there, without abandoning our faith in some constancy in the way the term is used. See Waldron, *The Right to Private Property*, 49-50. Waldron then draws a distinction between concepts and conceptions (via Rawls and Dworkin) suggesting that the bundle is useful for lawyers dealing with the concrete forms of property (conceptions of property), but that we may think about property or ownership in the abstract (the concept of property). He is making a distinction between definitions of property arising from justifications for a ‘system of property’ and a definition of property per se. This doesn’t seem to me to alleviate the problems of defining property as laid out in the critique of the bundle of rights below. Whether property is a concept or a number of conceptions, there is still nothing in and of itself that forces theorists to spell out the assumptions about political systems that they imagine exist to support property.

¹⁷ Munzer, *A Theory of Property*, 23.

¹⁸ Penner, “The ‘Bundle of Rights’ Picture of Property”, 714.

not, in any normative situation, suggest that liberalism is a slogan which inhibits our discussion of real issues. However, the point which Penner demonstrates is that the bundle of rights thesis actually generates two very different but interrelated theses and the confusion of this bipolar schema makes a methodology almost impossible to generate. This in turn suggests that there can be no defensible canonical formulation. Penner draws the two theses from the bundle-of-rights picture by calling into question the assumption that one can combine the analysis of Hohfeld and Honoré. He makes the point that ‘Hohfeld’s consideration of property is that one can well do without any concept of a thing, as in a ‘right to a thing’, while Honoré’s views depend upon formulating one.’¹⁹ This, Penner maintains, is an ‘unsatisfactory intellectual foundation’²⁰ insofar as it produces two quite different versions of the bundle thesis which need to be criticised from quite different perspectives.

The first thesis he names the ‘substantive’ version. In this thesis ‘property is a bundle of rights in the sense that property is a naturally complex normative relation that should be regarded as an historically contingent association of various rights.’²¹ The second version of the thesis, the ‘conceptual’ bundle, is drawn from Hoffmaster’s definition of property as a relative concept.

The concept of property is ... flexible and malleable ... A statement of ownership is a conclusion drawn from comparing a particular combination of the incidents of ownership, existing together in a determinate situation, with the paradigm of ownership... A strategy that begins by defining the ‘essence’ of property ... is fallacious because if there are any essentialist concepts at all, property is not one of them²²

In this version of the bundle of rights, all is relative. Each of Honoré’s sticks can be used in any variation. As far as one can see, the defining element is that the writer calls them property rights; no particular view is definitive.²³ Both these two versions of the bundle thesis overlap or support each other. The sticks of the substantive version give the conceptual thesis its basic tools. The conceptual version aids the use of the substantive by providing the criteria for deciding which laws are to be aggregated as the separate property

¹⁹ Ibid., 722.

²⁰ Ibid.

²¹ Ibid., 722-3.

²² Barry Hoffmaster, “Between the Sacred and the Profane: Bodies, Property, and Patents in the *Moore* Case”, *Intellectual Property Journal*, vol. 7 (1992), 128-30.

²³ Penner, “The ‘Bundle of Rights’ Picture of Property”, 723.

right sticks in the bundle. The separate theses are generated because of different interpretations possible when combining Hohfeld and Honoré.

Hohfeld on rights in rem and in personam and property rights

The bundle of rights thesis is grounded in Hohfeld's discussion of rights *in rem* and *in personam*²⁴; it provides the frame for his denunciation of the possibility of having 'rights in things' i.e. his critique of the simple view that a property right is a right in a piece of property. Hohfeld begins his discussion of the two concepts of right with the uncontroversial claim that jural relations, rights included of course, obtain between persons: 'since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.'²⁵ That is, all rights are really against persons; and 'whether they are proceedings, or *rights in rem* depends on the number of persons affected.'²⁶ So it is the scope of a right that makes a 'right *in rem*' a general right, and differentiates it from an individual's claim right. That is, while I may contract specifically with someone regarding my land, I have a general claim right to sell it to whomsoever I chose. This means that while a right relating to a thing 'may be functional with respect to describing one variety of rights *in rem*, no concept of a right to a thing provides any plausible basis for defining a subset of rights *in rem* under the rubric of 'property rights.'²⁷

So no special place exists for property rights in Hohfeld's categorisation of rights. Why then is he held to have such significance? Because 'from Hohfeld we understand property is a legal complex, consisting of an aggregate of rights, privileges, powers and immunities of a characteristic kind..., all of which are multital jural relations; this complex aggregate does not necessarily (though it may) relate to some tangible object....'²⁸ The oft cited quote from Hohfeld on this point is:

²⁴Roughly rights in general, and rights agreed by two parties, respectively. More specifically, 'A paucital right, or claim (a right *in personam*), is either a unique right residing in a person (or group of persons) and availing respectively against a few definite persons. A multital right, or claim (right *in rem*), is always *one* of a large class of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people.' Hohfeld, *Fundamental Legal Conceptions*, 72.

²⁵ Ibid., 75.

²⁶ Ibid. from Chief Justice Holmes, *Tyler v. Court of Registration*, (1900), 175 Mass, 71, 76.

²⁷ Penner, "The 'Bundle of Rights' Picture of Property", 725.

²⁸ Ibid., 730.

Suppose, for example, that A is a fee-simple owner of Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call land consists of a complex aggregate of rights (or claims), privileges, powers, immunities. First, A has multital legal rights or claims, that others, respectively, shall not enter on the land, that they shall not cause physical harm to the land, etc...Second A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc... Third, A has the power to alienate his legal interest to another, ...to create a life estate in another,...to create a privilege of entrance in any other person by giving 'leave and license'...Fourth, A has an indefinite number of legal immunities...Thus A has the immunity that no ordinary person can alienate A's legal interest or aggregate or jural relations to another person...²⁹

As Penner has pointed out, it is difficult to decide between the two possible interpretations that Hohfeld's argument might produce. The first interpretation is that 'Hohfeld was merely expressing the point that property is a relation between persons that concerns things'. The second and more radical interpretation for both Hohfeld's and our understanding of property is that he understood the legal concept of property as a particular 'kind of aggregate of jural relations where it is the *configuration and extent* of those relations that endows it with the character of "property", *not* any reference to some "object of ownership".³⁰

Honoré's elements of property

Honoré is generally thought to have provided delineation of the sticks in the bundle of rights thesis for which Hohfeld had provided the frame. Following the bundle as an analogy, Hohfeld cut the tree down, but Honoré cut the trunk into its sticks. In Penner's words Honoré provided the 'substance' for the bundle of rights thesis. We have already seen the list of elements of ownership provided by Honoré and that Becker and others have built upon this list. The article which introduced Honoré's incidents of ownership is remarkable for how little background it gives as to the method that he used to produce the list. Honoré is, however, more forthcoming on the goal he meant to achieve.

I propose, therefore, to begin by giving an account of the standard incidents of ownership: i.e. those legal rights, duties, and other incident which apply, in the ordinary case, to the *person who has the greatest interest in a thing* admitted by a mature legal system. To do so will be to analyse the concept of ownership... rather than in any more restricted notion to which the same label may be attached in certain contexts.³¹

A clearer statement that Honoré was relating the concept of ownership to a 'thing' could not be made. As Honoré goes on to state, 'there is, clearly, a close connection between the idea of ownership and the idea of a thing owned as is shown by the use of words such as

²⁹ Hohfeld, *Fundamental Legal Conceptions*, 96-7.

³⁰ Penner, "The 'Bundle of Rights' Picture of Property", 731.

³¹ Honoré, "Ownership", 107 (Italics added).

‘property’ to designate both.³² At this point, Penner’s trouble with the Hohfeld-Honoré combination starts to become very clear. Honoré is not filling in the gaps of a radical version of the interpretation which takes Hohfeld as suggesting property has no inherent substance. Honoré, in his approach denies such an attempt is possible when he suggests the close connection between the idea of ownership and the thing owned. As Penner puts it:

[Honoré’s] remarks do not serve as a foundation for a radical version of the bundle of rights view that escapes the “right to a thing” approach. Indeed, one might regard Honoré’s paper as capturing the bundle of rights picture of property, taking the promise of analysis of property that depends purely on a characteristic configuration of norms, a patterned congeries of rights and duties and so on with no reference to any underlying substantive content, and reducing it to a much more mundane thesis; that the right to a thing is complex, and indeed involves what might be regarded as a ‘bundle’ of rights.³³

This is the same conclusion reached by Pavlos Eleftheriadis. He states that Honoré’s contribution to the bundle of rights thesis does not take us away, as promised by Hohfeld’s initial work, from the idea of a property right as a right to a thing. Interestingly, however, Eleftheriadis argues that a Hohfeldian analysis does work with property, that property rights are between people, and not with a ‘thing’. Yet he and Penner agree that the bundle of rights thesis does not explain the concept of property satisfactorily. Eleftheriadis argues that Hohfeld’s analysis is correct through his demolition of two popular critiques of the attempt to use Hohfeld to explain property rights. He characterises these critiques in two theses:

Thesis (1): Property

The distinction between rights to property and other rights in private law follows the formal distinction between ‘rights to things’ and ‘rights against persons’. Property rights are ‘rights to things’. Rights arising in torts or contract are ‘rights against persons’

Thesis (2) Private Property

The right to private property establishes an exclusive relation between the thing and one person. In a regime of private property the owner is the exclusive holder of the right to the thing³⁴

Eleftheriadis, to cut short his demolition of Waldron’s defence of thesis one, points out that in legal discourse ‘It is always an error to...contrast ‘rights to things’ with ‘rights against

³² Ibid., 128.

³³ Penner, “The ‘Bundle of Rights’ Picture of Property”, 733.

³⁴ Pavlos Eleftheriadis, “The Analysis of Property Rights”, *Oxford Journal of Legal Studies*, vol. 16, no. 1 (1996), 32. Eleftheriadis does make an important side note to these two theses, which is also a theme in this chapter, when he states ‘although this account of property is incompatible with the Hohfeldian analysis of property rights, it does not necessarily deny that there are some Hohfeldian relations arising out of property’: That is, although in this chapter I deny that Hohfeld and Honoré add to the knowledge about the political philosophy of property rights, I am not denying that Hohfeld’s idea of legal relations cannot be applied across legal or even moral rights.

persons³⁵ as if these referred to conceptually different categories of rights', as legal relationships are always between people. Given such reasoning, thesis one collapses, and from this Eleftheriadis concludes thesis two also collapses since it depends on thesis one. Without the first thesis, the second thesis comes to mean that ownership would be absolute, since the exclusive relation between the 'owner' and the 'thing' could not be mediated by any general rights against owners. Eleftheriadis maintains this would be an absurd position to hold since 'this would mean the owner, by virtue of this very real treasure (absolute ownership) would be transformed into a complete sovereign over his fellow citizens.'³⁶ He quotes Joseph Singer to give a picture of the ideas behind thesis two;

We are interested in identifying a single person as the owner because we assume that, with certain exceptions, the owner prevails in a dispute with the non-owner. In other words, we presume that owners control and use their property as they see fit until we are convinced otherwise. This image creates a core and a periphery. The core is an area of freedom for the 'owner'; the periphery limits the owner's freedom [in order] to protect the interests of others.³⁷

Eleftheriadis concludes that once a conceptual distinction between 'rights to the thing' and 'rights against persons' is abandoned, thesis (2) becomes untenable and the simple distinction between core and periphery collapses. The notion of property and the further idea of a core of private property becomes riddled with much more complex issues.

The disintegration of property as a category

We have seen that the accounts of property proffered by Hohfeld and Honoré are problematic, and that Becker's statement that all the problems around the concept of property have been solved, or that at the least we can make do with them, is unsound. I have argued already, and extend upon this, that the assumptions upon which the bundle-of-rights conception of property is based are antithetical to political philosophy and need much work before they can be accepted as helpful to understanding of political institutions in any way. Before moving into the more precise analytical arguments, however, I want to explore an article that puts more flesh on my argument regarding the general nature of property as a concept in the twentieth century. The article, by Thomas Grey, suggests that,

We have gone, then, in the last two centuries, from a world in which property was a central idea mirroring a clearly understood institution, to one in which it is no longer a coherent or

³⁵ Ibid., 40.

³⁶ Ibid., 41.

³⁷ Joseph Singer, "The Reliance Interest in Property", *Stanford Law Review*, vol. 40, no. 3 (1988), 641.

crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated.³⁸

At a linguistic level, Grey contends that there is no longer ‘any coherent concept of property encompassing both simple-thing ownership on the one hand, and the variety of legal entitlements that are generally called property rights on the other.’³⁹ If this is true, then, Grey argues, the morality of political argument around property no longer has any purchase upon political institutions. Indeed, moral statements about property become antithetical to the nature of property within law. Hence, he argues, the substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory.⁴⁰ Grey can state this because, in his – admittedly brief – analysis of the development of a largely capitalist market economy, rights *in rem*⁴¹ have been substituted for rights *in personam*. We have gone, he contends, from regulation to individual contracts. In a clever use of the original hypothetical example put forward by Hohfeld, Grey shows how, in the twentieth century, he believes rights *in rem* to have been dissipated.

Yesterday A owned Blackacre; among his rights of ownership was the legal power to leave the land idle, even though developing it would bring a good income. Today A puts Blackacre in trust, conveying it to B (the trustee) for the benefit of C (the beneficiary). Now no one any longer has the legal power to use the land uneconomically or to leave it idle – that part of the rights of ownership is neither in A nor B nor C, but has disappeared.⁴²

The same, Grey contends can be said of ownership generally; if a full owner starts to sell off the sticks of the bundle of rights comprising his or her ownership – leasing it for a year, giving it over to a property agent to manage the lease – when does he or she cease to be the owner? In general sum, Grey contends that

...with very few exceptions, all of the private law institutions of mature capitalism can be imagined as arising from the voluntary decompositions and recombination of elements of simple ownership, under a regime in which owners are allowed to divide and transfer their interests as they wish.⁴³

Early in his book Munzer attempts to dispose of Grey’s argument. He does so reducing the argument so that is ‘stripped to essentials’ and then suggesting that it lacks coherence.

³⁸ Grey, “The Disintegration of Property”, 74.

³⁹ Ibid., 78.

⁴⁰ Ibid., 81.

⁴¹ Grey defines ‘rights *in rem*’ as rights good against the world, and ‘rights *in personam*’ as rights good against determinate people. Ibid.

⁴² Ibid., 70.

⁴³ Ibid., 75.

Munzer contends that Grey's argument can be simplified to the following 'quartet of premises and a trio of conclusions':

- P1. The eighteenth-century conception of property, which is also the ordinary conception, views property as the ownership of material things.
- P2. Traditional capitalism supported property understood according to that conception
- P3. Traditional Marxism attacked property understood according to that conception.
- P4. Because of disintegration, property today is not identical with the ownership of material things.

Therefore

- C1. Traditional capitalism is undermined.
- C2. Traditional Marxism is undermined.
- C3. Property is no longer an important category in legal and political theory.⁴⁴

Shorn of all other material in this way, Grey's argument inevitably looks 'overdrawn' and 'confused'.⁴⁵ The theoretical material will not just look 'stylised' as Munzer would have it, but is simple in the absurd. After making it look absurd, however, Munzer decides to take seriously Grey's argument and puts reasons forward as to why the propositions do not hold historically, and why the theoretical arguments could easily be reframed so that 'both capitalism and Marxism ... do not depend on identifying property with the ownership of material things.'⁴⁶ But Grey's point – aside from his severely simple historiographical explanation of the redundancy of property as a category in political theory – is that the dominant uses of property as a concept have created a situation in which property is 'no longer a coherent or crucial category in our conceptual scheme'.⁴⁷ Therefore Munzer proves Grey correct. By removing any substance from the idea of property in those theories, Munzer himself demonstrates how tenuous is the purchase of property as a category in political theory. Munzer may not see this as an area of grave concern – and clearly does not given his focus on the meta-theoretical aspects of Grey's article. Yet Grey poses a difficult question: how is it possible to integrate into a political theory a concept antithetical to the uses of common speech and which is not altogether coherent? From the melange which is property, to borrow from Raz, how does one generate a political morality, a principled approach to political actions concerning property?⁴⁸

⁴⁴ Munzer, *A Theory of Property*, 32.

⁴⁵ *Ibid.*, 33.

⁴⁶ *Ibid.*, 34.

⁴⁷ Grey, "The Disintegration of Property", 74.

⁴⁸ Raz, *The Morality of Freedom*, 3. It should be noted that Raz is talking about political theory in general terms, not specifically a political theory of property.

Some may contend that Grey is simply stating the obvious – that the justifications of property are many – and this need not concern us.⁴⁹ This may well be true. I wish to read the statement, however, in different light. The interpretation I wish to explore is that Grey was pointing out how little aid the bundle of rights thesis gives to discussions of property within political theory. He is not ejecting property per se from out discussions of political theory, but twentieth century conceptions of property. He is rejecting a conception of property that allows no morality, or to put it another way, allows for so many different moralities, that it is of no consequence in political theory. The bundle of rights thesis, in its methodology, does away with the idea of property rights before one has even started to investigate them. The bundle thesis transmogrifies into debates over rights between individuals over land that, like the abortion debate, reflect little more than a country's laws, and people's moral intuitions about the moral propriety of those laws. In short, for the purposes of this chapter, Grey's article will be read as producing this thesis: given property rights as a bundle of rights, property is no longer an important category in political theory. In the next section of this chapter I want to show in detail why such a thesis is warranted.

Critiquing the bundle of rights thesis – and dismissing the disintegration thesis.

As noted earlier, Penner advocates two possible interpretations of the bundle of rights thesis. One is the substantive bundle – this is the interpretation that regarded 'property is a naturally complex normative relation that should be regarded as an historically contingent association

⁴⁹ Penner takes a slightly different line to mine. Grey's argument, he states 'is a straightforward application of classical semantics; if the bundle of rights thesis of property permits multiple definitions of property, then the term is applied on the basis of different sets of necessary and sufficient conditions. We therefore have different concepts not the same concept. Penner, "The 'Bundle of Rights' Picture of Property", 770. But a second disintegration thesis – or what Penner calls the 'uselessness thesis' – is that 'the bundle of rights leads to a 'concept' of property which has no determinate realm of application. Rather, property is a flexible or malleable concept, with no definable essence, and no guidelines for definition which might in any way govern its application in particular circumstances.' This is also Hoffmaster's version of property. 'A statement of ownership is a *conclusion* drawn from comparing a particular combination of the incidents of ownership existing together in a determinate situation, with the paradigm of ownership.' Hoffmaster, "Between the Sacred and the Profane: Bodies, Property, and Patents in the *Moore* Case", 129., quoted in Penner, "The 'Bundle of Rights' Picture of Property", 770. The idea here is that 'property' is a special kind of concept which is only used to make particular kinds of legal statements. 'Property' is not a term which simply applies to particular normative situations, say to the case where I won a house; rather 'property' serves a peculiar linguistic role, as an identifier that a certain sort of legal or philosophical discussion has concluded. In other words, 'property is only used *prescriptively*, to lay down a rule or state a result in a case for the parties; it is never used *descriptively*, to characterise a normative situation simply because of the features it manifests.' Penner, "The 'Bundle of Rights' Picture of Property", 771.

of various rights'.⁵⁰ This idea of the bundle is that property is made up of a number of different rights to a thing. As Penner notes, this interpretation is a little odd at first sight because the bundle idea is normally associated with the loss of property rights as a right to a thing.⁵¹ That is, such interpretation of the bundle thesis offers little more than the idea that property is complex. The other interpretation of the bundle thesis – the conceptual bundle or thesis – regarded property as a concept in which each particular case of a 'thing': 'the various incidents or indicia of property may add up in some way, or show sufficient resemblance to a paradigm, such that 'property' is correctly applied to describe it.'⁵² So the substantive idea of property is about the sticks. The two bundle theses are produced because Hohfeld's writings produce two possible interpretations – rights between people, or rights with a thing – and Honoré approached property with the latter interpretation of Hohfeld, but his ideas have been made to support both by later writers.⁵³ The first thesis issues a challenge to later writers to come up with a substantive bundle-of rights that will be called property rights, that will declare what is property, and what rights attach to it, and the thesis will be complete in form. The second thesis, quite oppositely, declares that property in general is unknowable, and has to refer to each discrete case. The theses are critiqued separately.

Critiquing the substantive view

Penner's most basic argument against the substantive 'bundle of rights' thesis is that the explanation it offers avoids the complexity of property rights and instead clouds the issue with other equally relative concepts of political theory.

While property is complex, it is not complex because it is a 'bundle of rights'. Lots of rights are just as much this kind of bundle, but we do not thrash about in conceptual confusion.⁵⁴

Penner makes the point that while the bundle might be a good analogy for rights – for instance human rights – it should not be used to replace conceptual clarity. For instance, in the substantive thesis, must one imagine each separate property right as a bundle of sticks or as slices of a cake? Since the substantive bundle captures all that is property and is part of an overall view of legal relationships, the cake is perhaps the better analogy. However, the war

⁵⁰ Penner, "The 'Bundle of Rights' Picture of Property", 722.

⁵¹ Ibid., 731-2.

⁵² Ibid. 723

⁵³ See, for instance Becker, "Too Much Property".

⁵⁴ Penner, "The 'Bundle of Rights' Picture of Property", 739.

between the bundle and the cake is a spurious conflict. Cake or sticks, the idea of ‘property’ still has no sharper focus as it remains unclear what purpose it serves other than as an adjective. While it may be painful, the analogy of the cake serves some purpose so the reader is asked to bear with it for a moment longer.

The legal relationships predicated by the word ‘property’ do not combine into a bundle of rights because they are only related by the adjective ‘property’. ‘Property’ is seen as a singly cake from which the different rights are cut. Yet the making of a cake is completely different from the way in which it will be cut. The product not even end up divided and certainly it is not necessary that the cake be partitioned the same way each time. As Penner points out, the ‘law of property did [not]create the capacity to eat apples; property protects my natural capacity to eat apples which are mine.’⁵⁵ That is, moral ideas are able to circulate outside property laws. Legal systems are not necessarily reflective of those ideas and find it difficult to group certain rights as ‘property’ in any definable sense, hence, the bundle of rights idea. It does not follow from this separation between morality and law that there can be no distinct concept of property. As with a cake, the intentions displayed in making the cake, such as decisions on the recipes and the cooking equipment, do not have to indicate how the cake is to be cut. The cutting, say in a group of people, is designed to fit that occasion – perhaps the cake has been designed for that occasion, perhaps not. Whatever the intent, to conflate the cooking and the cutting would mean that we would all design cakes with symmetrical (or not) indications of where to cut. Likewise, property exists as a concept outside of the idea of the legal system or the rights that legal system allocates. Why else do we see political protests over such moral issues as the property rights of indigenous fishing or government reserves? As Penner puts it

If we do not look past legal powers which merely facilitate otherwise pre-existing natural or social powers (a poor term to describe the power to commit oneself to another person, in an agreement for example), it appears that property can be nothing more than a series of powers or rights to use things, all of which have independent status.⁵⁶

The substantive thesis of the bundle of rights fails then in Penner’s view because it does not account for the complexity of property rights, nor does encompass all the qualities of

⁵⁵ Ibid., 766.

⁵⁶ Ibid.

property because the thesis can only justify each discrete piece of property and the right surrounding it. Munzer, though he uses the bundle thesis, makes this point:

A mastery of Hohfeld's vocabulary is not enough to resolve the issue. One also needs to know the law and to make sound policy decisions about it ... An analytical vocabulary does not dictate an answer, but it does clarify the choice a judge must make in imposing, or refusing to impose, a new duty.⁵⁷

In other words, one cannot use the bundle as a general philosophical rule to make moral decisions, for would be rule takes legal norms as the norms of property, rather than placing them in a wider context of political institutions and actions where individuals have moral as well as legal rules. As Penner states:

[p]roperty is indeed complicated, but it is complicated because of the natural ability of people to use different kinds of things in different ways, and because of its situation in a normative system wherein different rights and duties and powers interrelate and inform each other⁵⁸

The substantive bundle is, in its methodology, a tool for lawyers. To give it a status more than that is to suggest property rights are unimportant, and conflicts over property can be resolved easily between people or peoples without recourse to politics. This is simply untrue.

Critiquing the conceptual view

The conceptual bundle-of-rights view of property argues that each particular property case is different, and related only by certain sticks in each bundle. One way of imagining this thesis is to suggest that it examines the patterns that reoccur in certain cases involving rights *in rem*, where a thing is involved. Penner suggests that this view is created by theorists unable to find a definitive meaning of property.

Property, Penner argues, has been turned into a bundle of rights because it cannot be defined in the concrete manner that some writers desire. Those writers, he suggests, are working within 'a particular semantics, the Classical view, which sets very high standards for the knowledge which a speaker must have in order to apply a linguistic term such as 'property' correctly...'⁵⁹ This view has suggested that property must be a flexible term because it is without a definitive account; hence the conceptual bundle of rights solves the

⁵⁷ Munzer, *A Theory of Property*, 21.

⁵⁸ Penner, "The 'Bundle of Rights' Picture of Property", 767.

⁵⁹ *Ibid.*

problem because it is entirely flexible. On this view ‘property represents a defective concept: a concept which is useless, or more commonly, one which is merely a vague marker for a certain sort of discussion, a malleable and flexible word revealing few limits to its widespread application.’⁶⁰

The classical view should be harmless. That some theorists believe property is not a definitive concept should not damage the concept, as long as other scholars contend against that view by grappling with the problem of defining the concept of property. Yet, as has already been shown the bundle of rights thesis has become more than one competing view of property – it has become the definitive way of seeing property. There would be some humour in the bundle of rights thesis becoming the definition of property (given its origins in pointing out the innate inability of property, at law, to be defined) if it were not so damaging to the concept of property. For property, like justice or liberty, will never find a final definitive meaning. Such an ultimate concept would be only a moral construct, and will therefore provoke endless debate from which will spring ideas and argument that political authorities may use to provide plausible principles and reasons for their actions. Thus, the importance of discussing property lies not in finding a definitive view, but in searching for that view, and exposing all other views in that search. The use of the conceptual bundle-of-rights view of property as the paradigm of property is not damaging in itself. Rather, it is damaging because it negates other views of property. The conceptual view simply overarches them all, and suggests that debate is fruitless. The legal system has a number of rights which can be seen as property depending on your point of view, and one need not go further than simply categorising those rights.

This view of property defeats itself as a definition. As Penner points out, Grey’s uselessness thesis makes sense because property now has so many definitions – all relative under the conceptual bundle of rights thesis – that ‘as theorists, we are now in a state of confusion as to which rule for the application of the term we want to apply.’⁶¹ Property has become a policy choice, an instrument of categorising other moral choices. To put it another way, the bundle view of property rights may be critiqued in a manner similar to the attack by Sandel

⁶⁰ Ibid., 796.

⁶¹ Ibid., 797.

on the notion of the liberal individual. As Sandel pointed out, the view that the liberal individual was a moral palimpsest – that the liberal individual presupposed no moral ideas – was wrong; the liberal individual depended, prior to the rest of her or his moral views, on an absolute view of the necessity of choice. The individual had to believe in the primary liberal values.⁶² Like the liberal individual, the conceptual bundle of rights view – and the substantive view also – presupposes a view of society. This is not wrong in itself. Theories often presuppose ideas of society, political systems etc. The trouble lies with the view of society, or lack of one, presupposed by those who use the bundle of rights. Like Sandel’s insight into the theory of the liberal individual, the bundle of rights theory allows the person using it to avoid acknowledging the morality and implications of its use. This is perhaps an effect of its place as an overarching, or paradigmatic view, when it is merely a competing moral view; and a strangely vacuous one at that because it suggests property has no moral significance in politics.

To conclude the critique of the bundle-of-rights picture of property, it is a morally vacuous view because it has neither a supporting morality for its view of political institutions, nor reasons why individuals should view property through its lens. As Penner so well puts it

On the bundle of rights view we confuse ourselves by misunderstanding and over emphasising our freedom, thinking it is underpinned by the natural flexibility of terms, or their multiple meanings. But, as ever, our freedom is to think harder. We are always in danger of being confused by our stipulative and metaphorical uses of terms, but the bundle of rights picture suggests that this is impossible.⁶³

The bundle picture is little more than a categorisation exercise. Useful surely, but very limited because it allows the user’s moral prejudices to be hidden by a sophistication. Whether I decide that an element or incident of property should be included is up to me, and no clear logic can be worked through to allow for argument and defence, excepting court cases. Jurisprudentially the bundle is useful. For normative political philosophy or theory, it is a dead end.

⁶² Michael J. Sandel, “The Procedural Republic and the Unencumbered Self”, *Political Theory*, vol. 12, no. 1 (1984), 81-96.

⁶³ Penner, “The ‘Bundle of Rights’ Picture of Property”, 798.

A clearer picture of the idea of property in political philosophy; the exclusion thesis

Raz suggests that the task of political theory is to provide the principles – the political morality – which should guide political action, where political action is the construction of political institutions and their procedures.⁶⁴ To examine property, on this interpretation of the task of political theory, is to examine the principles that should guide political action over property. Most particularly the task is to examine the morality of those institutions that seek to ground their justification to regulate property in a general claim of authority. The most important of these institutions is the state, due to its claim to be the final authority in the regulation of all aspects of life.⁶⁵ Political theory, then, has a primary interest in the political morality of the claims of a state in its actions toward property.⁶⁶ Another way of putting this is to suggest that the legitimacy of a state rests on the principles or political morality that justify its claims to be the final authority. So political theory would investigate the rights and duties the state imposes upon its subjects.

A state's (or government's) legitimacy is the complex moral right it possess to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. Accordingly state legitimacy is the logical correlate of various obligations, including subjects' political obligations.⁶⁷

As regards property, then, the task of political philosophy is to examine the legitimacy of a state's claim to be the final authority over the rights and duties of property. As the bundle thesis fractures property into a number of rights and duties, the discourse of property is so reduced that it can no longer be of interest to political philosophy. As Penner puts it

If we are to take the bundle of rights analysis of property seriously we have to believe that the individual rights are like members of a club, that is, independent rights which under the auspices of particular legal systems have been bundled together to form property.⁶⁸

In the sections above, this chapter has remarked on the analytical difficulties of such a view. For political philosophy, the bundle of rights view presents a more practical problem. If property rights depend upon a myriad of different normative principles, then there is no particular normative justification of a state's treatment of the rights and duties of property.

⁶⁴ Raz, *The Morality of Freedom*, 3.

⁶⁵ *Ibid.*, 4.

⁶⁶ As Raz points out, there are many other institutions, such as trade unions, political parties, and private corporations that may lay claim to substantial power to regulate or control (have power over) parts of our lives, but they do not claim to be have the final and general authority of the state. *Ibid.*, 4-6.

⁶⁷ Simmons, *Justification and Legitimacy*, 130.

⁶⁸ Penner, "The 'Bundle of Rights' Picture of Property", 754.

On this understanding of ownership, political philosophy should discuss particular justifications of property rights and duties imposed by the state through the legal system, not the particular claim of a state to impose rights and duties arising from the need to regulate property. A theory of property would then be a moral cum legal analysis of the particular ways in which a number of different laws shape, and are shaped by, property.⁶⁹ This would seem to take for granted the state's right to impose rights and duties over property; that is, it would leave unexplained the general claim of the need for a state to regulate, at the very least in its own territory, and importantly for political philosophy of a liberal kind, the property of its subjects.

The first step to specifying the particular rights of property over which a state may claim authority is to recognise that it is rights held *in rem* that pique the interest of political philosophers. As the bundle-of-rights picture points out, other rights, such as those arising from contracts between individuals over property, are dealt with through justifications of other state regulatory activity such as contract law. That is, it is the right to exclude that requires the enforcement of duties of others, and so requires normative justification of political action. This right to exclude can be overstated. It is not the right of exclusion, for instance, of Locke's state of nature that implies a right of self-defence.⁷⁰ Rather it is a right which calls upon the state to enforce the exclusion to the degree that it thinks justified by the interest individuals have in using property. As Penner puts it, 'the right to property is like a gate, not a wall.'⁷¹ The right is 'grounded by the interest in the use of things', but at the same time acknowledges that 'our use of things is social'.⁷² Property, as a right to exclude in Penner's conception, is not to protect autonomy, but to allow individuals to use the thing from which others are excluded.⁷³ If it to be grounded in a need to protect autonomy, property would then encompass all laws which protected private action. For the same

⁶⁹ As, for instance in Munzer, *A Theory of Property*.

⁷⁰ Though this right of exclusion, arising as it does from the idea of property as a right *in rem*, draws on the history of natural law thought that is at least one of the intellectual languages upon which Locke drew. It captures the attempt by, for instance, Grotius, Pufendorf and Locke to justify the exclusionary property rights from the common. See Chapter Four, and Gordon Schochet, "'Guards and Fences': Property and Obligation in Locke's Political Thought", *History and of Political Thought*, vol. 21, no. 3 (2000), 365-89.

⁷¹ Penner, "The 'Bundle of Rights' Picture of Property", 744.

⁷² *Ibid.*, 743.

⁷³ In full Penner's definition is 'the right to determine the use of disposition of a thing in so far as that can be achieved or aided by others excluding themselves from it, and include the rights to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.' J. E. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 2000), 103.

reason, the right to contract over property is seen to arise from the prior right to exclude. That is, the interest of political philosophy lies with the right to exclude others from property, separate from the right to contract over it. If a right to contract was included within the rights to property with which political philosophy was concerned, the thesis would need to deal with, for instance, the right of an individual to contract themselves to their own labour.⁷⁴ This would return the thesis to a moral examination of the ‘particular’ rights of property, rather than examination of a state’s ‘general’ justification to regulate all property rights.⁷⁵ These are not entirely separate issues, since a ‘particular’ or ‘specific’ theory of property rights, such as self-ownership, may be used to judge the justification of particular rights and duties of property over which a state may claim authority.⁷⁶ Yet there is a more general and prior claim by the state to regulate all the rights and duties associated with property. Conceiving of that right as a right to exclude still permits the exploration of the moral and social issues of property such as self-ownership. Indeed, it aids such analysis, since it highlights the interest of the owner in deciding on the use of property. The right to exclude permits ‘one, not only to make solitary use of one’s property, via the exclusion of others, but also permits one to make a social use of one’s property, that is with other people, via the *selective* exclusion of others.’⁷⁷ So the right to exclusion as a definition of the idea of property does not preclude the moral and legal arguments which suggest that a particular view of property has an impact on the type of property rights that should be recognised by a state. However, as Penner has noted, the definition of property as a right to exclude will give no help, ‘...to one who wishes to extract some moral about distributive justice from property rights *simpliciter*.’⁷⁸ For Penner, the interest of distributive justice in property arises because the exclusion right is often of value in economic transactions. This is overstated, relying as it does, on seeing property as a creature of law.⁷⁹ Nevertheless, that Penner can

⁷⁴ Penner, “The ‘Bundle of Rights’ Picture of Property”, 753.

⁷⁵ I am using ‘particular’ and ‘general’, in the sense of the Becker’s typology of property rights. Against a general justification of all property rights, or a specific (type) of property right is justified, a ‘particular’ property right requires ‘the justification of why a particular person ought to have a particular property right in a particular thing.’ See Becker, *Property Rights: Philosophic Foundations*, 10, 22-3.

⁷⁶ Stephen R. Munzer, “The Acquisition of Property Rights”, *Notre Dame Law Review*, vol. 66, no. 3 (1991), 661-86. For a wider argument see G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995).

⁷⁷ Cohen, *Self-Ownership, Freedom, and Equality*, 744.

⁷⁸ Penner, *The Idea of Property in Law*, 103.

⁷⁹ As Penner himself notes, the idea that property in and of itself has no impact upon distributive justice is predicated upon recognizing the right of exclusion as merely ‘the idea of property in law, in so far, that is, as it grounds what we recognize as property rights’. *Ibid.*

make an argument against a particular notion of justice on the basis of his idea of property, suggests the task of this chapter is done. I have argued that a lack of a coherent idea of property disables attempts to think about property as a political phenomenon. Penner's criticism of distributive justice demonstrates that his idea of property is able to conceive of property as a right that can be grounded in individual use, rather than a particular morality, or a specific legal system. One question raised by grounding the right to exclude in individual use, rather than a particular moral or legal system, is whether there are particular 'things' that are conceived as property.⁸⁰ It is not a question I propose to discuss in this thesis, since it is of a secondary nature. A state seeking to justify its authority to set exclusion rights over a particular object would first need to justify having its general authority to grant and enforce a right to exclude.⁸¹ It is that justification, the justification of authority over the right to exclude, and its correlative, the duty of non-interference, which is the subject of the thesis.

In conclusion, this thesis is concerned with a state's right to impose morally binding duties *in rem* over property. Rights in *personam*, while often associated with property, and of interest to political philosophy, are not rights specific to property. Rights over property, held generally against the world (or other citizens of a state), are of interest to political philosophy because they require protection by the state. Since they require protection by the state, the justification of those property rights is a proper concern of political philosophy. Those property rights against the world, can be usefully aggregated under one particular right: the right to exclude.

⁸⁰ Penner, as he must in a legal text on the idea of property at law answers this question. See 'Chapter 5, Objects of Property: the Separability Thesis' in *Ibid.*, 105-27.

⁸¹ Whether corporeal or incorporeal the only implication of the right of exclusion, to paraphrase Penner, is that the 'thing' conceived of as a property can exist in its own right, and can therefore be the object of duties *in rem*. *Ibid.*, 128.

Chapter Three

Property in the contemporary political philosophy of justice

Introduction

Defining property as a right to exclude *in rem* makes possible an examination of the normative grounds on which a political authority might claim such a right. This thesis argues that modern political philosophy does not plausibly address that claim right. This chapter frames that argument with a comparison of the way in which theories of historical and contemporary distributive justice conceptualise property. It does so by examining the work of the Jeremy Waldron on the historical injustice of indigenous peoples' loss of property rights. In various papers Waldron argues that in changed circumstances, the need to rectify the historical injustice of indigenous people losing their property rights is 'superseded' by the 'contemporary needs, claims, and deserts' of society today.¹ He names this argument the 'Supersession Thesis'.² As I stated in the introduction to this thesis, the conclusions on the plausibility of historical indigenous property rights are the issue at stake here.³ Rather, it is the framing of the two theories of justice and the theories of property that they produce which this chapter examines. In effect, though not explicitly, Waldron is arguing that the normative constructions of legitimate political authority and property rights produced by contemporary distributive justice theory are more plausible than those produced by historical justice theory.

¹ Jeremy Waldron, "Settlement, Return, and the Supersession Thesis", *Theoretical Inquiries in Law*, vol. 5, no. 2 (2004), 237-68; Jeremy Waldron, "Redressing Historic Injustice", *University of Toronto Law Journal*, vol. 52, no. 1 (2002), 135-60; Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession" in *Justice, Ethics, and New Zealand*, ed. Graham Oddie and Roy W. Perrett (Auckland: Oxford University Press, 1992), 139-70; Jeremy Waldron, "Superseding Historic Injustice", *Ethics*, vol. 103, no. 4 (1992), 4-28.

² Waldron, "Settlement, Return, and the Supersession Thesis", 240.

³ See footnote 16 in this chapter.

Waldron's argument has provoked the Lockean scholar, A. John Simmons, to make a more plausible theory of historical justice theory. Simmons's theory and its success in avoiding supersession by contemporary distributive theory is examined in the second half of this chapter. Quite consciously, Simmons's theory seeks to undermine Waldron's argument by pointing out that Waldron's idea of historical theory relies on the idea of property rights as rights to a particular 'thing'. Simmons's suggests instead that one should view property rights as rights to a particularised share of a society's property holdings. So, the claims of injustice by indigenous peoples over the loss of their land should be viewed as claims to a loss of those peoples particular share of property, not a specific piece of land. There is a distinct possibility that Simmons' argument would succeed in justifying a finding by a specific government that indigenous peoples' within that government's purview had suffered some injustice, and were due their 'fair share'. Nonetheless, I argue that it fails in the task of justifying the right of regulation over property by a legitimate political authority. Such a conclusion on the theoretical plausibility of Simmons's historical theory re-iterates the point I made in the introduction to this thesis that, while I use indigenous examples in which indigenous people claim the historical loss of property, my concern is not to lay out a policy prescription for dealing with indigenous claims. Rather my concern is with the paucity of the normative theory that we use to examine those claims, or any others, that centre around property rights and the justification and legitimacy of political authority. This chapter, then, examines the success or failure of Waldron and Simmons' arguments on the basis of the internal logic of their arguments.

The supersession thesis was initially developed to discuss the claims of historical injustice made by indigenous peoples in countries such as New Zealand, Australia, Canada, and America. Recently, Waldron has widened the historical purview of the supersession thesis considerably, using it to examine the Israeli settlements within the Occupied Territories.⁴ In that paper Waldron summed up the proposition of the thesis as exploring the idea that 'certain things that were unjust when they occurred may have been overtaken by events in a

⁴ Waldron, "Settlement, Return, and the Supersession Thesis".

way that means their injustice has been superseded.⁵ His fuller summary of the formulation of the thesis is that it concerns⁶

[h]istorical injustices of the sort discussed in relation to indigenous peoples' rights in New Zealand, Australia, and North America. The idea is that even if wrongful acts (for example, in the course of land purchase, expropriation, and settlement) lead to an unjust situation, S_1 , in say 1860 in which some indigenous people, P, stand deprived of resources to which they are at that time morally (and perhaps legally) entitled, the persistence of that deprivation for a long period of time, in the course of which circumstances change drastically, may result in an altogether different situation, S_2 , which is no longer unjust – relative to contemporary needs, claims and deserts – and in which no one, including the descendants of P, are deprived of resources to which they are legally or morally entitled. (Or, if in S_2 , the descendants of P are deprived of resources to which they are entitled, the injustice of that deprivation is intelligible and remediable without any reference at all to the injustice that led to S_1 .⁷

So the historical injustice of indigenous deprivation during the colonial situation, S_1 , is superseded by the situation as it is now in S_2 . Waldron argues that the distributive justice of S_2 is more compelling and plausible than trying to account at S_2 for the historical injustice at S_1 . By plausible, I mean that the theory of distributive justice at S_2 is more complete and less open to criticism than the theory of historical justice that asks those at S_2 to rectify the injustice at S_1 . The intellectual problem that Waldron's argument attempts to solve is the moral conflict in a situation of historical injustice between 'historical' and 'end-state' theories of justice. Historical theories of justice argue that the justice of a state depends upon ensuring the justice of each property transaction. For Nozick, from whom this distinction came, only when individual property rights are justly held can the state itself be just. This type of argument is most commonly thought of as originating in Locke's defence of private property in his *Two Treatises of Government*, and in Nozick's *Anarchy, State and Utopia*. For such political theories, the justification for forming a state is wholly or partly the protection of individuals' property rights. If a political authority does not protect its subjects' property rights, that authority would lose at least part of its normative justification for existence. If subjects of an authority had agreed to the its use of coercive power on the basis that their

⁵ Ibid., 240.

⁶ Ibid. I have taken the summary from the latest article. However, since there is quite a degree of variation in both the intellectual resources drawn upon for the articles and the examples used to demonstrate the thesis, I use all four articles in the exposition of the thesis as a whole. To give an example, the 2002 paper devotes five pages to establishing Kant's proximity principle as a starting point for discussions of justice, while Kant is not mentioned in the original 1992 *Ethics* paper. If one was critiquing the thesis, finding its most plausible form might become a lengthy first step. However, since I am using the thesis to explicate difficulties with historical rights theory, rather than reviewing the whole thesis, any variation becomes a matter of scholarly accuracy rather than an absolute imperative. I hope that the former – accuracy of interpretation – is still well served in what follows.

⁷ Ibid.

property would be protected, then the authority's power, for those subjects at least, would no longer be 'morally unobjectionable' or legitimate. Oppositely, end-state arguments suggest that the justice of individual property rights rest on the 'moral character of the structure (or pattern) of the set of holdings of which they are a part.'⁸ End-state arguments are those that seek to re-distribute property rights according to an overall goal or principle, such as 'equality of fair opportunity' put forward in Rawls's *A Theory of Justice*.

Waldron's supersession thesis allows this thesis to frame a dispute between theories of justice as a dispute over the treatment of property rights in normative theories of a legitimate political authority. Waldron argues that historical theories of justice for the priority of property rights are not sufficient to entitle individuals to hold those property rights where the demands of contemporary justice require property to be redistributed. On this reading his argument juxtaposes two different views of the justification of property rights by political theories that examine the justification and legitimacy of a state. Since this is the first reading or interpretation of the supersession thesis from this particular frame, some discussion of the issues at stake is required. I start that discussion with a generic example based on indigenous peoples' experience, since those are the experiences which Waldron draws upon. Indigenous people's history of property loss within the countries specified by Waldron has the benefit of rapidly mapping out the problem. However, the example I draw is generic enough to include property conflicts between individuals following a historical breakdown of any kind in a state's defence of its subjects' property rights. Imagine that A's grandparents lost his property to B's grandparents in a historically contested situation (colonisation, government order of a morally unsound kind, or a war). Both now live in the same polity (of a reasonable liberal kind). Since the political arrangements make it possible, A is now making a claim to that property. B has legal title, and did not contribute in anyway to the original injustice committed by B's grandparents. To make necessary some deliberation on distributive justice, imagine that the descendant of the original victims, A, is in the bottom socio-economic decile and B is in the top decile of that polity. The argument of the supersession thesis is that the historical injustice is disregarded, as long as the polity in which A and B are living is making a decent fist of distributive justice so that A and B are more or

⁸ Simmons, "Historical Rights and Fair Shares", 150-51.

less equal.⁹ B's historical injustice claim is intuitively strong; it is hard to argue with the general statement that on average those who are descended from the original inhabitants of colonised countries as diverse as Ireland, New Zealand, or South Africa (or indeed any of the original inhabitants of the two thirds of the globe claimed by other countries in the nineteenth century) have lived less well than the descendants of the settlers. However, the supersession thesis suggests that we must give priority to those living. According to Waldron, that priority arises because contemporary distributive justice matters more than historical injustice. However, from the perspective of an individual claiming a property right on the basis of historical injustice, why is it that the historical property rights claim is deemed of less priority than the contemporary holder of the property right? From this perspective A might well ask why the property rights of B are so sacrosanct now, given that they seem to be the same type of rights that A's grandparents found to be useless.

If we note some of the conflicts between contemporary and historical principles of justice we might more clearly see the role that property has played. First and following Nozick's historical theory of justice, let us assume that an argument for a reasonable rectification of historical injustice is that the legitimacy of the polity is otherwise undermined. Oppositely, end-state or contemporary distributive justice takes legitimacy as being affirmed by the achievement of its desired pattern of equality, not the historical transactions that led to that desired pattern. The interference in property rights necessary to achieve that pattern is precisely the grounds on which historical justice would deny the legitimacy of end-state patterns of justice. That is, contemporary and historical claims use legitimacy (and thus political obligation) in differing ways. In the terms of political philosophy the debate arises because '...one cannot both affirm people's *antecedent* moral claims to resources [as does end-state theory] and the idea that people come to own resources as a *consequence* of some appropriating act [as does historical theory]...' ¹⁰ While contemporary justice theories argue that political obligation arises from the promise of better equality and freedom for the

⁹ Quite how they are to be judged thus is never specified in Waldron's articles. For the purposes here, I presume that the distributive fairness is judged on the basis of contemporary distributive justice. It is a question beyond the purview of this chapter whether Waldron's thesis is undermined by the lack of definition of a particular distribution scheme.

¹⁰ Jurgen de Wispelaere, "The Equal Right to Non-Exclusion: The Logical Inconsistency of Libertarian Egalitarianism Revisited" (paper presented at the 49th Annual Meeting of the UK Political Studies Association Nottingham, 23-25 March 1999), 5.

individual, historical justice theories argue that such political obligation is undermined by any prior injustice (and ameliorating that injustice is the first step in reaffirming political obligation).¹¹ So contemporary justice theories suggest that the political obligations of indigenous peoples arise from the promise of better equality and freedom. Historical justice theories, on the other hand, suggest that indigenous peoples' obligation to the state is already undermined. Such a tension clarifies the disagreement between contemporary distributive and historical justice theories over property: the former is primarily concerned with the contemporary liberal protection of individual autonomy regardless of the polity, the system of property rights, and historical or present injustices. Historical theory is concerned all too closely with the past and present actions of the particular polity under study and its particular system of property rights. A third difference is the treatment of the individual as moral agent. Contemporary justice theory hails the mythical liberal individual moral agent who is everyone.¹² Historical injustice is concerned with only particular individuals in particular situations who claim that they have lost specific property rights.

These disjunctions between property and justice in political philosophy are brought to the surface by the supersession thesis. Of most concern is Waldron's conclusion that even in ideal theory the historical ordering of property has no relation to, or purchase upon, contemporary theories of justice. This means that contemporary distributive theories must be solely concerned with the end pattern of society and have no regard for property holdings as they exist in the here and now.¹³ Waldron's supersession thesis demonstrates that ideal historical theory assumes that the connection between the property right and its bearer is the basis of justice. As Waldron rightly points out, this is nonsense and leads to inhumane consequences. Such a conclusion raises serious questions for the liberal-egalitarian project. With the side-constraint of historical entitlements removed the stability provided by the

¹¹ Susan Dodds, "Justice and Indigenous Land Rights", *Inquiry*, vol. 41, no. 2 (1998), 197-99.

¹² Sandel, "The Procedural Republic and the Unencumbered Self".

¹³ Waldron notes that the two may coincide, e.g. the relative poverty of victims of historical injustice would generate concerns for a more equal contemporary distribution. But as he notes 'it is worth stressing that that it is the impulse to justice now that should lead the way in this process, not the reparation of something whose wrongness is understood primarily in relation to conditions that no longer obtain': Waldron, "Redressing Historic Injustice", 160. Thus the point at which they coincide is to do not with moral agreement but with, seemingly, a coincidence - a coincidence which I argue throughout this chapter is based on both theories avoiding the obvious: property.

historical ordering of property to end-state theory is gone. This suggests that the idea of property in either historical or distributive theory is not well resolved.

The counterfactual critique of historical injustice

In an early article on the supersession thesis, Waldron suggests that one should examine historical grievances with a view to doing ‘justice to the legitimate grievances and claims of individuals in this context.’¹⁴ He notes that if the individuals were alive, then there could be some direct restitution and compensation. However, in the context of the colonial examples of his article, he argues that there are too many generations between the injustice and today. So he suggests that ‘the best hope of reparation is to make some sort of adjustment in the present circumstances of those descended from the persons who suffered the injustice...’¹⁵ Without examining quite why, he then assumes that reparations should ‘transform the present so that it matches as closely as possibly the way things would be now if the injustice had not occurred’.¹⁶ In making this leap from injustice to total rectification Waldron is echoing the historical justice theory of Nozick, and accepting the distinction Nozick draws

¹⁴ Ibid., 143. I am not so sure he does justice to actually stated historical grievances, see note 16 below.

¹⁵ Ibid.

¹⁶Ibid., 144. Quite why Waldron should think that any historical settlement process is attempting to do such a thing is quite obscure. It is notable that Waldron never references indigenous or other victims of historical injustice suggesting they are entitled to full rectification of their property rights. Yet Waldron by implication and analogy suggests that indigenous peoples’ (and particularly Maori) claims resemble Nozick’s principle of rectification. It is always hard to prove the negative, but I certainly have never seen that claim, and have often been surprised by indigenous leaders, pulling their punches so to speak, in their claims: For example, E. T. Durie, “Waitangi: Justice and Reconciliation” (paper presented at the School of Aboriginal and Islander Administration, University of South Australia: “Second David Unaipon Lecture”, Adelaide, 10 October 1991). Indeed, the only possible theoretical defence of the full rectification against which he argues is the one set out in Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). While some might suggest also Locke, both Waldron and I agree that Locke is not a historical rights theorist. In a more recent paper Waldron cites some examples of claims for rectification, but they are claims for the rectification of sovereignty. Waldron, “Settlement, Return, and the Supersession Thesis”, 244, n. 12. While that example (a claim for the sovereignty of Australia to revert to Australian Aboriginals) may suggest a claim for historical injustice Waldron would then need to explain how self-determination and sovereignty claims can be compared with contemporary justice theories. Since Waldron, other than in that particular note talks solely of the loss of property, it would seem that he is not in fact comparing sovereignty claims and historical injustice, but rather property rights and historical injustice. This seems wise since the literature on international norms of sovereignty and self-determination is quite at odds with ideal theory of end-state contemporary political philosophy. This is a point well made in the global justice literature summarised in Simon Caney, “International Distributive Justice”, *Political Studies*, vol. 49, no. 5 (2001), 974-97. See also various articles on historical claims for self-determination e.g. Brilmayer, “Secession and Self-Determination: A Territorial Interpretation”, *Yale Journal of International Law*, vol. 16 (1991), 177-202; Allen Buchanan, *Secession, the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, 1991); Chaim Gans, “Historical Rights: The Evaluation of Nationalist Claims to Sovereignty”, *Political Theory*, vol. 29, no. 1 (2001), 58-79; Will Kymlicka, “Theorizing Indigenous Rights”, *University of Toronto Law Review*, vol. 49 (1991), 281-93; Meyer, “Transnational Autonomy: Responding to Historical Injustice in the Case of the Saami and Roma Peoples”, *International Journal on Minority and Group Rights*, vol. 8, no. 3 (2001), 263-301; Janna Thompson, “Historical Obligations”, *Australian Journal of Philosophy*, vol. 78, no. 3 (2000), 334-45.

between historical entitlement arguments for property rights and end-state arguments for justice in the distribution. Historical theories argue that the justice of a person's holdings are decided by the moral character of each transaction that led to the individual holding that property right. Whereas end-state arguments suggest that the justice of holdings rests on the 'moral character of the structure (or pattern) of the set of holdings of which they are a part.'¹⁷ Given this characterisation of the difference between the historical injustice and contemporary justice theories, it is unsurprising that Waldron then uses Nozick's principle of rectification as the theory which he thinks is superseded by contemporary claims of justice.¹⁸

Since Waldron is assessing claims of indigenous peoples at this point, he can have much fun pointing out the amount of counterfactual speculation that would be involved in trying to assess what would be the position of indigenous peoples today, if the original injustice not occurred.¹⁹ He demonstrates the difficulties of the rectification project using as an example the wrongful acts done to Maori in the colonisation of New Zealand.

'What would the rightful owners of that land have done with it, if wrongful appropriation had not taken place?' To ask this question is to ask, in part, about how they would have exercised their freedom if they had a real choice. Would they have held onto the land and

¹⁷ Simmons, "Historical Rights and Fair Shares", 150-51.

¹⁸ Waldron, "Redressing Historic Injustice", 144. Cf. Nozick, *Anarchy, State, and Utopia*, 152-53. 'This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice [justice in acquisition and justice in transfer] . . . , and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.'

¹⁹ See Waldron, "Redressing Historic Injustice", 144-46; Waldron, "Superseding Historic Injustice", 7-14. Intriguingly, the concern with the counterfactual problems of rectification is not included in his most recent paper. It is replaced with a much longer section on the problems of moral desert that accompany the supersession thesis i.e. that it rewards wrongful acts: Waldron, "Settlement, Return, and the Supersession Thesis", 248-54. Given his point that historical injustice is only superseded when it 'might carry us in a direction contrary to that indicated by a prospective theory of theory', and that 'the Supersession Thesis does not in any way mitigate or detract from the ordinary normative implications of a theory of justice with regard to unjust actions presently being contemplated' it is difficult to see why the moral desert of past actions is a concern, unless one is concerned with the legitimacy of the institutions that enforce justice. Waldron, "Settlement, Return, and the Supersession Thesis", 251. As I pointed out in the introduction, that is exactly the trouble with the comparison Waldron has drawn. The difficulty of moral desert does not impact on his supersession thesis because such a problem only creates difficulties for political institutions as they exist in the here and now. The comparison which Waldron is drawing is not actually, the here and now, but rather a brighter future where justice shall reign, so legitimacy can be taken as a given. That is, a concern with moral desert (and its consequential questions over the legitimacy of the polity) would only be a proper objection to the supersession of historical injustice if Waldron's idea of contemporary justice took seriously the difficulty of consent and property in moving from the here and now to the rosy distributionally just future.

passed it on to their children and grandchildren? Or would they have sold it – but this time for a fair price – in response to the first honest offer they were given? And, if they had, then what would the purchaser have done with it? Sold it again? Passed it on to his children? Lost it in a poker game?²⁰

Scepticism toward the use of guesses about what should be a just outcome, and more especially their normative power is deserved. Waldron goes some way to demonstrating the philosophic basis for such doubts. He has three key objections to the counterfactual approach of historical injustice: first that it questions autonomy of the individual; second that it gives no guidance as to what should happen to the descendants of those who committed the wrongful act; and third, that it begs the question of who actually holds the rights which have been violated.

The first criticism of counterfactuals by Waldron is his claim that the use of counterfactuals involves assumptions about the way in ‘which free will would have been exercised.’²¹ He notes that this is not an ‘epistemic difficulty’, since ‘we make predictions all the time about how people will exercise their freedom’.²² Rather the problem is that such predictions in this case have ‘moral authority’, over the actual choices of the people involved in a decision.²³ Outside of the confines of Waldron’s justice theorems, this objection is all too easy to rebut. The historical injustice is not the dispossession itself, but the lack of ability to action the ‘free-will’ for which Waldron argues. Putting aside the dispossession of choice argument and restricting the argument to Waldron’s sense of justice, the free will problem is not insurmountable. Indeed, as A.J. Simmons has noted, while ‘the difficulties of assessing counterfactual judgements are very real and substantial....nothing in that admission (or in the nature of human freedom) justifies any stronger scepticism about counterfactuals involving persons or about their employment in moral judgement.’²⁴ That is, end-state theory requires assumptions and counterfactual judgements, so it seems an unnecessarily difficult criterion to place on historical justice.²⁵

²⁰ Waldron, “Redressing Historic Injustice”, 144. I have used the later version of this paragraph, see also Waldron, “Superseding Historic Injustice”, 9.

²¹ Waldron, “Redressing Historic Injustice”, 144.

²² *Ibid.*, 144-5.

²³ *Ibid.*, 145. See an extended version of this argument in Waldron, “Superseding Historic Injustice”, 9-11.

²⁴ Simmons, “Historical Rights and Fair Shares”, 159.

²⁵ A response to this question has been made by some scholars along the lines that the existential difficulties involved in the counterfactuals are so great as to put them beyond the purview of philosophic method e.g. that persons born after the injustice cannot have a claim to rectification. Christopher W. Morris, “Existential Limits

Perhaps Waldron's main point about the difficulty of counterfactuals is that they exist, if you will, personified, in the descendants of those who committed the original wrongdoing. So a historical theory needs to be able to accommodate those descendants, especially where they have in no way contributed to the historical wrongdoing, but continue to live with the descendants of the victims. As he puts it

We cannot simply hold the *dramatis personae* constant in our speculations. Children may be conceived and born, and leave descendants, who would not have existed if the injustice had not occurred. Short of putting them to death for their repugnancy to our counterfactuals, the Nozickian approach offers no guidance at all as to how the claims are to be dealt with.²⁶

This is overstated. The principle of rectification calls only for a return of unjustly appropriated objects, not death sentences. Shorn of the rhetoric, Waldron's point is perhaps more damning; historical rights theory is silent on what to do when circumstances have changed. The rectification principle argues only that all wrongs against property rights are to be remedied. There are no principles to be applied to those who have appeared and used the property since it was originally mis-appropriated, in the thought they had legitimate holdings. The problem of the lack of normative guidance arises not from attempting to apply ideal theory to non-ideal situations, but from within the argument of the historical theory. The historical theories are to be applied over generations, yet the principles generated give no guidance on dealing with the problems beyond one generation, where descendants depend on transactions (by sale or inheritance) taken in good faith after the initial injustice.

Another proof of the failure of the principle of rectification over the generations occurs on the other side of the original wrongdoing, the descendants of the victims. Waldron notes that after one generation it may be difficult to establish who holds the rights of the victims

to the Rectification of Past Wrongs", *American Philosophical Quarterly*, vol. 21, no. 2 (1981), 175-82; George Sher, "Ancient Wrongs and Modern Rights", *Philosophy & Public Affairs*, vol. 10, no. 1 (1981), 3-17. The scholars' claims may or may not be true. Should their claims be true, I do not think it interferes with the arguments in the chapter. That is, even if the existential difficulties of historical rights rectification are insurmountable, as I have already pointed out, indigenous claims are seldom couched in purely rectificatory language (and so rely on less idealised rights, or on other claims such as promissory treaties or legitimacy of indigenous and government institutions). On the other hand, if their critique is to be applied only to ideal historical rights claims, then they are right, insofar as historical rights theory as an ideal theory fails.

²⁶ Waldron, "Redressing Historic Injustice", 145.

of the historical wrongdoing. In reference to the New Zealand example dealing with historical injustice claims, Waldron suggests that the historical theory approach

...depends on the claim that the right that was violated when white settlers first seized the land can be identified as a right that is still being violated today by settlers' successors in title. Their possession of the land today is said to be as wrongful vis-à-vis the present tribal owners as the original expropriation...what is it for a group (such as tribe) to survive over (say) four or five generations, in the context of claims about injustice?²⁷

Waldron questions whether we can say on a principled basis that the tribes seeking rectification of their rights have the same responsibilities toward their people as the tribes had when the original injustice was committed. He gives the example of the settlement of historical injustice claims by Maori over exclusion from commercial fisheries. The settlement was heavily contested in litigation by different Maori groups and tribes. On one side of the litigation were the tribes (iwi) that held the original rights and so argued that the settlement should go to them. Other Maori groups suggested that this would exclude a large number of Maori, who clearly descended from original rights holders (and so, presumably were claimed to have inherited these rights individually), but were not affiliated with any iwi.²⁸ The resulting court cases – over the proper disbursement of reasonably large sums of fishing quota, cash and shares in fishing companies²⁹ – were fraught with arguments between historical theories (that the rights remained with the iwi) and the supersession of iwi by other modern organisations that better represented Maori and so should be included as beneficiaries of the settlement. In one of the more important court cases in the process of litigation, Waldron notes that a dissenting judge presented something similar to the supersession argument. The dissenting judge suggested that the tribal argument,

...confuses the benefit of collective rights of individual Maori with the benefit to be conferred pursuant to the settlement... [the tribe's lawyer]..asserts that the benefit should be directed to those who have lost their rights...the traditional tribes...But the settlement is for

²⁷ Ibid., 147-8. Though his point may be correct, Waldron seems to deny (or at least put the burden of proof upon) the beliefs of those many peoples who consider themselves to be legitimate heirs to those historical injustice. A better question might be: what are the principles on which the rightful recipient of rectification is decided?

²⁸ It was reflected in the resulting court cases, that recent New Zealand census results that roughly 25% 'either do not know their iwi or for some reason or other choose not to affiliate with it' *Te Waka Hi Ika O Te Arawa V Treaty of Waitangi Fisheries Commission*, 1 NZLR 285, 338, per Thomas J., dissenting (2000).

²⁹ Before disbursement started, the settlement was worth around \$NZ700 million. New Zealand Treaty of Waitangi Fisheries Commission, *He Kawai Amokura : Report to the Minister of Fisheries* (Wellington: Treaty of Waitangi Fisheries Commission, 2003), 13.

the benefit for all Maori...³⁰

Waldron's approval for the dissenting judge's position is that he considers that the tribes are in a 'very different and attenuated position' from the particular tribal entities that suffered the original violation.³¹ The point is not that Waldron is necessarily right to recognise the supersession argument in the dissenting opinion, but that historical theory offers little guidance as to the rights and wrongs of the tribal entities' historical rights arguments. Historical theory offers little guidance because it is bereft of the ideas of legitimate representation and political authority that would make it possible to decide whose rights were being rectified, and those rights could only spring from a clearer idea of the actual property system that was being rectified.³²

Another problem for the counterfactual approach which offers Waldron some sport is that there is no guidance on how many iterations of the rectification principle are enough in rooting out historical injustice. Lawrence Davis made a similar point about Nozick's theory some years ago: one cannot stop investigating rectification until there are no more to be had, since

if there has been a single injustice in the history of a state, not matter how far back, the state will not be able to achieve a just distribution of goods in the present.³³

³⁰*Te Waka Hi Ika O Te Arawa V Treaty of Waitangi Fisheries Commission*, 341, per Thomas J., dissenting. While Waldron's overall point here is valid, the evidence from the court cases is a little less straightforward. The actual settlement deed, signed by Maori negotiators on behalf of all Maori and the New Zealand government, contained the text, "Maori agrees that the settlement evidenced by this Settlement Deed of all the commercial fishing rights and interests of Maori ultimately *for the benefit of all Maori*" (Italics added). The Judge was thus, perhaps, reflecting more upon the literal meaning of the words of the deed which conferred the settlement rights, rather than the broad themes of historical justice and its equity. See Her Majesty the Queen and Maori, Deed of Settlement 4.5.1 (1992). For an excellent and detailed examination of the legal issues merely nodded at here see Kirsty Gover, "Constitutionalizing Tribalism: States, Tribes, and Membership Governance in Australia, Canada, New Zealand and the United States" (JSD, New York University, 2008) 223.

³¹ Waldron, "Redressing Historic Injustice", 150.

³² In this particular case, the institutions allotting property rights had fundamentally changed the property rights system; changing from a license based fishing system, to a system of tradeable quota. Thus the rectification argument is seemingly superfluous, since it was the *opportunity* right to commercially fish from which Maori were excluded in the nineteenth century and for which they were to be compensated by the fisheries settlements, not a tangible property. So they were compensated in an entirely new and different property system, from the one in which the historical injustice occurred. I make this point simply to suggest how historical and distributive theories via the supersession thesis are able to skate over complete property systems without the merest glance down to the salient points, and also to provide evidence for my claim earlier that it is very easy to misrepresent indigenous claims when illustrating points in political philosophy.

³³ Lawrence Davis, "Comments on Nozick's Entitlement Theory", *The Journal of Philosophy*, vol. 73, no. 21 (1976), 839 in; Simmons, "Historical Rights and Fair Shares", 153, n. 8.

So a historical theory sends us back to the beginning, so to speak, of time. The objection here is not so much about the historical theory being absurd, though Waldron has fun with an apocryphal example of the Delancy family's loss of property at the hands of the Norman invaders of England in 1066.³⁴ Rather it is that any particular date seems arbitrary. In the New Zealand example, the Commission of Inquiry charged with investigating the historical injustices toward Maori, The Waitangi Tribunal, can go no further back than 6 February 1840.³⁵ Historical theory suggests that any imposition of a date is wrong, and the state must continue to seek justice on all property transactions. Since all those transactions at any point are subject to its principles and since, as we have already seen, it offers no guidance on multi-generational rights holders, it fails to account for the effects of its theory and must therefore fail to provide a just state.

A similar failure in historical theory occurs if the property is altered or destroyed, since Nozick's principle of rectification appears to become vacant as no guidance could be offered by a strict historical theory.³⁶ Nozick solves this problem by proposing an additional principle for his historical theory: where the property is destroyed or altered, the victim of the theft or wrongdoing should receive some of the wrongdoer's goods such that the victim's goods are raised to as a point high enough that their overall share is as if the theft not taken place.³⁷ As Simmons points out, this move from a deontic to an outcome based conception of rights would leave many possible just rectifications from which to choose, without supplying guidance on the choice. Indeed, one odd result of the indifference

³⁴ Waldron, "Redressing Historic Injustice", 141, n. 29. It is worth quoting more fully '...take the oldest surviving English aristocracy that you can think of, and consider the earliest unrectified injustice done to that family that any one can remember... Suppose the 1086 injustice deprived the first Baron Delacey of his place at the King's Great Council. Are we sure that the late-twentieth-century Delacey family survives as an entity that still suffers this deprivation?'

³⁵ The date of the signing of the Treaty of Waitangi, and also the start of the historical period Waitangi Tribunal is authorised to investigate for breaches of the Treaty by the Crown. Treaty of Waitangi Act 1975, section 6. There is some legal reasoning behind this apparently arbitrary time; the assumption of British sovereignty, and thus assumption of responsibility for law making, was consequent on the signing of the Treaty. But this is in some ways specious, the British authority at the time could not possibly provide law and order across New Zealand (see Chapter Six for an argument on this). That is, the date is not an example of the difficulty of applying ideal theory to non-ideal situations, but a case of ideal theory simply having no input whatsoever, and another set of normative assumptions (in this case, of sovereignty at international law), being used instead.

³⁶ Davis, "Comments on Nozick's Entitlement Theory", 840-1 in; Simmons, "Historical Rights and Fair Shares", 166, n. 27.

³⁷ 'Nozick suggests using nonhistorical patterned principles for distributive justice as "rough rules of thumb" for approximating historical rectification in real world cases where information about the past is incomplete.' Simmons, "Historical Rights and Fair Shares", 166-7. Cf. Nozick, *Anarchy, State, and Utopia*, 230-1.

principle would be that no rights would be violated should a victim's well-being be enhanced during the course of their rights being infringed.³⁸ The supplanting of historical rights theory for end-state conceptions of justice that occurs with the introduction of the indifference principle proves that Waldron's objections to the counterfactuals are correct. Yet that is not the only thing established. The introduction of the indifference principle also severs the connection between the property and its attendant rights in historical theory, because the rights have become a share in something. Without a direct connection between the property and the rectificatory right, historical theory is bereft of any normative argument since it can no longer hold that all property holdings are based on the principles of just acquisition and transfer.

In conclusion, Waldron's objections to historical theory based on his analysis of the counterfactual problems are more or less correct; where circumstances have changed there is a lack of guidance from Nozick's history theory of entitlement about what is to be done, and Nozick himself suggests –via the indifference principle – that a theory of justice focussed on contemporary concerns would supplant, where necessary, the historical entitlement. Waldron's counterfactual critique well illustrates Simmons's point that 'in anything but a world very close to moral perfection, historical rights will have no determinate content and hence will not be real rights at all.'³⁹

The lack of viability of historical theories of justice is of concern since they are the only theories of justice that acknowledge the ties between property and people as advanced in the political claims of the victims of various historical injustices.⁴⁰ For example those groups who have been subject to ethnic cleansing, colonial misrule, and civil war all need access to historical theories of justice. Since 'contemporary political liberalism is founded upon the Dead-Are-Gone Assumption', it is not surprising that the property rights of previous

³⁸ Simmons, *Justification and Legitimacy*, 236.

³⁹ *Ibid.*, 227.

⁴⁰ There are a number of other approaches to historical injustice claims, but Waldron's article, as I stated at the beginning of the chapter, is of interest for the clear differentiation it draws between theories of contemporary justice, and historical theories. See for instance, David Lyons, "The New Indian Claims and Original Rights to Land", *Social Theory and Practice*, vol. 4, no. 3 (1977), 249-72; Morris, "Existential Limits to the Rectification of Past Wrongs", 175-82; Tim Mulgan, "The Place of the Dead in Liberal Political Philosophy", *Journal of Political Philosophy*, vol. 7, no. 1 (1999), 52-70; Sher, "Ancient Wrongs and Modern Rights", 3-17.

generations are disregarded.⁴¹ Nevertheless, the lack of purchase of historical theory reveals the thinness of normative defences of property rights since property, even in a single generation, needs a theory of historical entitlement. If we are to understand property rights only in the present moment with no normatively defensible history then property rights are necessarily under constant scrutiny as to their justification from end-state theory. That is, since we cannot depend on historical theory (and its principles of freely chosen transactions), all transactions, and indeed all the petty and simple holdings of property and the rights associated with those holdings are open for scrutiny to the distributive impulses of contemporary political philosophy. The stability of property systems, in normative terms, would then depend entirely on justifications from within end-state theory where stability would be the owners' continuing control over property and its rights without interference every time societal distributions changed.⁴² It might be possible to introduce other theoretical justifications for property rights, such as legitimacy or efficiency. Yet, if such external justifications of stable property holding could be supported by end-state theory, then end-state theory should support some form of historical injustice theory. But end-state theory cannot (and possibly *a priori* does not) support historical theory where circumstances change but must supersede it. In this logic, Lawrence Davis's point on the endless iterations of historical theory can be flipped on its head. Without the side constraint on distributive impulses proffered by historical rights theory, there is the possibility of never-ending iterations of redistribution as soon as any change occurs which alters the distribution of holdings across a society.⁴³ Alternatively, end-state theory could simply be wrong-headed

⁴¹ Mulgan, "The Place of the Dead in Liberal Political Philosophy", 68. That is, "Those who are no longer living have no morally relevant interest in the contemporary polity." Mulgan, "The Place of the Dead in Liberal Political Philosophy", 54.

⁴² The ability of contemporary political philosophy of justice to assume such a responsibility is investigated in Chapter Five.

⁴³ Simmons argues against this point, on the basis of authorial intention. Nozick's conception of end-state or patterned theories, he argues, would suggest that the distributional principles were 'intended to govern all distributions of goods within societies. Thus, in a perfectly just society, if you give me a more expensive gift than I give you, ...a patterned theory would require redistribution to restore the pattern'. Simmons then suggests that 'no real defender of a patterned theory believes that Christmas is a time for the redistribution police to be especially wary'. This is an exceptional illustration of the argument I shall be making in Chapter Five. Simmons, "Historical Rights and Fair Shares", 161, n. 20. If there are changed circumstances following Christmas, what is to stop the historical distribution that was in place before Christmas being superseded, if historical entitlements (pre-Christmas) are not binding in the changed circumstances? That is, aside from authorial intention, why would the distributive police not be involved? Contemporary distributive justice theory seems to assume that historical entitlement stops the need for such a police force. Waldron's supersession thesis suggests historical entitlement theory cannot be relied upon in such a way.

in its neglect of the need to incorporate property rights that can continue in the face of arguments for equality.

Hume

Since Waldron knocks down historical theories, it might be supposed that he agrees with Hume's view on property and justice. After all, it was Hume who provided us with the first argument on supersession of historical injustice, arguing that to speak of injustice before the polity has decided who owns what property was logically absurd. If there was no one to enforce the rules, then there were no sentiments of justice or right and wrong that are worth discussing. Essentially Hume argued that it is impossible to consider justice until property ownership had been decided.

After this convention, concerning the abstinence from the possessions of others, is enter'd into, and everyone has acquired a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of *property*, *rights* and *obligation*. The latter are altogether unintelligible without first understanding the former.⁴⁴

According to Waldron, in the Humean account of the development of society, people developed, though a sense of reason, a 'peace dividend' in which societies agreed that it was better to accept the property arrangements as they are than continue fighting. Hume, on this account considers the distribution of property immaterial, since support should be offered to any distribution which will move society 'towards the benefits promised by a system of positive law and an orderly marketplace.'⁴⁵ The questioning of the justice of the existing distribution was, therefore, ridiculous, since the basis of justice and its language was the entitlements as they came to be. As Waldron puts it

The claim is that those who lost control of resources in the era of unregulated conflict can hardly complain on grounds of justice without kicking away the very foundation of the intelligibility of justice discourse.⁴⁶

Waldron disagrees with this Humean argument on the basis that whenever the sentiments of justice develop it does not stop them being applied to events preceding the establishment of property within that society.⁴⁷ To borrow Waldron's example, in New Zealand it is normally supposed that society of Maori and non-Maori was constituted in some way by the signing

⁴⁴ David Hume, *A Treatise of Human Nature*, ed. P. H. Nidditch and L. A. Selby-Bigge, 2nd ed. (Oxford: Clarendon Press, 1978), 490-1.

⁴⁵ Waldron, "Redressing Historic Injustice", 141.

⁴⁶ Ibid., 142.

⁴⁷ Ibid.

of the Treaty of Waitangi. So if we imagine that Hume's convention applies from 1840, while there is no way to regulate the events of 1825, 'we can develop post-1840 principles that make what is to happen now a function of what we can find out about what took place in 1825.⁴⁸ So, for Waldron, Hume's aversion to historical injustice – preceding settled society – does not confound the attempt to ameliorate historical injustice.

There are two opposing points to be made about Waldron's argument before concluding this section on Hume. The first, following Barry, is that Hume's argument may well justify concerns with historical injustice more rigorously than Waldron seems to acknowledge.⁴⁹ So, while the logic of Waldron's example may succeed, it is also plausible that the Humean account would be indignant at the illegality of actions toward Maori following 1840, since such actions would necessarily undermine the convention created by the Treaty of Waitangi. That is, post-convention, the peace dividend to Maori seems undermined so a Humean would expect (at least on Waldron's account of the theory) those injustices to be dealt with. On the other hand, even if we accept Hume's argument on the intelligibility of justice before and after the convention, several of Waldron's counterfactual objections would apply. For instance, like historical theory, there is no principled guidance from Hume on how we are to judge when property rights become intelligible (through a convention). Second, as Waldron notes, the Humean convention gives priority to the last occupants of a property at the time of its settlement as a matter of practicality.⁵⁰ While such practicality is to be admired, it hardly helps ideal theory to be without a justification for acquisition. Likewise, we have no guidance from Hume on who holds the rights over several generations, since such ideas are the developments of society since the convention. Hume then, neither helps nor hinders the supersession thesis. Waldron suggests that Hume's theory does not stand in the way of ideas of historical injustice,⁵¹ but neither can Hume's argument be mined for anything like support for Waldron's supersession thesis.

⁴⁸ Ibid.

⁴⁹ Brian M. Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), 301.

⁵⁰ Waldron, "Redressing Historic Injustice", 142-3, n. 22. This idea is developed more fully in Jeremy Waldron, "Indigeneity? First Peoples and Last Occupancy", *New Zealand Journal of Public and International Law*, vol. 1, no. 1 (2003), 55-82.

⁵¹ 'So judgments about past injustice, and demands for compensation for past injustice, and a structuring of the present system of property so that it takes account of the dire and unfair effects of past injustice – none of this can be ruled out on the Humean approach.' Waldron, "Redressing Historic Injustice", 143.

Resuscitating historical theory: Simmons's particularised share

Since Waldron, amongst others, has correctly identified several objections to a historical theory of rights, one course of action is to simply reject any historical right. Yet, as Simmons puts it,

...this simple rejection of historical rights also seems feeble. For in our anything-but-ideal world, in both law and morals, we still take historical rights to rectification very seriously. Given the many reasons we have for taking practice to be relevant to theory, the best response to the problems of historical theories would seem to be neither to rationalize away the problems nor to dismiss the theories, but to see whether further clarifying our conception of historical rights can make the problems more manageable.⁵²

Also, as indicated above, the lack of plausible historical entitlement leaves property rights – both those directly affected by the remaining end-state theories, and those not affected – without a normative theory of justice to support them. In order to rectify this situation, Simmons attempts to provide a historical theory which is able to avoid Waldron's criticism. The following section outlines Simmons's proposal, with particular attention to its ability to define more accurately the property rights used in historical injustice theory.

Simmons starts from the assumption that while it is true that historical theories have difficulty precisely specifying the contents of the rights they purport to grant, this is not a defect in the theory. Rather,

The best historical theory will entail that persons can sometimes have rights that give us only imprecise, but nonetheless principled, guidelines for rectification, rather than giving us determinate entitlements to particular things or performances.⁵³

Such a clear rejection of the essentially Lockean concept that property rights are determinate individual rights held on the basis of labour that is normally associated with Nozick's theory requires some explanation. Simmons suggests that Nozick's picture of historical theories as 'rights-to-a-thing' and end-state theories as 'rights-to-a-share' is badly drawn. Normally historical rights theories rely on a justification of political authority based in that authority's ability to enforce individual property rights, where those property rights arise from a morally acceptable relationship between the individual rights bearer and his or her property. In Nozick's work that connection between the individual and his or her property is justified

⁵² Simmons, "Historical Rights and Fair Shares", 156.

⁵³ Ibid., 157.

with a type of Lockean labour theory.⁵⁴ Undoing the injustice of, say, property being stolen, requires the connection to be re-established. But what if the stolen property, perhaps a bicycle, has been destroyed? The connection cannot be re-established and the theory folds. With end-state theory, since there is no necessary connection with the property, the bicycle itself need not be returned. All that need to be given the victim is goods to return their holdings to the appropriate level within the preferred overall distribution for society. To solve this problem Nozick's historical theory must turn to end-state theory using, for example, the indifference principle to cope with the destruction of the stolen property.

Simmons proposes another solution. Rather than a right to particular property, he suggests historical theory endorse a right to a particular share of holdings, a 'particularised share'.⁵⁵ For instance if a victim's stolen property is destroyed, the historical right should be to a 'certain-sized share of a particular set of holdings—namely to a share of the holdings of the wrongdoer'.⁵⁶ While this destroys the historical connection via labour theory to the right (of a particularised share), Simmons notes that so do free and just transactions.⁵⁷ As he puts it,

one needn't have any deep historical connection with an object, beyond a transactional connection, in order to have a historical right to that object. If you give me an object you own (or sell it to me), my right to it is perfectly historical, despite my having no prior connection to it.⁵⁸

He acknowledges this might seem like the complete submission of historical theory to end-state distributions, but argues that it is not. Rectification of stolen and destroyed property is still on the basis of historical holdings and is 'justified by the importance of free acquisition and transfer'.⁵⁹ A claim for rectification based on a particularised share being unjustly taken would still not be based on an end-state distribution, but rather on the historical share. So a historical theory incorporating the idea of a particularised share deals with the objection against historical theories that they cannot rectify property that has been altered or destroyed.

⁵⁴ '...this Labour being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joynd to...' Locke, *Two Treatises of Government*, Second Treatise, §27.

⁵⁵ Simmons, "Historical Rights and Fair Shares", 162.

⁵⁶ Ibid.

⁵⁷ Indeed, since historical theories are often criticised for their inability to explain how alienation of rights is possible, if those rights can only be created through labour, Simmons proposal is doubly effective; it avoids one of the major troubles in Nozick's theory, the importation of end-state theory via the indifference principle, and avoids making property within historical theory dependent upon labour theory. Ibid., 162, n. 21.

⁵⁸ Ibid., 162.

⁵⁹ Ibid., 163.

Waldron's objections to historical theories are somewhat overcome by Simmons's reconfiguration of historical theory. Those objections were that historical theory questioned the autonomy of the individual, gave no guidance as to what should happen to the descendants of those who committed the wrongful act and so violated the rights of the innocent, and begged the question of who actually held the rights that had been violated. As indicated above, Waldron's first objection did not hold, since as Simmons noted, 'it is easy to be a bit too sceptical about the possibility of making reliable contrary-to-fact judgements (and about the moral importance of such judgements).'⁶⁰ We often use such judgements to establish the moral wrong in a situation e.g. 'if he hadn't stolen my bicycle, I would have been better off.'⁶¹ Rather than assuming improbable events in the counterfactual, 'for the purposes of assigning blame and liability we assume a normal unsurprising course of background events, roughly like the ones that actually occurred.'⁶²

Notwithstanding that Waldron's first objection seems unnecessary, Simmons's notion of a particularised share deals with it perfunctorily. Waldron's criticism is that we cannot know what choices a person may make with a particular piece of property, so that there is not so much an epistemic difficulty as a difficulty in assigning moral authority to the guesses involved in working out the counterfactuals. Where the historical injustice involves the taking of a particularised share, rather than a particular property, the guess is much more circumscribed. Working out the rectificatory rights is now a guess within a much narrower range – what would be a fair share if the injustice had not occurred. Since that is the same guess required by end-state theory, it would be difficult for Waldron to find that counterfactual objectionable. Also, even if circumstances have changed markedly between the original injustice and when rectification occurs, the rectificatory principle can give much more detailed guidance when using the notion of a particularised share, than when trying to re-establish a connection between the rights-holder and the original property. Simmons sheds light on this idea with an example of its operation in the changing circumstances of a mandatory 'down-sizing' of legitimate holdings across a society.

⁶⁰ Ibid., 157.

⁶¹ Ibid.

⁶² Ibid. I should note here I am relying here on Simmons's account of counterfactuals. I do so to ensure that the moral philosophy that lies behind such an analysis is not misrepresented unwittingly.

If I legitimately appropriate a water hole, and all the other water holes subsequently dry up, the content of my rights over the water hole changes with the changed circumstances. I can no longer charge what I wish for the water.⁶³

The objection Waldron makes is that there is no guidance forthcoming from historical theory as to how to deal with this change in circumstance, beyond, I suppose he would argue, allowing people to die of thirst. In Simmons's view, the correct position would be that property rights at stake in such an example, to be legitimately acquired, must be incorporated into our 'legitimate purposive activities'. They are opportunity rights for the use of a particular resource (such as land, or in this case, water) not rights to a specific holding, in and of itself. The rights, or particularised shares, are then amenable to something like a Lockean proviso, where they are circumscribed by what is considered a fair share of those resources; that is leaving 'enough and as good' for others.⁶⁴

To illustrate how the incorporation of the Lockean proviso in his particularised theory helps the clarification of historical rights, Simmons expands upon the ubiquitous castaway example. In his example, eight castaways have an equal access right to one-eighth of an island's land and resources. New castaways arrive on the island and children and grandchildren of the original castaways need to be accommodated. The original castaways then must – to leave as good and enough for others – “downsize” their previously legitimate holdings' so as to give 'the new population fair access to their shares of the island.'⁶⁵ The changed circumstances demand that the historical right of the original castaways is reduced to some 'appropriate share' of their original property.

Through this idea of down-sizing Waldron's overall objection to historical theories, that changes in circumstances cannot be accommodated, no longer holds in general. The second objection Waldron made (what of the innocent descendants of the original wrongdoers?) can also be rejected by Simmons's theory. The innocents who occupy the original property unjustly no longer solely bear the efforts of rectification. The rectification affects each and every holder of a particularised share, as every particularised share held in that society is

⁶³ Ibid., 163.

⁶⁴ Ibid., 164.

⁶⁵ Ibid.

reduced to accommodate the payment of compensation to those to whom it is due.

Simmons puts it this way:

...an original islander might retain control over more than his fair share, denying newcomers full access; but later developments might increase available land...or decrease the demand, rendering the retained share fair at this later time. In that case compensation is owed the newcomers for losses suffered by not having had access to fair shares during the intervening years.⁶⁶

Alternatively, the newcomers to the island could grab more than their fair share. Again, circumstances might change to the point where the whole society has a generally fair particularised share. Compensation based on the historical situation would then be owed to the original inhabitants' descendants for the time during which they did not have a fair share. Though this scenario may suggest that historical justice has been superseded by the contemporary need for fair shares, it has not. Instead, while there are changed circumstances, the compensation due is for the historical injury, not because of any particular desired outcome, except justice in transfer. The claim for compensation is based, not perhaps on a definite piece of property, but on a definable share of the resources (i.e. property with its attendant rights). A further clarification: the compensation is not due solely from the innocents. Indeed, the thrust of the theory of historical shares is that compensation is due from the society as a whole, rather than compromising the innocents' legitimate particularised share.

Historical theory, Waldron argues, is unable to provide guidance about what should be done about the descendants of settlers who hold property rights on the wrongfully taken land yet are innocent of the original injustice. Simmons's reconfiguration of historical theory demonstrates that rectification or compensation can take without impinging unfairly on particular innocents. Instead, the rectification of the injustice is for the whole society to decide upon and pay for. This is not odd, and indeed goes some way to showing that Simmons's historical justice theory has 'moral standing ... alongside end-state principles'.⁶⁷ As with end-state theory, in Simmons's historical theory the burden of compensation for inequality falls on society as a whole. Simmons's argues that it is morally right for society to compensate the victims or their descendants for historical injustice, since it was that society

⁶⁶ Ibid., 169.

⁶⁷ Ibid., 151-2.

that allowed the original wrongdoers to gain more than their fair share in the first place. Of course, his argument assumes that society has some type of government that is legitimate and representative of that society, is able to enforce property laws, and is able to enforce changes to those property laws. His theory also avoids the quandary that it seems unreasonable that new arrivals to a society should foot the bill for historical injustices committed before they arrived. Since the theory allocates fair shares to all, newcomers receive a fair particularised share of resources.⁶⁸ In this way Waldron's second objection fails: historical theory, can guide us to ensure that those innocent of the stain of historical injustice are not harmed.

To surmount the third of Waldron's objection, Simmons's historical share theory would need to show that the reconfigured historical theory could offer us guidance on who held the rights that were to be rectified, one generation or more, after the injustice. In the example Waldron used, he questioned whether aboriginal tribes that are the recipients of historical injustice settlements play the same role today as they did when the injustice occurred. Waldron's point was that it cannot be assumed that the children simply inherit the rectificatory right and that such rights could be aggregated by a tribe as it exists today; historical theory needs to demonstrate the normative principles for such inheritance and corporate identity. Here Simmons's theory comes a little unstuck. Without assuming ideas of inheritance, and throwing in some ideas of legitimate representation and political authority, it is hard to fathom why tribes, who are no longer the key governance structures in the societies in which indigenous people live, should be the recipient of rectificatory rights.⁶⁹ Simmons makes three points about this difficulty. First, the particularised share theory produces principles of rectification that are conservative (for instance we must take into account fair shares of all other citizens).⁷⁰ This seems to be tantamount to saying that the compensation is not much, so why worry? So the first response is not able to identify the

⁶⁸ It may be argued that newcomers are unfairly penalised when, with the rest of society, they must compensate for historical injustices that took place before they arrived, but come to light only after they have arrived. This is true, but since they receive a fair particularised share on arrival, the down-sizing effects are no more than an end-state theory would demand of the whole of society (including newcomers) to alleviate the inequality created by the original injustice.

⁶⁹ For a gloss on the place of chiefs and governance in early modern Maori society see Lyndsay Head, "The Pursuit of Modernity in Maori Society" in *Histories, Power and Loss: Uses of the Past : A New Zealand Commentary*, ed. Andrew Sharp and P. G. McHugh (Wellington: Bridget Williams Books, 2001), 98-121.

⁷⁰ Simmons, "Historical Rights and Fair Shares", 178.

rights bearer in historical theory. Second, Simmons argues that ‘children have rights against their parents to the receipt of property... that is needed by those children for a decent life.’⁷¹ While Simmons defends this argument using Lockean perspective on the rights of children against their parents,⁷² it seems problematic in the context of the libertarian impulses of a historical theory to curtail the choices of anybody, including parents, over the disposal of their legitimate holdings. However, the problems of his second approach are perhaps overruled by his third point that tribal property unjustly taken was exactly that: tribal land. Thus, for the indigenous tribes of Canada, New Zealand and Australia, the identity of the recipient of rectification was never in doubt. The identity of the rights bearer was corporate, since indigenous land was jointly owned by tribe members,⁷³ and so whether rights can be inherited through death is neither here nor there.⁷⁴ As Simmons puts it,

Thus, Native American tribes can certainly be supposed even on a Lockean view to have joint property in bodies of land or in natural resources. They can thus have historical rights to land or resources that can persist through time; they can have rights to rectification of property injustices (i.e. injustices consisting in violations of those historical rights); and they can have rights that may be affected... by changing circumstances.⁷⁵

If Simmons’s point on the corporate identity of the tribes is accepted all Waldron’s objections are overcome, and historical theory is renewed as a plausible normative argument for compensating indigenous people for historical injustice. Also Simmons’s theory has the benefit of according with our intuitions and political practice – that a state’s property regime

⁷¹ Ibid., 179.

⁷² Ibid. Cf. A. John Simmons, *The Lockean Theory of Rights, Studies in Moral, Political, and Legal Philosophy* (Princeton, N.J.: Princeton University Press, 1992), 204-12.

⁷³ At this point Simmons makes much of the difficulty of incorporating what he takes to be indigenous ideas of land (e.g. inalienable, in harmony etc) with the Lockean assumptions of his argument such as the need for productive individual use. This follows the argument in James Tully, “Rediscovering America: The Two Treatises and Aboriginal Rights” in *An Approach to Political Philosophy: Locke in Contexts*, ed. James Tully (Cambridge: Cambridge University Press, 1993). Such an argument conflates anthropology and political philosophy and does detriment to both by failing to recognise the difference between historical and modern indigenous voices (which was surely the reason it was attempted). What indigenous people do with the land is their concern and the idea that a political philosophy of an ideal type should attempt to constrict that use on the basis of group identity or race or culture seems repugnant. What a historical theory looks at is another matter altogether, and there the questions are: who owned it? Are they identifiable today? As Simmons makes clear, there is nothing in Locke that rules out collectively owned property. Simmons, “Historical Rights and Fair Shares”, 181-82.

⁷⁴ Things are never quite as easy as that. For instance, in New Zealand the historical injustice settlements to iwi (Tribes) gives the Tribal corporations, via legislation, all the historical rights of the various hapu (sub-tribes) that made up that iwi. This can provoke absolute consternation from those who believe that the attendant resource rights properly resided with individual hapu, not the larger iwi. See for instance the delineation of such conflicts in Andrew Sharp, “Recent Juridical and Constitutional Histories of Maori” in *Histories, Power and Loss: Uses of the Past: A New Zealand Commentary*, ed. Andrew Sharp and P. G. McHugh (Wellington: Bridget Williams Books, 2001), 52-4.

⁷⁵ Simmons, “Historical Rights and Fair Shares”, 182.

cannot be legitimate if it is riddled with many historical injustices toward a group of people within its borders, but neither can it be legitimately overturned without visiting further injustices upon, as I call them, the innocents. Rather the state can work towards a legitimate property regime by carefully examining historical injustices and dealing with compensation for the loss of the particularised share that was created by the injustice. In this way historical injustices are not superseded by an end state conception of justice, but nor are the rights blindly held against all changes in the world. Rectification of historical injustice is done therefore without contemporary injustices being created, taking into account the distribution of resources as they exist now, as they have changed, and what they will be.

While this is a nice conclusion in that it purports to escape Waldron's objections, it is not so simple. For Simmons has not justified either of the two crucial steps that allow his indigenous example to rise above Waldron's point that after one generation historical injustice theory cannot plausibly identify the rights-bearer of an historical injustice. From the principles of his particular shares theory, Simmons has justified neither inheritance nor the corporate authority of the modern tribe over its descendants. Instead, to escape the supersession of historical injustice, he simply assumes those are plausible property rights. He has assumed first, that inheritance of rights to rectification is plausible (on the basis that inheritance of property rights is plausible) and second, that the rights-bearer can be considered the tribal entity that exists today. Neither of those assumptions can be derived from the historical theory Simmons puts forward, though both are somewhat plausible assumptions for the indigenous example he uses.⁷⁶

At the start of this chapter, I made the point that Waldron is objecting to the ideal theory of historical theory, and for the ideal theory his last objection holds: historical theories do not tell us who are the rights-bearers over the generations without, as Simmons's does in the indigenous example, importing into those historical theories a vast array of cultural or legal assumptions about property rights. Therefore, a normative historical theory of legitimate political authority is unable to specify a clear theory of property rights, even when modified

⁷⁶ For a detailed analysis of the many notions of tribal membership, see Gover, "Constitutionalizing Tribalism".

by Simmons.⁷⁷ Historical rights theory fails as an ideal theory. This is odd since the genesis of historical rights theory, at least in Nozick's interpretation, is the protection of those rights. One would have thought that an ideal historical theory would, at the very least, be able to justify an ideal system of property rights.

Conclusion

This chapter has demonstrated that Waldron was correct to argue that contemporary conceptions of distributive justice would supersede historical entitlement. This places political philosophies of legitimate political authority in an invidious position. If there are no historical entitlements to property, then only end-state theory can provide a complete normative argument for any kind of property system. As I show in Chapter Five, end-state theory cannot provide such an argument. Indeed, I demonstrate that rather than providing a theory of property, the political philosophies of distributive justice tend to rely on the side-constraint of historical entitlements. Given the failure of historical entitlement theory, this would suggest that there is no plausible theory of property rights that could provide stable property holdings within end-state theory. End-state theory, in the face of the ever changing circumstances of individuals in a society, would have to continuously re-evaluate property holdings and the attendant rights, leaving rights holders in a permanent flux of competing distributional priorities.

Simmons's historical shares theory was an attempt to create a plausible alternative historical rights theory that avoided supersession by end-state theory. I argued in this chapter that Simmons's theory was not complete and would be superseded by end-state theories of justice when the circumstances of a society changed. I noted that in a specific context where his assumptions on inheritance were plausible Simmons's historical shares theory might make sense. In other words, Simmons's theory might plausibly justify a political authority's relationship with the property rights of its subjects, if the assumptions Simmons's makes about inheritance of rectificatory right are normatively plausible for a legitimate political

⁷⁷ Simmons's hope that the particularised share would somehow avoid the problem of infinite regression created by the need to have a state free of historical injustice, seems frail. Simply because people are allocated fair shares at any given moment, does not, all other things being equal in human nature, stop injustice. Thus there will continue to be historical injustice within society, and the infinite regress of a historical theory of justice would continue.

authority. As I pointed out in the introduction to this thesis, a judgement on plausibility of legitimate relations between a political authority and its subjects could only be made when the BLD had already been decided. This suggests Simmons's is presuming that the BLD already includes a theory of property amenable to his idea of property rights as particularised shares in a society's resources. Waldron has no need for such a presumption since the distributive justice approach he advocates (as it is political moralism) presumes justification on the basis of the theory of legitimacy of the political authority. Simmons's argument has no recourse to such a presumption. Where Waldron presumes justification on the basis of legitimacy, Simmons presumes justification on the basis that removing conflict over property rights is part of the BLD of the state. In other words, for Simmons a theory of property rights is part of the normative justification of a legitimate political authority. This presumes that normatively justifying a state on the basis of its ability to stop conflict over property would produce a legitimate or morally unobjectionable theory of property of the type Simmons's proposes. This is a conceit based in Locke, and unfortunately, it is without foundation. As I show in the next chapter, there is deep and unnerving problem with accepting interpretations of Locke's work that suggest that the justification of a legitimate state can produce a particular political theory of property rights.

Chapter Four

Locke, consent, and property

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a *Property* in this own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.
John Locke, *Two Treatises of Government*.¹

Whoever therefore, from henceforth, by Inheritance, Purchase, Permission, or otherways *enjoys any part of the Land*, so annex to, and under the Government *of that Commonwealth, must take it with the Condition* it is under; that is, *of submitting to the Government of the Commonwealth*, under whose Jurisdiction it is, as far forth, as any Subject of it.
John Locke, *Two Treatises of Government*.²

This chapter examines the link between legitimate government and individual property rights in the political theory of Locke's *Two Treatises on Civil Government*. The examination is conducted within the tradition of interpretation of the *Two Treatises* which suggests that legitimacy of the state in Locke's theory depended upon consent alone, whereas property contributes only to establishment of the original contract.³

¹ ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), (II §27). Henceforth *Two Treatises*: A note on quotations and spelling: quotations from Locke are from Laslett's edition of the *Two Treatises* and as is often the case, are recorded by treatise (in Roman numerals) and paragraph (in alpha numeric script). The use of American or English spelling in contemporary sources is a rather different matter. American spelling (labor for labour) in the quotations from American published works has been changed. Hence, the scrupulous reader will note that quotations from twentieth and nineteenth century works have had the occasional 'u' added or 'z' changed for an 's'.

² Locke, *Two Treatises of Government*, II §120.

³ Of which the seminal articles are Hannah Pitkin, "Obligation and Consent: Part 2", *American Political Science Review*, vol. 60, no. 1 (1966), 39-52; Pitkin, "Obligation and Consent: Part 1", 990-99. Importantly for my argument in later chapters, Pitkin endorses the view that the social contract in Locke is in some way hypothetical, in that '[a]s long as a government's actions are within the bounds of what...[Locke's] contract hypothetically *would have* provided, would have *had* to provide, those living within its territory must obey...[therefore]...the only "consent" that is relevant is the hypothetical consent imputed to hypothetical, timeless, abstract, rational men.' Pitkin, "Obligation and Consent: Part 1", 996-7.

The argument of this chapter is that there is no normative stance on individual property rights in the political society of Locke's *Two Treatises*, excepting the qualification that individual property is justifiably held against the common in a state of nature.⁴ The conclusion is that Locke intended that individual property rights will be defined by a legitimate government. Property will, in a sense, not be delineated by anything necessarily intrinsic to property but rather by the decisions of civil society. What normative content Locke gives to property is confined to the state of nature where maker's or mixer's right – depending on the interpretation – prevails in a fashion, limited by the Lockean proviso. In the argument of this thesis, such a conclusion, proves historical theories of justice cannot provide a plausible account of property theory in a legitimate political authority. They may, like Locke's argument provide a justification of political authority's right to regulate property, but they neglect to proffer a way of evaluating the legitimacy. To argue for a property based system within Lockean civil society, theorists would need to show that Locke produced normative statements that would help decide conflicts over individual property within civil society.⁵ That is, 'who should get what?' However, the production of such statements would be anachronistic⁶ because Locke is gloriously silent on who should get what. Once he justified a civil society formed on the basis of consent, he seemed to have felt his work was done: he had justified the holding of private property separate from Adam's right, created a consent based government focused on the preservation of property, and had shown that a government which acts in an arbitrary manner can be removed on the basis of that consent. Locke is explicitly not concerned with distributive justice (who should get what?) but with creating a state that is legitimate because it does not take property arbitrarily. It is then, the institution of private property that Locke defends, on behalf of his

⁴ A point of clarification. I use civil or political society, to mean the society formed after individuals have created a polity based on consent. Such a society has already been through a period of natural society, or a state of nature.

⁵ Pitkin, while glossing the subject, appears to suggest that it is natural rights against which Locke suggests one can timelessly judge a government's legitimacy (and thus one's obligation to obey), but this is an inference from Locke. So it is the tradition of interpretation that I follow, not the interpretation itself. For the purposes of the argument here – concerning property – it is safer to suggest Locke draws only one particular line in the sand of natural rights for the judging of a government's legitimacy and that is whether a government acts arbitrarily, (though, given Locke's conceptualisation of property can include 'Lives, Liberties and Estates' (II, §123), that gives some pretty wide limits itself). Pitkin, "Obligation and Consent: Part 1", 999. See also Dunn, "Consent in the Political Theory of John Locke", 153-82.

⁶ Istvan Hont, *Jealousy of Trade: International Competition and the Nation State in Historical Perspective* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005), 440. Hont makes the point that none of the political pamphleteers of Locke's time 'posed as a problem of justice ... [the problem of] reconciling property claims against need claims.'

argument against arbitrary government, not individuals' specific private property rights. Locke's question, after all, was not 'who should get what?', but 'Who Heir?' and he specifically rejects that property rights can answer this question, suggesting instead in the Second Treatise that the answer was whoever achieves legitimate government by consent.

In the preceding paragraphs I have made several distinctions between Locke's intention and the ways in which his work have been interpreted. These distinctions arise from a turn in history of political thought in the late 1960s when scholars such as Quentin Skinner and John Dunn suggested that political theory and philosophy was often quite insensitive to the historical context in which works such as the *Two Treatises* were written.⁷ Skinner, for instance, advocated that scholarship in intellectual history, particularly in politics, should concentrate on the use of political language literally in the history of political thought. Against this approach, Rawls' work – though drawing on historical discussion and within a specific context – is modern enough that its context would be difficult to study as history, and so is contemporary political philosophy. Many of the scholars used in this thesis draw this distinction in different shades. Sreenivasan, for instance, relies heavily on scholars of history of political thought but then explicitly (and somewhat inexplicably) attempts to improve Locke's argument, and Simmons barely notes Locke's context, though he often is more careful to remain within it than other scholars, as demonstrated by Tully's later writings.⁸ Perhaps it is best to say, with Kenneth Minogue that

Philosophers are interested in abstract ideas, historians in the individuality of the utterance, and the problem of the intellectual historian is how to negotiate this extremely interesting and poorly demarcated frontier.⁹

In this chapter, I negotiate the boundary on a functional basis. I think there are explicit philosophical failures in the attempt to read a full property rights theory in Locke. By placing Locke in his historical and linguistic context that philosophic failure is made clear.

⁷ See, John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (London: Cambridge University Press, 1969); Quentin Skinner, "Meaning and Understanding in the History of Ideas", *History and Theory*, vol. 8, no. 1 (1969), 3-53. For a narrative and robust set of references of the scholarship on the *Two Treatises* both before and during the historicist turn in history of ideas see 'Chapter 3: The framework of natural rights in Locke's analysis of property' in James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 96-99.

⁸ See Tully's creation of Locke's indigenous contemporaries in 'Chapter 5: Rediscovering America: the Two Treatises and aboriginal rights' in Tully, *Locke in Contexts*, 137-76.

⁹ Kenneth Minogue, 'Method in Intellectual history: Quentin Skinner's *Foundations*', in James Tully, *Meaning and Context: Quentin Skinner and His Critics* (Cambridge: Polity Press, 1988), 186.

For instance, that context reminds us that Locke did not aim to debate distributive justice, or to create a defence of intellectual property rights, but rather to justify the exclusion of a King and *The Two Treatises* need to be read in this light. Such a focus also reminds us that the modern pre-occupations of political philosophy are based in making order for well-meaning people, in hypothetical circumstances: they do not theorise the role of property rights in actual governments. As I shall show, even Locke did not attempt to describe their role, and he did have a chapter on property rights; something strangely missing from texts on contemporary philosophy of justice and liberty. In presenting Locke's theory of government, and arguments for property and the importance of property to individual rights, this chapter sets the stage for commenting on contemporary political philosophy's fashion of removing all discussion of property's governance, while nevertheless expecting property to exist, to be useful, and – more unfeasibly – to be capable of incorporation into a more general rights framework.

Interpreting property rights in Locke's civil government

This section examines the link between property rights and government – the civil society that is contrasted with the state of nature – in Locke's *Two Treatises*. The proposition offered here is that Locke's theory of property, like utilitarian and liberty arguments for property¹⁰, is simply one moral theory that – while applicable to the decision making of political institutions – belongs alongside others that justify individual claims to property.¹¹ The focus here is not whether labour theory works as a moral justification of private property ownership (there is quite enough material on that already),¹² but on whether such a theory interacts with Locke's consent theory, and if it does interact, how? In the most straightforward interpretation property rights are the justification for government. As Harrison puts it '...property gives government its point', since once Locke establishes that there is a natural right to property, then a need arises for government to give owners of property some security of title.¹³

¹⁰ As suggested by Becker, *Property Rights: Philosophic Foundations*; Munzer, *A Theory of Property*.

¹¹ See, for instance, the use of labour theory alongside liberty and utility theories of property in Munzer, *A Theory of Property*, 254.

¹² For contemporary reviews of the strength of labour theory see, for instance, *Ibid.*, 254-91; Alan Ryan, *Property and Political Theory* (New York: Basil Blackwell, 1984); Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (New York: Oxford University Press, 1995); Waldron, *The Right to Private Property*, 137-252.

¹³ Ross Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (Cambridge: Cambridge University Press, 2003), 220. This thesis disagrees almost entirely with Harrison's

In history of political thought, the purpose of Locke's treatment of property was at once more politically pragmatic and more theoretically complicated than this view. Scholars generally agree that the final development of the theory of the *Two Treatises* was completed in the intricate politics of Exclusion crisis of 1679-81. In the practical politics of this period suggests Ashcraft, the Whig movement, of which Locke was a prominent theorist, needed the electoral support of the both the nascent middle class of the period ('merchants, the tradespeople, artisans, shopkeepers'), and the gentry.¹⁴ This meant that the Whigs' argument for exclusion (via consent) needed to reassure the propertied classes that placing limits on the rights of a monarch also did not carry 'levelling' implications for property.¹⁵ As a Tory critic put it at the time, under the guise of property and public good, the Whigs, 'hoped to prevail with those to come over to the party, who were honest and industrious'.¹⁶ Ashcraft suggests that Locke's *Two Treatises* should then be read as the most sophisticated of the pamphlets that intended to provide the intellectual frame for this political strategy: to show propertied classes that the natural rights that gave them grounds for excluding a Monarch, also ensured the defence of their private property.¹⁷ Locke had to show unequivocally that natural rights could justify both privately held property and limited government.

account, since his view is that Locke's natural rights claims are absolute makes it difficult to see why Locke needed a government in the first place. See pages 219-220, where Harrison binds the bundle of rights idea to Locke's view of property, picks an element of the bundle as an example (the right to control), and then states 'If this is a natural right, as Locke wishes to argue', which seems slightly at odds with his statement earlier on the page that 'At a minimum, the "private right" with which Locke says he is dealing includes an exclusive right to use'. As I pointed out in the first chapter, an exclusive right to use is very different to the total control Harrison has earlier taken Locke's property to mean. Having chosen the stronger right, he then moves to argue that it gives bounds to government, since 'if property is the point, then government must respect property in ways that do not interfere with this point.' It all depends on what you mean by total control – can troops requisition it? Probably not. Do Armies invade it? Can it be taxed. If the answer is no then it looks suspiciously like sovereignty, if the answer is yes, then where is line drawn on total control. My point is not that Locke is arguing any of these things, but rather that he is arguing none of them. As Harrison himself admits, '...it is not clear from Locke's text exactly how much of these natural property rights are supposed by him to survive once we reach the stage of government.' Harrison, *Hobbes, Locke, and Confusion's Masterpiece*, 239.

¹⁴ Richard Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government* (Princeton, N.J.: Princeton University Press, 1986), 228.

¹⁵ *Ibid.*, 247-52.

¹⁶ The quotation is from *Achitophel's Policy Defeated*, 1683, 18. Quoted in *Ibid.*, 228.

¹⁷ See *Ibid.*, 230-40. Also, 'Thus, the *Two Treatises* overcomes the conceptual difficulty the Levellers had in justifying revolutionary assistance from their Grotian premise of self-preservation' Tully, *Locke in Contexts*, 27, n. 53. Cf. Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 150.

The intellectual context

Locke's focus was the refutation of Filmer's argument that the origins of government lay with original grant of dominion by God to Adam, and then to each successive sovereign. At the same time, for the reasons given above, he needed a basis for private property that did not rely on either consent or the sovereign's grant.¹⁸ Filmer had suggested, against earlier defenders of limited government, that 'each act of appropriation would require the consent of all and so everyone would starve waiting for universal consent.'¹⁹ Filmer's argument was the knock out blow for the earlier arguments of the original natural law philosopher, Grotius, that private property emerged on the basis of consent from the original gift – from God – of earth to mankind in common.²⁰ Pufendorf went some way to improving Grotius' argument by introducing the idea that the initial community was 'negative'. Pufendorf used the term 'negative' to describe the community in an earlier time when the world belonged to 'the community of mankind, ... it was no one's in particular.'²¹ This conception of the world allowed individuation of property to take place without explicit consent; only tacit consent was needed for appropriation.²² Locke also jettisoned the positive community idea,²³ instead suggesting that 'the great common of the earth [in the state of nature] was open to any taker; it was a negative community, neither individuated to Adam, nor given to a positive community.'²⁴ Locke, though, went further than Pufendorf, and provided a theory which removed the need for even tacit consent in appropriating property.²⁵ This meant that Locke could avoid Filmer's criticism of earlier natural law philosophers that it was absurd to

¹⁸ The gloss provided here is only one interpretation possible from Locke's writings. For a more specific discussion of the possible varieties see Becker, "The Moral Basis of Property Rights"; Harrison, *Hobbes, Locke, and Confusion's Masterpiece*; Sreenivasan, *The Limits of Lockean Rights in Property*. Becker's discussion of Locke's labour theory is by far the clearest but unfortunately is based in the literature of its times and thus cannot rely on the plethora of work in the history of political thought over the last 30 thirty years. Sreenivasan can rely on such work and does so. While Harrison's work suffers from a lack of sources, his discussion in Chapter Eight 'The Key to Locke's Property' is illuminating on Locke's philosophic moves through his chapter on property. See also, for a general justification of private property based on Locke, 'Chapter 10: Original-Acquisition Justifications of Private Property' in Simmons, *Justification and Legitimacy*.

¹⁹ Tully, *Locke in Contexts*, 27. Cf. Robert Filmer, *Patriarcha and Other Political Works of Sir Robert Filmer*, ed. Peter Laslett (Oxford: Blackwell, 1949), 273.

²⁰ On the evolution of these arguments in the natural jurisprudence tradition see Hont, *Jealousy of Trade*, 419-43; Schochet, "'Guards and Fences': Property and Obligation in Locke's Political Thought".

²¹ Hont, *Jealousy of Trade*, 427.

²² Samuel Pufendorf, *Of the Law of Nature and Nations* (London: J. And J. Knapton and others, 1729), 4.4.13: 4.4.9. noted in Hont, *Jealousy of Trade*, 428.

²³ Perhaps via Tyrell see Hont, *Jealousy of Trade*, 431-2, n. 102-3.

²⁴ *Ibid.*, 432.

²⁵ *Ibid.* Hont notes that Locke was also to improve upon Pufendorf's account of the emergence of property, by more carefully specifying the boundaries of individual shares available in the state of nature, via what has commonly come to be called the Lockean proviso. See Hont, *Jealousy of Trade*, 433.

imagine consent being the basis of the institution of property – and thus legitimate the institution of private property - while retaining consent for his later purpose of justifying government. Locke managed to produce private property from a negative community, without consent, by assuming that in the state of nature there was such abundance as to allow ‘takings’ by private individuals that did not impact on their neighbours.²⁶ One of Locke’s more famous passages is unequivocal on this abundance, ‘In the beginning all the World was *America*’ (II, §49), since in America ‘we shall find that the *Possessions* he could make himself upon the *measures* we have given, would not be very large, nor even to this day, prejudice the rest of Mankind, . . . , or think themselves injured by this Man’s incroachment. . . .’ (II, §36). So it was unnecessary for individuals to need consent for taking property, since there was ‘no rational reason either to contend with each other or to be required to make explicit arrangements as to their division.’²⁷ As Locke puts it

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. (II, §33)

This transformation of seventeenth century political thought on property not only places Locke in context, it also provides food for thought on the circular nature of Western philosophy of property. As Hont notes, Locke made it possible for Adam Smith to ‘conclude that a world “before mine and thine” was a distant historical chapter of no direct relevance to the modern world’, which in turn discarded concerns with distributive justice.²⁸ This was possible for Smith because Locke had rejected the need to explain the injustice created by the contemporary ‘exclusive individuation’, by transforming the natural jurisprudential idea that the world was given to mankind in common.²⁹ As Hont puts it

In both Pufendorf’s and Locke’s discussion . . . we can see how the natural law theorists had shifted the problem of adjudicating the need claims of the poor and property claims of the

²⁶ Here I follow Hont, *Jealousy of Trade*. Hont draws on a wider range of secondary sources on the period than other recent writers on Locke, such as Sreenivasan or Simmons. I do have a quibble with Hont, however, since he suggests in the paragraph in Locke, that following ‘all the world was America’, was the line ‘the inhabitants were too few for the Country and want of People and Money gave men no Temptations to enlarge their Possession of Land or context for a wider extent of Ground.’ See Hont, *Jealousy of Trade*, 433, n. 105. Unfortunately, the second quotation is not from II, §49 but from II, §108, and while it mentions America and is discussing America as an example of the ‘first ages’ of Europe and Asia, it is not focussed on property, but rather makes the point that the generals of those first ages could not command complete sovereignty in peace time. I use the quotation from II, §36 regarding the abundance of America, which proves the same point and has the benefit of being part of the chapter ‘On Property’ from which the original line comes.

²⁷ Hont, *Jealousy of Trade*, 432-3.

²⁸ *Ibid.*, 441.

²⁹ *Ibid.*, 440-1.

rich beyond a juridical plane and had begun to consider how a market system could be run in such a way that the scarcity constraints forcing a choice between the claims of need and the claims of property could be overcome altogether.³⁰

For Hont, that is, Locke set the stage for Smith's 'paradox of commercial society; that economic inequality was a paradox because it drove a wedge between the traditional egalitarian intuitions of Western moral thought and the guiding assumptions of modern political economy'.³¹ For the purposes of this chapter, the narrower conclusion is that Locke was at the end of an argument among natural law theorists and their adversaries regarding political and economic equality: for Locke, society could have unequal property holdings, and yet regard each individual as politically equal. This distinction between strict or individual justice and distributive justice was clearly drawn: property, in the natural law tradition in which Locke wrote, was produced by the natural law that judged individual behaviour. Those natural laws then, justified the institution of private property, without a concern for distributive justice (beyond the spoilage condition).

This next section gives the outline of Locke's labour theory with some concluding remarks and footnotes along the way alluding to the major debates over the exact nature of the theory. The debates fall into two categories of scholarship: the first is over Locke's intentions in the text (what he thought he was arguing). Here I employ the best available histories of political thought. Responding to the second category of debates is more problematic: these concern which arguments Locke should have made if he had wanted to maintain a rigorous theoretical argument. In this category Locke's ideas are imported in twentieth- and twenty-first-century political argument. This should be either a point of historical research on what it was that Locke thought, or a reflection upon a contemporary debate about the morality of ownership. By the latter I mean it is a moral argument about

³⁰ Ibid., 440.

³¹ Ibid., 92. Hont goes on to note that it was Smith in his work on *Wealth of Nations* during the 1750s and 60s who first addressed the paradox that was to become central to the liberal tradition, and that it was within the tradition of 'natural jurisprudence [including Locke]...rather than in the "economic" pamphleteers usually described as Smith's predecessors...that we can see the preparation to a specifically "market" solution to the paradox'. Hont, *Jealousy of Trade*, 440. As he suggests, this paradox came to be an essential part of Liberalism, where it could be defined as 'the coexistence of political and legal equality and significant economic inequality in the very same polity.' Hont, *Jealousy of Trade*, 92. I note Hont's views at length because his analysis in *Jealousy of Trade* provides a wider background to views of distributive justice I develop in this and later chapters though Hont does not pursue or discuss the political concept of property. Instead Hont – where it becomes necessary for his argument – concentrates on the theoretical arguments over the justification of private property that enabled the justification of inequality and created the paradox of Liberalism. See especially his discussion Pufendorf's theory of property rights pages Hont, *Jealousy of Trade*, 179- 82.

how to conceive of objects which somebody claims to own (and were not owned before, or where the ownership is contested); for instance, one could use labour theory as a defence of intellectual property rights.³² As I have made clear, I am not primarily interested in moral arguments around property that simply accept all other pieces of the political puzzle as given. To give a quick example of how difficult Locke's importation into contemporary political philosophy can become, Sreenivasan resorts to separating out two separate types of property: *Locke's property* as the name for Locke's explicit position on the types of private property for which he argued, and *Lockean property* for the types of private property right 'the *Two Treatises* actually succeeds in establishing.'³³ Sreenivasan notes that the Locke's property rights (i.e. the ones he explicitly avows) are 'largely indeterminate.'³⁴ Then he examines a 'modernised' theory to establish that Lockean property is broadly similar to the full liberal ownership rights (with some qualifications).³⁵ Whether his argument on the Lockean property is convincing is beside the point for my example (though I shall say something on this later in this chapter). The point of the matter is that Sreenivasan's method reduces Locke's political theory to a moral theory of property: a defence of private property holding by an individual. It may well be a very reasonable theory and have some import for government deciding upon property rights. But by modernising Locke's property theory, Sreenivasan has dismissed the very mechanism that can turn a moral theory of property into the institution of property; a government. As seen in the section on the context of Locke's property theory, Locke's property argument removed an impediment to the use of natural jurisprudence, a language which he needed to argue for consent government.³⁶ Natural law, via Grotius, suggested that amongst other things all men had rights in property, in the earth. If that were the case, the consent problem was not just about who rules, but about why there were rich and poor. Locke needed to avoid that problem, in order to advance the core of his argument in natural law terms: that governments could be removed if they lost the consent

³² See Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property", *Chicago-Kent Law Review*, vol. 68, no. 2 (1993), 842-87.

³³ Sreenivasan, *The Limits of Lockean Rights in Property*, 95-96.

³⁴ *Ibid.*, 100.

³⁵ 'The limitation that the sufficiency condition imposes on modernised Lockean property, then is especially clear; the institution of Lockean property is legitimate only if it conserves everyone's liberty of access to the means of production.' *Ibid.*, 139.

³⁶ 'We may be... led to question whether he [Locke] may not have had the intention to shift the discussion of political obligation onto a more abstract level..., by ignoring the claims of prescription and arguing entirely in terms of the concepts of natural law and natural rights.' Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action" in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully (Cambridge: Polity Press, 1988), 105.

of the people. In simply assuming that one can do away with indeterminacy of property in Locke, Sreenivasan has left behind the question of legitimate government. He has focused on the problems associated with the moral theory of property that enabled the larger political theory without first asking whether the indeterminacy of property is instrumental in the larger political argument of the *Two Treatises*. Instead, Sreenivasan emphasises that Lockean property rights can be the full determinate title of modern jurisprudence, if the right changes are made to Locke's argument. At that point, it becomes the simply the 'labour theory of property' and Locke is an historical, if important, footnote.³⁷

The labour theory

The primary purpose of Locke's labour theory is to explain how property may become individually owned when it is given by God to all, disabling the criticism by Filmer of the natural law theorists who had posited that individual ownership came from consent.³⁸ In Locke's argument, 'The Earth, and all that is therein, is given to Men for the Support and Comfort of their being' (II, §26), but yet 'there must of necessity be a means *to appropriate* them some way of other' in order to enable the use of it by an individual. Given that supposition, there are then four or five separate steps³⁹ that Locke makes in his labour theory to justify the institution of private property. I follow Becker's summary of the standard steps in the argument so that the controversies and debates over the Labour theory

³⁷ I want to make clear here I am not intending to criticise Sreenivasan for his interest in examining how Locke's argument might contribute to our modern understanding property by examining the morality of ownership. My point is rather that such arguments are moral philosophy, not political theory, because they presuppose a high authority to arbitrate the moral disagreements between individuals. For any number of reasonable replies can be made by society to an individual's claim to a property where that claim was based upon an interpretation of the Lockean property argument. So arbitration, by a higher authority, would be required. That is, the Lockean claim would require governance.

³⁸ Schochet, "'Guards and Fences': Property and Obligation in Locke's Political Thought". For an example of contortions necessary when using a natural law reading of Locke's property in jurisprudence see Damstedt on copyright laws, where he claims 'under a civil government, the government itself enforces the natural law [of Locke].' Benjamin G. Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine", *The Yale Law Journal*, vol. 112, no. 5 (2003). For evidence Damstedt quotes the *Two Treatises* II, §87. In that section Locke states that the natural law to protect property is resigned to the civil government, all 'Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right.'

³⁹ This obviously depends on the interpretation proffered by particular scholars: but a clear schematic of the labour theory is reasonably rare - unsurprisingly given its difficulties. See for instance the discussion of it in Munzer, *A Theory of Property*, 254-84. Munzer follows Nozick in giving a quick nod to Locke, before moving on: 'It is not claimed that Locke makes this argument...[since]...the argument...has little in common with Locke's views about gaining property rights.' Munzer, *A Theory of Property*, 256, n. 1.

are more easily observed.⁴⁰ Locke's starting assumption is that an individual needs to have in property 'a right to it, before it can do him any good for the support of his Life.' (II, §26) The first step in the differentiation of individuals' rights to property is proposing the right of the individual to self-ownership: 'every Man has a *Property* in his own *Person*.' (II, §27) A person's body and – by extension – the person's labour with that body are exclusively his (or hers). By labouring upon a thing, the individual has mixed, or made, the thing with his own labour. As Locke puts it 'The *Labour* of his Body, and *Work* of his Hands, we may say, are properly his.' (II, §27) As Becker notes, there is much sport here with how this process actually happens, how someone's Labour 'joyned' an object to an individual. Locke makes the point more abstract by commenting that when the individual removes the object from 'the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the right of other Men.' (II, §27) That is, it is through both the intent *and* action of the individual to exclude others from this part of nature's bounty that Locke imagines or argues that a right in the property is created:⁴¹ Thus Locke sums up his theory after debating the apocryphal Acorn example, 'The *labour* that was mine, removing them out of that common state they were in, hath *fixed* my *Property* in them.' (II, §28) There is one more step commonly associated with the Lockean labour theory, known as the Lockean proviso. The proviso places a limit on the appropriation of things by one's labour 'where there is enough, and as good left in common for others.' (II, §27) A slight variant of the proviso introduced by Locke is that an individual can take only so much as is able to use: 'whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.' (II, §31)⁴²

⁴⁰ Becker, *Property Rights: Philosophic Foundations*. See especially 'Chapter Four: The Labour Theory of Property Acquisition', 32-56.

⁴¹ Clearly, that is not all there is to say on the subject of mixing and making. As I have noted before, whether the method of obtaining property is done by 'mixing' or 'making' or 'joining' may have a considerable impact in contemporary public policy debates on, for instance, intellectual property rights. But again, for the purposes of this chapter, the crucial point is that a right to private property *can* be established through the ownership of one's own labour. The differences in Locke's treatment of the subject in the *Two Treatises* that are important to modern debates: whether it is the value added that is owned (II,28) or the property itself (affirmed by Locke in II, §40). The normative implications of self-ownership are vastly more complicated than I have suggested here. For a brilliant demonstration of its problems and implications see Cohen, *Self-Ownership, Freedom, and Equality*. I do not deal with them at this point, since I am arguing that the normative implications from Locke's theory of property do not (especially solely) shape property in a civil government.

⁴² Sreenivasan, *The Limits of Lockean Rights in Property*.

A short note on Locke's property theory, its modern use, and the differences therein

Having seen the basic structure of Locke's property theory, it is now possible to extend the earlier discussion regarding a distinction between that theory's place in moral philosophy and its purposes in political theory. Becker concludes that Locke's theory is wanting because one cannot own one's children.⁴³ He finds Mill's reformulation of the theory more successful. Mill argued that property rights are based on the value that labour adds. However, as Becker points out, in order to for Mill's argument to be morally unobjectionable: the property must not have existed before the labour; the labour itself must not be part of moral duties to others; and others must not lose by being excluded from the thing which is laboured upon. Becker notes that in a competitive situation, any deterioration of competitive position is a loss, and therefore any private ownership of the means of production (e.g. land or other natural resources) cannot be founded upon the Millian reformulation of Locke's theory. As Munzer suggests, in these terms the Millian reformulation 'supports socialism, rather than possessive individualism.'⁴⁴ Whether or not Locke or Mill should be interpreted to support possessive individualism, this is a philosophically fascinating area for scholars interested in labour and desert theory. However, there are many problems with this treatment of Locke's theory of property. I point out one: that the intention of Locke's theory of property was not to justify individual private holdings the one against the other, but rather to justify the possibility that property could arise without consent. Thus it is strange to place Locke's theory in the modern and competitive situation of scarcity in all natural resources: Locke had explicitly noted that the state of nature in which the labour theory was operating was one of abundance. That is, Locke's labour theory was not proposed by him to work in a competitive environment. Indeed it was the arrival of scarcity that propelled man, according to Locke, into placing all property under the rule of government and law. While it could be observed that his argument might be of use in a competitive modern economy, the absurdity of Locke's theory being put to use in such debate becomes abundantly clear when Munzer criticises Becker's interpretation of the Millian reformulation:

...Becker construes the "no loss" requirement too stringently. His view is that any acquisition of property involving deterioration in competitive position brings with it the loss of an existing good, namely, as assumed competitive parity. But not all losses are *net* losses.

⁴³ Becker, *Property Rights: Philosophic Foundations*, 37.

⁴⁴ Stephen R. Munzer, "Book Review: Property Rights Philosophic Foundations by Lawrence C Becker", *Minnesota Law Review*, vol. 63, no. 3 (1979), 533.

Munzer suggests that Rawls's difference principle may come to the aid of the Millian reformulation by suggesting that if one could provide a theory of how losses and gains are to be weighed and off-set, and show that the gains outweigh the loss in competitive advantage then the 'Locke-Mill argument might regain some of its force, and socialism might not be the order of the day after all.'⁴⁵ This is 'philosopher king' talk at its worst: political order appearing as if from thin air. There is little political theory left in this argument besides the attempt to justify the property rights decided by a philosopher's argument, not a decidedly easy way to achieve a government derived by and ruling through legitimacy: Munzer is suggesting that a particular formulation of a labour theory derived from, but owing little to Locke's perambulations on the idea, may not be suggesting when Becker thinks it is, that socialism(of what type?) is the best answer. Whether a government, already hemmed by laws constitutions and peoples might find this idea gives a reasonable justification for some property laws is another matter; it is after all a pre-eminently economic debate about the efficiency of private property which must be weighed against other normative schemes and the particular property rights under examination.⁴⁶ Which is exactly why, Munzer's argument become absurd when so far from Locke's original idea of property as a defensible natural right which one could obtain in the state of nature. Munzer's use of Locke is semiotic only and somehow lends authority to an argument so far removed from the presuppositions within Locke's text that it seems 'reasonable' in turn, to stick up a hand to say 'that is not a Lockean argument'.

From property to government

So what has Locke's theory of property to do with his theory of government? As with all things, it is a matter of some debate. This section starts with Laslett's work on the subject of government formation in Locke as his is the standard interpretation upon which modern recent scholars base their argument. Scholarship that tweaks or moves Laslett's interpretation forward is then reviewed. Finally, I look at Ashcraft's work, which takes Locke in a markedly different direction, and one that more reasonably fits with the interpretation of property which I am defending.

⁴⁵ Ibid., 535.

⁴⁶ The weighing of a number of normative arguments about the moral justification of a particular property rights is proposed in Munzer, *A Theory of Property*.

In Laslett's introduction to his standard text, the defence of property is the key reason for individuals forming civil society via government.⁴⁷ This requires an understanding of Locke's argument for government. Laslett begins with Locke's answer to "How is government possible at all?"⁴⁸ He suggests Locke answered that government is possible because, given freedom and equality as starting points,

everyone has the Executive Power of the Law of Nature (II, §§6,7,8,9,13)

On Laslett's interpretation, Locke argued that anybody was able to wield this executive power over a transgressor of the natural law.

If anyone offends against the law of nature, everyone else has the right to punish him for it, not simply for his own damage but to vindicate the rule 'of reason and common Equity, which is that measure God has set to the actions of Men, for their mutual security (II, §8)

From this argument that others may punish a transgressor, Laslett's interpretation assumes that Locke derived collective action, stating 'we may and we must co-operate with other individuals against this "trespass against the whole Species"'.⁴⁹

On this natural right, which arises out of humanity itself, is based not simply the right of governing, but its power as well, for it is a collective power which is used against an offender even if only one man wields it. The right of governing, and the power to govern, is a fundamental, individual, natural right and power, set alongside that of preserving oneself and the rest of mankind (II, §§128-30)

It is but a short step from the idea of individuals having a right to execute the law of nature in concert with others, to a fully formed political theory of government. For if the law of nature is to be found via the reason of man, then the law of nature, is to be the law of man.

Or as Laslett states about Locke's right of executive power

It is judicial in nature, for it is the pronouncing and enforcing of a law, the law of nature which is the law of reason⁵⁰

In a less convoluted way, the right of every man to preserve himself and everybody, translates immediately into a political theory – 'government is simply a "Magistrate, who by being Magistrate, hath the common right of punishing put into his hands" (II, § 11).'⁵¹ The

⁴⁷ An interpretation which Hont makes too: 'Locke's improvement on Pufendorf, as Babeyrac observed, was to have pushed back the moment in history when contract became necessary by virtue of a hypothesis of initial abundance, and then to have theorised the emergence of the inequality that would make necessary a pact establishing government' Hont, *Jealousy of Trade*, 437.

⁴⁸ Locke, *Two Treatises of Government*, 97.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid., 98.

development of a political theory of government in Locke's text, suggests Laslett, is through the comparison with the original state of nature.

The state of nature is simply the condition in which executive power of the law of nature remains exclusively in the hands of individuals and has not been made communal. It can be inferred that it was the original condition of all of humanity, because wherever established and permanent collective authority is found, it is always discovered to be the result of men taking thought, making deliberate arrangements to secure and establish the rule of rationality and the provisions of natural law. It is not an adequate reply to this to say that men are all observed in fact to live under government, because 'Government is everywhere antecedent to Records' (II, § 101, compare I, §§ 144,15) and because primitive tribes are known to be living now without government or very nearly so.⁵²

If 'In the beginning all the World was *America*' (II, § 49), then Locke, according to Laslett, is setting out the 'universal background against which government should be understood. It tells us what government is and what it does by showing us what it is not.'⁵³ As an example of such a comparison, Laslett notes Locke's statement that a monarchy is '*inconsistent with Civil Society*, and so can be no Form of Civil Government at all (II, § 90).'⁵⁴ A monarch, that is, rules according to his own judgement, as men do in a state of nature. This being the case, Locke can then argue, a Monarchical society is itself in a state of nature. Importantly, the state of nature in a Monarchical society does not impede all attempts for peace, justice and social and political cooperation. As Laslett puts it, 'men are not like that. The state of nature is already social and political'.⁵⁵ While such realism and complexity make Locke's analysis more compelling, it does raise the inevitable question of why anyone would depart from the state of nature.

Although his state of nature is inconvenient, and although his individual is perfectly capable of transcending it and we can see why he and his fellows should wish to do so, Locke introduces here a motive for the establishment of political society which few had considered in the context of political origins, and none had given much prominence. He abruptly injects into the discussion the concept of property.⁵⁶

Later in this chapter, whether Locke or Laslett is introducing this motive will come under debate, since Ashcraft concludes that the motive to move to a political society exists without the defence of property. It is important to note here three points about Laslett's analysis. First, Laslett needs to be correct that there was not sufficient reason for the move into society. Second, he needs to be correct that Locke intended it to be so (either as a true

⁵² Ibid.

⁵³ Ibid., 100.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid., 100-01.

reflection of ‘Mankind’, or simply because he wanted to add an extra motive). Third, Laslett at this point needs the reader to agree that property should be read as a right in a defined object (otherwise Laslett could simply have argued that Locke introduced the defence of personal liberties.)⁵⁷ For now, let us assume that Laslett is correct: property is a motive – if not the motive – for entry into society. Individuals leave the state of nature in order to ‘set up a source of power “for the Regulating and Preserving of Property”(II, § 3)’.⁵⁸ Laslett’s conclusion is that property is the necessary and sufficient reason for creating a society. His conclusion is based on the idea that Locke justified political authority, by its ability to end conflict over property. Only a society ruled by a civil government could arbitrate on the law of nature to stop conflicts over different interpretations of that law by individuals and in so doing stop conflicts over property.

The need for a civil government: the indeterminacy problem

Sreenivasan’s label for Laslett’s interpretation of the role of property in the creation of government is the ‘indeterminacy problem’.⁵⁹ Locke argued, according to Sreenivasan, that while a right to private property could be established in a state of nature, it suffered from an *indeterminacy* problem.⁶⁰ That is, while property is legitimate in a state of nature, it

...is nevertheless incomplete, for the theory of property which Locke propounds in Chapter 5 established only ‘how Labour could at first being a title of property in the common things of nature’ (II,51). These natural titles which Labour brings are indeterminate and the enjoyment of them is ‘very unsafe, very unsecure’ (II, 123).⁶¹

On this interpretation, because the natural law is indeterminate it follows that property rights are also indeterminate. Individuals therefore search to make their property rights determinate. Sreenivasan notes that the search for determinate land titles is given several other motives in the *Two Treatises*. There is an argument about the depravity of human

⁵⁷ Alternatively Locke could have been intentionally vague, or at the furthest reaches of his philosophy. As Schochet puts it, ‘While Locke certainly had an understanding of the ownership of land under government, he did not have a *theory* or justification of such ownership that was derived from his more general concept. *Life, liberty and estate works in civil society for Locke as a general notion because it is rooted in the self-ownership that is constitutive of his concept of the person in the Two Treatises. That is as far as it goes; it does not work as a basis for land that is owned subject to governmental regulation.* Given the historical and political differences between property in land and material possessions, on the one hand, and property in one’s self, on the other, it is doubtful that a single theoretical doctrine could contain them both.’ (Italics added) Schochet, “‘Guards and Fences’: Property and Obligation in Locke’s Political Thought”, 379, and on the difficulty of property in Locke’s *Two Treatises*, 76-82.

⁵⁸ Locke, *Two Treatises of Government*, 102.

⁵⁹ Sreenivasan, *The Limits of Lockean Rights in Property*, 90.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* He also quotes ‘the law of Nature...found...in the minds of Men,...where there is no Judge: And so it serves not, as it ought, to determine the Rights, and fence the Properties of those that live under it’. (II, §136)

nature being such that individuals will unjustly prey on others' property.⁶² Sreenivasan also mentions another motive, but is less than clear on its meaning, stating

Also, this insecurity [of title] is exacerbated by the 'straitning' of some, which is occasioned by the scarcity of land.⁶³

Whatever the reasons for the indeterminacies of property, Sreenivasan is clear that the moral right to private property is established in the state of nature - an uncontroversial idea. This seems a plausible reading of Locke

To avoid these Inconveniences which disorder Mens Properties in the state of Nature, Men unite into Societies, that they may have the united strength of the whole Society to secure and defend their Properties, and may have standing Rules to bound it, by which everyone may know what is his (II, §136)

So individually held property is justified in Locke's writing on the state of nature, but becomes determinate through its codification and regulation by civil government. Thus the creation of government is seen as the '*completion* of a property which was inaugurated by natural appropriation and which survives...entrance into that society.'⁶⁴ In Sreenivasan's view, then, 'property and its rights are rendered determinate through civil codification.'⁶⁵ This 'indeterminacy' argument seems plausible, but the next step Sreenivasan makes, is less so. He argues that Locke meant that 'the property which a man owns in civil society can be seen as the *completion* of a property which was inaugurated by natural appropriation and which survives his entrance into that society.'⁶⁶ The word upon which this accomplishment turns here is 'survives'. To bolster his argument Sreenivasan quotes an apposite paragraph from Locke seeming to approve of individuals' property rights *surviving* the transition to civil society.

[T]he 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' (II,45; cf II,38).⁶⁷

⁶² Ibid., citing Locke, *Epistola de Tolerantia*, 21, 56-6. Sreenivasan acknowledges an earlier reference in Locke, *Two Treatises of Government*, 350, n. for II, §124.

⁶³ Sreenivasan, *The Limits of Lockean Rights in Property*, 90. He writes in the footnote to this passage: 'Perhaps it is even bought on by this scarcity; Locke suggests that such disputes and difficulties are absent in the age of abundance (II, 39, 51).'

⁶⁴ Ibid., 91.

⁶⁵ Ibid.

⁶⁶ Ibid., 91

⁶⁷ Quoted in Ibid., 91.

In short, property is ‘regulated’ by the establishment of government, who then ‘protect’ that property.⁶⁸ In answer to the question of why property survives, Sreenivasan can cheerily answer that it is to ‘preserve men in their property (II, §124)’, which is, after all, the reason Locke gives for entering government.⁶⁹

Sreenivasan’s thesis is that the indeterminacy problem is answered in Locke’s text by the survival of an individual’s property rights in the transition from the state of nature to civil society. It is a happy solution since it proffers a motive on the part of the individual’s consenting to government – they secure protected title to their already established property. However, there are problems with this transition: if their title is insecure, it is because there are ‘controversies’ (II, §124) over their property in a state of nature. This point, in turn, suggests that it would not be an easy task for a government to establish who had the right to a particular piece of property. To follow this line of thought, when a government came to decide who was the owner of the land, surely – to echo Nozick – it would be just as easy for an individual to lose a piece of property that they claimed (to another claimant for that land) as it would for them to retain it.⁷⁰ As a problem of governance it is not insignificant. When a government decides the appropriate natural rights to property, it may be that the original property holder has interpreted his or her natural right differently, and so loses the land to which they claim entitlement under their interpretation of natural rights. The last chapter of this thesis focuses on a government facing precisely that problem in colonial New Zealand. Should it be possible to lose land, as well as gain it, in the transition to civil society, much of the motive for entering civil society seems to vanish, as no longer does civil society necessarily ‘preserve men in their property.’⁷¹ A simple way of asking this question might be to say, ‘survive according to whose rules?’ bringing Locke’s theory back to the original ‘Who Heir?’

Sreenivasan’s solution to the indeterminacy problem is frail. It is frail because Locke’s text does not support it. To highlight the error a close reading of Sreenivasan’s textual evidence from the *Two Treatises* is needed. First, Sreenivasan claims that §45 discusses the survival of

⁶⁸ Ibid., 91-2.

⁶⁹ Ibid., 92.

⁷⁰ Nozick, *Anarchy, State, and Utopia*, 174-5.

⁷¹ Sreenivasan, *The Limits of Lockean Rights in Property*, 92.

natural property rights in civil society. This is the section that suggests ‘...*Communities...by Compact and Agreement, settled the Property* that Labour and Industry began’ (II, §45). Locke discusses much in general in this section, as it is a short summary of his whole labour theory, but in particular he is discussing the territorial claims of whole ‘States and Kingdoms’. Sreenivasan too easily takes *settling* property as settling the individual rights over it, rather than settling government, order, or possession by the government. All the paragraph states about individual property is that communities regulate the properties of men by compact and agreement. Whether the ‘Labour’ and ‘Industry’ is referring to general populations, or to individual property owners is not clear and given the generality of the whole paragraph, claiming it as an argument for the continuation of individual property seems to be stretching Locke’s text.

The argument here is not with Sreenivasan’s general point that individual’s are entering civil society ‘to avoid these Inconveniences which disorder Mens Properties in the state of Nature’ (II, §136). That would be to argue against Locke’s explicit

‘The Reasons why Men enter into Society, is the preservation of their Property; and the end why they chose and authorize a Legislative, is that there may be Laws made, and Rules set as Guards and Defences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every part and Member of the Society’ (II, §222).

Yet no matter how clear this paragraph is in setting out the indeterminacy problem of individuals in Locke’s state of nature, it does not contain an argument suggesting that property in a state of nature survives the transition to civil society. After setting out the indeterminacy problem, Locke immediately turns his discussion to the governance of settled property. He does not discuss how property becomes settled. Surely if Locke wanted to make clear that all property title in the transfer from a state of nature to a civil society was settled in a law of nature his style and ability in English language would have him allowed to do so unequivocally. The point is rather that Sreenivasan’s discussion, and indeed many discussions, of the *Two Treatises* stretches Locke’s general justification of privately held property (and a general defence against arbitrary taking by government) into a defence of individual private property against civil government. Such a discussion takes for granted the ease with which a government coming into being can make determinate the property titles of a pre-existing order.

Literature on Locke and property – as in the *Two Treatises* itself – generally elides the question of the link between consent government and property. Historians of political thought have suggested that the link is not much discussed in Locke’s writings on political institutions for reasons of political strategy. As noted earlier, Ashcraft shows that while Locke wanted to offer a theory of consent government, he also needed to reassure the propertied classes that such theories did not make their property rights insecure.⁷² While that may be a reason for the elision of a straight-forward explanation of how Locke’s theory of property aids the formation of government, and why it is not much discussed after that by Locke, the contextual history does not help explain the paucity of later literature on this issue. Contextual literature may explain why the elision occurs but it does not explain why later theorising about property rights based in a Lockean labour theory has neglected the theory of government in which it is located. This thesis is not the place to proffer an explanation since it would require a programmatic reading of the motives of Lockean scholars in the twentieth century and would be a thesis in its own right.⁷³

The neglect of the links between consent and property arguments in Locke in writings on Locke would suggest that the links between natural and civil property have not been studied, but such a logical assumption would be wrong. Those who have examined Locke’s theory, of whom Sreenivasan is but one of the most recent, take it for granted that Locke’s property theory transfers seamlessly between the state of nature and civil society. Where individuals

⁷² See for a summary of this issue, *Ibid.*, 15., whose discussion comes from a detailed analysis in Richard Ashcraft, “The Politics of Locke’s Two Treatises of Government” in *John Locke’s Two Treatises of Government : New Interpretations*, ed. Edward J. Harpham (Lawrence, Kan: University Press of Kansas, 1992), 246.

⁷³ It would be disingenuous not to proffer some tentative thoughts on this since I draw an analogy between contemporary political philosophy and Locke’s political thought on which I expand in the next chapter. Distributive justice has been the focus of many political theorists, and this has engendered literature drawing out Locke’s thoughts on that topic, a topic for which Locke’s political theory (as opposed to the moral theory of property ownership which can be drawn from it) is almost wholly unsuited. This means that scholars must blur the distinction between Locke’s theory and the labour theory of property derived from his work that emerged in the late twentieth century via Nozick, as a counterpoint to the more distributive inclinations of many political philosophers. For examples of Locke’s use in the distributive justice debate see Waldron, *The Right to Private Property*. Some historians of political thought can be very dismissive of such an attempt, see for example, Vaughn’s comment that ‘Of course, the whole question of what any man is due is really the crux of some of the recent Lockean scholarship. This is not the place for me to comment upon that large and complex question, except to note that... [i]n order to make the case that Locke was really an egalitarian of sorts (or even to make the opposite case that he definitely believed that income should be unequally distributed) requires textual gymnastics that can never be completely convincing. Here, I simply take the position that Locke, by saying little on the matter, probably more or less accepted the economic status quo with a few reservations about monopoly banker and middlemen.’ Karen Iverson Vaughn, “The Economic Background to Locke’s *Two Treatises*?” in *John Locke’s Two Treatises of Government : New Interpretations*, ed. Edward J. Harpham (Lawrence, Kan: University Press of Kansas, 1992), n. 26.

have indeterminate property in the state of nature, via consent and the formation of government, those titles become determinate with the use of a Lockean theory of property rights. On this reading, Locke's theory of consent government is both a product of, and a solution to squabbles over property rights found in the state of nature. This reading of Locke has been considered so plausible that the best current gloss on Locke's property theory condemns any attempt to 'drive a wedge between the natural and civil property regimes' on the basis that 'the whole thrust of Locke's analysis of property calls for continuity between the two.'⁷⁴

A few theorists have offered interpretations that suggest that Locke's property theory is not the morality by which property is rendered determinate in civil society. For instance, Olivecrona discards altogether the idea that natural property continues into civil society, when he suggests that for Locke the theory of appropriation is trumped by 'a series of agreements to introduce money, divide the earth, and to institute government which issued laws concerning property-rights.'⁷⁵ That is, with the move into civil society based on consent, individuals' 'contemporary property-rights were regulated by laws', rather than by a particular moral theory derived from their experiences in a state of nature. Thus, for Olivecrona 'the theory of appropriation only served to explain how men had been able to break loose from the original community of property'; it did not set limits on the laws of property decided by a government.⁷⁶

Olivecrona suggests that Locke's theory of property appropriation, as put forward in his chapter 'of Property (II, §§25-515), is necessary only insofar as it shows how individuals came to be able to privately own land in a state of nature.'⁷⁷ The problem for Locke, notes Olivecrona, was that he shared with Grotius and Pufendorf, the view that 'the earth had been given to mankind in common.'⁷⁸ So the question for Locke was 'how could the original

⁷⁴ Sreenivasan, *The Limits of Lockean Rights in Property*, 91, n. 61.

⁷⁵ Karl Olivecrona, "Locke's Theory of Appropriation", *The Philosophical Quarterly*, vol. 25, no. 96 (1974), 231.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 224-5. 'When Locke contends the fruit or the deer becomes the Indian's in the sense of being "a part of him", he follows the same line of thought as Grotius and Pufendorf. The spiritual personality is extended so as to encompass physical objects. Locke only gives an uncommonly clear and pregnant expression to an idea which pervades natural law thinking.'

⁷⁸ *Ibid.*, 221.

communism...have given way to private rights in property?⁷⁹ The answer, in Olivecrona's interpretation, was that private appropriation was possible in an age of abundance simply though the act of making the object one's own⁸⁰ as long as there was 'still enough, and as good left' for those remaining. The characterisation of Locke's state of nature was

...perfect harmony seems to have reigned in the age of abundance. It was possible for a man to appropriate as much as was required for the support of his life. Needs were limited, and no man was able, or authorized, to amass property in land or movable things to the detriment of his neighbours. There was "little room for Quarrels or Contentions about Property" (II, §31, 17ff); there could be "no doubt of Right, no room for Quarrel"(II, §399).⁸¹

For further emphasis, Olivecrona points out that Locke's stress in the text was that this justification of property was the '*Beginning* of property' (II,30) and suggests that the stress was made because 'in the age of scarcity another order prevailed.'⁸² With the introduction of money, individuals could own more than they could consume, so long as they did not let it spoil.⁸³ For Locke, the ability to store and trade property, via money, made it

...plain, that Men have agreed to the disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to anyone. (II, §50)

Olivecrona is unusual in finessing the labour theory to give two separate arguments. The first is that outlined already: the theory of appropriation that allowed communal property to become privately held, without consent, in a state of nature. In this interpretation the labour theory is a defence of private property as an institution.⁸⁴ The second argument is more closely aligned with the standard view of the labour theory of value as creating property in

⁷⁹ Ibid.

⁸⁰ See Ibid., 227-8. Olivecrona notes differences between appropriating movables or land in Locke's text: on movables, he suggests that the argument about picking up acorns is really an appeal to the 'common way of looking at things', and was argued as a piece of ideology, though the cases used by Locke are 'typical instances of occupation according to natural law theory'. Olivecrona, "Locke's Theory of Appropriation", 227. The appropriation of land, however, was more comprehensively argued by Locke. On Olivecrona's interpretation, in the state of nature appropriation (the assertion of ownership) required enclosure of the particular area to be appropriated and continued cultivation. Olivecrona, "Locke's Theory of Appropriation", 228.

⁸¹ Olivecrona, "Locke's Theory of Appropriation", 230.

⁸² On the stress of 'beginning', Olivecrona cites the *Two Treatises*, II, §§28, 30, 45, 51. See Ibid., 231.

⁸³ As I am setting out Olivecrona's argument for illustrative purposes, I do not wish to pursue too many of its defects, but it is odd that he does not note his interpretation of Locke retains one natural law (against spoilage) in the age of scarcity, while jettisoning the rest (such as enough and as good be left for others) by arguing that they are trumped by the use of money. Ibid., 230.

⁸⁴ See Ibid., 221-6. Particularly 'When Locke contends that the fruit or the deer becomes the Indian's in the sense of "being a part of him", he follows the same line of thought as Grotius and Pufendorf. The spiritual personality is extended so as to encompass physical objects.' Olivecrona, "Locke's Theory of Appropriation", 225.

civil society. Olivecrona carefully analyses Locke's writings on the value of labour in order to discover whether title does indeed emanate from labour in Locke's text.⁸⁵ He finds that

What Locke says is that the value of things almost wholly derives from the labour used to produce them or improve them. This is the reason why his theory of property is said to be based on the labour theory of value.⁸⁶

Rather than following most commentators in suggesting that therefore Locke thought that labour gives title, Olivecrona suggests that it would have been patently absurd for Locke to think this since 'titles to property were defined in law and consisted of conveyances, inheritance etc. The whole distribution of property was directly or indirectly based on agreements.'⁸⁷ Rather Olivecrona suggests, 'Locke's intention must have been to *justify* the actual distribution of possessions'. That is, the historical work of labour to turn the 'worthless Materials' of 'Nature and Earth' (II,43), and its rise in value is balanced in Olivecrona's view, against the small loss suffered by the original community. In this way he makes sense of Locke's point that

Nor is it so strange, as perhaps before consideration it may appear that the *Property of Land* should be able to over-balance the Community of land. For 'tis *Labour* indeed that *puts the difference of value* on everything. (II,40)

In his argument Olivecrona then notes with deceptive simplicity that Locke never suggests that the 'labour must be the labour of the present owner'.⁸⁸ So 'the value of contemporary possessions in England was evidently derived from the labour of generations of forgotten men.'⁸⁹ This labour had never been common, since the land title was arranged through agreement. So long as the present owner had lawfully acquired it, according to Olivecrona's version of the labour theory of value, the value of the labour from which the owner profited was rightly his, and since the land's value in its natural condition was negligible, 'it could not be maintained that the present owner or his predecessors had robbed others of anything worth mentioning.'⁹⁰

⁸⁵ Olivecrona cites the *Two Treatises*, II, §§42 & 43. See Olivecrona, "Locke's Theory of Appropriation", 231.

⁸⁶ Ibid.

⁸⁷ Ibid., 232.

⁸⁸ Ibid., 233. Deceptively because it relies, as Olivecrona admits, on Locke's omission of the central point of the argument – that he meant that contemporary owners had the right to the wealth of the property, wealth which was generated by previous owner's labour.

⁸⁹ Ibid.

⁹⁰ Ibid.

Olivecrona does not address the indeterminacy problem identified by Sreenivasan. Indeed, he does not even see it as a problem; agreements (and therefore one supposes consent) do the work. One could well ask how? But even asking that question presupposes that Sreenivasan is right to identify the core problem of Locke's property in a state of nature as indeterminacy; Olivecrona's argument would suggest that this supposition is unnecessary since that state of nature is an age of abundance. At this point of an imagined debate between Sreenivasan and Olivecrona the water is murky indeed since we are then debating the degree of abundance in Locke's state of nature, and the point at which money came into existence as abundance became scarcity. Nevertheless two points emerge of interest for this thesis in a comparison of the wildly different interpretations of Sreenivasan and Olivecrona. First, there is agreement that Locke's argument for private property rights in a state of nature was successful. Exclusionary property rights can emerge from the common via an appropriate act that extends individual self-ownership to another object. Second, that such an argument does not necessarily lead to an indeterminacy problem where there is abundance. Where there is scarcity, it is unclear whether the indeterminacy of property rights drives agreements to solve the collective action problem or those agreements are driven by scarcity and money. While Olivecrona is forthright on the point that labour theory of value justifies unequal possessions and concludes that the private acquisition of property is justified in a state of nature, there is no examination, nor idea that there need be an examination, of the transfer from natural to civil property. That is, the idea of property in Olivecrona is still moral rather than political theory. Olivecrona's import for this chapter is that he shows it is possible to take seriously the labour theory and argue that property is not even a necessary condition for the formation of government (though he is very slight on any conditions, since he is not writing on Locke's consent theory).

Tully also argues against the traditional view that that property rights of individuals continue intact in the transition from the state of nature to civil society. He suggests instead that once civil society is formed, goods held by the individual in a state of nature become community property.⁹¹ This interpretation of Locke, Tully suggests, is the only plausible outcome of the combination of Locke's argument for an individual's right to sufficiency, and his framing of

⁹¹ James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980), 98.

property as a natural right.⁹² Tully has come in for some criticism for his view of Locke's property arguments in general and on particular points, especially from Waldron.⁹³ The general criticisms are against Tully's view that individual property rights in a state of nature become community goods in a civil society. These arguments are beyond the scope of this thesis.⁹⁴ The particular criticism important to this chapter is the one Waldron aims at Tully's argument against the standard view of the continuity of property from the state of nature to civil society. In attacking Tully, Waldron glosses the indeterminacy question; in Waldron's language he examines whether Lockean property rights are prior to civil society (and thus bind the government), or if government rules supersede the property rights attained in a state of nature. As Waldron notes, there is also the wider issue that should the former prove correct, and property rights in Lockean theory are not prior to political society, 'there are limits on the extent to which a Lockean theory of property can provide a basis for a theory of constrained or limited government of the sort discussed by Nozick.'⁹⁵

Waldron actually agrees with Tully that property in Locke's civil society cannot be entirely natural. For instance, he acknowledges that when a government 'settles' the property in civil society (II, §§38,45), the forms of regulation may involve a certain degree of modification of natural entitlements.⁹⁶ Yet, in admitting this point, Waldron's interpretation of Locke suffers the same failures of plausibility as Sreenivasan's indeterminacy problem. If it is natural rights that define property, and that property is supposed to continue in civil society, what is the basis for the decisions about who will get what? Or in Waldron's language, how will those natural entitlements be modified? Waldron's criticism of Tully's conventionalist account of Locke's property seems a bit odd once he has admitted that there will need to be some modification of the property rights achieved in a state of nature; since one may well reply

⁹² Ibid., 164-8.

⁹³ Jeremy Waldron, "Locke, Tully, and the Regulation of Property", *Political Studies*, vol. 32, no. 1 (1984).

⁹⁴ The general criticism is aimed at Tully's conclusion that Locke was advocating limits on inequality. Tully uses the natural rights arguments of the state of nature – particularly the Lockean proviso – to constrain the conventional (Waldron's description of property in civil society) distribution of property. This allows him to suggest that Locke effectively argued for some type of distributional scheme for government. This argument, as Waldron has pointed out, stretches Locke further than the standard interpretation. Since this chapter argues against importing natural property rights into civil society, the arguments I proffer against the standard interpretation throughout the chapter pre-empt Tully's interpretation in its starting blocks: though see below for specific criticism. Tully, *A Discourse on Property: John Locke and His Adversaries*, 164-8. See also Waldron, "Locke, Tully, and the Regulation of Property", 98-106.

⁹⁵ Waldron, *The Right to Private Property*, 233.

⁹⁶ Ibid., 239.

that as soon as natural rights are modified by a governing body, they are no longer natural but conventional. Waldron seems to realise this he has a query and so answers it with an example of what he means by the natural property rights continuing, suggesting that ‘a farmer may have conceived of himself as being entitled to that “that field over there” in a state of nature, but once he is in a political society his land will be strictly, precisely, and publicly defined.’⁹⁷ This Waldron suggests

... will not involve the wholesale abrogation of natural property rights, but merely their subjection to the conditions necessary or their effective protection by positive law.⁹⁸

If the farmer imagined himself to have a bundle of right exactly the same as the bundle allocated to him when his property was defined, one might just about agree with Waldron that there is no ‘wholesale abrogation of natural property rights’; though the serendipity of it may give pause. But Waldron is disingenuous to suggest that Locke thought the natural law so clear as to have complete synchronicity between those who have the natural rights and those who *determine* them. Locke did not think that an individual’s interpretation of the natural law was so sanguine and thus saw the need for an ‘indifferent Judge’ because ‘Men being too partial to themselves’(II, §125) and ‘though the Law of Nature be plain and intelligible, yet Men being biased by their interest,..., are not apt to allow of it as a Law binding to them in the application of particular cases.’ (II, §124)

In a larger way, Waldron also qualifies the continuance of natural property in civil society with the Lockean proviso. He argues that ‘to maintain that Locke believed that natural entitlements survive the transition to civil society is not to suggest that he regarded private property in civil society as absolute or unlimited’ since Locke held that all property rights are ‘subject at all times to the general right of every man to a basic subsistence when his survival is threatened.’

That general right – the primeval natural right of Lockean communism – ...qualifies... all of the special rights whose existence Locke has been attempting to argue for...Since it applies already to natural entitlements, it is *a fortiori* one of the natural duties that civil authorities may legitimately enforce in the discharge of their function of upholding natural rights.⁹⁹

⁹⁷ Ibid., 240.

⁹⁸ Ibid.

⁹⁹ Ibid., 241.

Again, the point is that there is nothing in the *Two Treatises* that suggests how those rights shall be defined in civil society, aside from the demand that all laws, including those on property, be made with the consent of the people via the legislative. Making an argument against Tully is important for Waldron because he wants to show that Locke argued that ‘private property rights are possible apart from Government.’¹⁰⁰ The interpretation proffered here agrees, inasmuch as it is true that within Locke’s state of nature there are rights to property without government. Waldron, however, pushes the argument further and states that Locke

Wants to show that there are principles of natural justice which govern property holdings and that these can be deployed critically against any government that threatens to interfere with or redistribute the property of its citizens.¹⁰¹

Locke actually did not state this. Rather, Locke’s avowed concern was the *arbitrary* taking of property because government would then be acting without consent. In place of consent as the legitimating device of government, Waldron has assigned to Locke the idea that it is the giving of security to each individual’s property that legitimates government,

...property-owning got under way at a time when there was no government, and that the function or ‘end’ of government is to protect property holdings that it has not itself constituted.¹⁰²

At the same time, Waldron acknowledges that there is a lack of determinate title in a state of nature, noting that ‘Locke, I think, would acknowledge that property in a state of nature cannot be as precisely or as clearly determined as in civil society.’¹⁰³ He makes the obvious analogy with other laws, concluding that governments tend to ‘pin down’ rules that already exist, such as murder.¹⁰⁴ Then Waldron suggests that the correct way to think about this indeterminacy is to think generally about the historical resonance of the state of nature, without getting too bogged down in ‘dating the historical material.’¹⁰⁵

From a historical point of view, property was always fairly secure, though the source of the security changed somewhat over time. But from an abstract point of view, property relations are both secure and insecure in the state of nature, and civil society both makes property relations possible now and responds to them as natural relations that already

¹⁰⁰ Ibid., 162.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid., 163.

¹⁰⁴ Ibid., 165-6.

¹⁰⁵ Ibid., 167.

exist.¹⁰⁶

This seems to place a bob each way, since ‘property relations are both secure and insecure in a state of nature’. Waldron effectively argues for continuity in property holdings between the state of nature and civil society but acknowledges that there is a lack of determinate title. This is a troublesome place to be, since it raises the question (again) of ‘who’ is going to provide determinate title and on what basis, given that the property argument in Locke does not do so. The answer to some of these difficulties lie in the conception of Locke’s property; it is doing too much work, and in the next section I will show how theorists such as Waldron have come to find themselves having to hold determinate title in civil society, while acknowledging that Locke does not indicate how determinate title is provided.

Consent cannot answer the indeterminacy problem within civil society

In their varying ways Waldron, Tully and Sreenivasan assume that consent can solve the indeterminacy problem of property, in accordance with the natural law in a state of nature.¹⁰⁷ As I have shown, there are difficulties with this view. Government alone, without explanation or mechanism, is not able to offer stable determinate title in civil society since Locke’s theory itself is neither asking that particular question (‘how to achieve a legitimate distribution?’), nor does the theory proffer the solution, except through consent itself (which

¹⁰⁶ Ibid.

¹⁰⁷ Notwithstanding the earlier quotation from him, Harrison suggests that he is not altogether sure that Locke is clear on what natural property rights survive in civil society and goes so far as to state that while in ‘several remarks he makes it sound as if the transition to political society amounts to a new property deal...Locke’s text seems to be ambiguous on this crucial matter.’ However, Harrison goes on to state with remarkable clarity the problem for the scholars against whom I am arguing is that ‘on other hand, the whole point of the account seems to be lost unless the natural rights to property limit what states may do to property, because as will be remembered, it was precisely to protect this property that, according to Locke, people entered into government in the first place’. Harrison, *Hobbes, Locke, and Confusion’s Masterpiece*, 239. He then continues examining the natural law in the conditions of scarcity, money and government, and examines a thesis close to my own (that property is ‘created by agreement, can be changed by agreement, and as such provides not constraint to the (agreed) operations of government.’ Harrison, *Hobbes, Locke, and Confusion’s Masterpiece*, 240. He does think this is a plausible reading, but intriguingly then decides that actually it is the best account of how Locke’s theory operates in modern society, because Locke meant that natural property constrained government but once it was passed on (inherited or sold) the owner became subject to the initial government settlement. Unfortunately, I cannot see how, if there is supposed to be a natural law of property that constrains government, it only would apply to the original person who agreed to the establishment of government. My scepticism is heightened by Harrison’s argument that if property is inherited then ‘it is already covered with government strings and benefits...and this means that... government is not here limited by natural property rights.’ Harrison, *Hobbes, Locke, and Confusion’s Masterpiece*, 241. I am unsure how ‘strings and benefits’ could be attached to a the initial natural property title since it is exactly that sort of interference, in Harrison’s reading, from which governments must abstain. Alternatively, if the original owner had consented to these strings and benefits as part of the government settlement, and therefore somehow they did not interfere with natural property title, why would those natural rights change merely through ownership and so force the receiver of the property to have government (as opposed to) natural title?

in turn begs the question of distribution). The difference between the interpretations that proffer such continuity and the one offered here is perhaps small in the overall gifts that the *Two Treatises* has bestowed upon our political language. Yet, for contemporary theory Locke's silence on property in civil society is not a small problem.¹⁰⁸ The criticism of current interpretations offered here is this: if property has an indeterminacy problem, then it is unclear how that problem is solved by consent government. Consent, as Locke intended, allows rebellion where there is an 'indeterminacy problem' created by the government (in Locke's context the King), and it follows that people who are thrust into a state of nature by arbitrary government have the opportunity to reform their political authorities. The indeterminacy problem of the state of nature is rather wider than this; it is between everyone.¹⁰⁹ Locke was writing against a Crown which was feasibly bringing indeterminacy ('arbitrary rule') to title, creating a state of nature, and thus could be rebelled against.¹¹⁰ How is this logic to be applied to all individuals consenting to create a state with each other? Simply put, the interpretation offered here is that while Locke took consent government to have delivered determinate title, he did not indicate the bases, methods or moral arguments on which indeterminate title is made determinate. That this is not a small problem can be seen most obviously in the literature dealing with such situations in the colonial period, the 'historical injustice' literature of recent years. In that literature, the injustice is framed usually by theorising colonial governments as political authorities who made unjust determinations over indigenous property. As I illustrate in Chapter Six, the indeterminacy problem suggests

¹⁰⁸ For instance, as mentioned earlier, Waldron rightly notes that libertarian ideas of a government constrained by pre-existing property rights would lose one of their foundational texts. Waldron, *The Right to Private Property*, 233.

¹⁰⁹ For a discussion of the difficulty of analysing how exactly Locke's property would work in civil society (i.e. be made determinate) see Chapter 4 "Limitation of the Original Theory", Sreenivasan, *The Limits of Lockean Rights in Property*, 95-119. Sreenivasan introduces a new concept, 'Lockean property... as a means of marking the fact that while Lockean property is the right that follows from the logic of Locke's argument, it is not so affirmed by Locke himself.' Sreenivasan, *The Limits of Lockean Rights in Property*, 96. While not wanting to detract from the intellectual interest in tracing Locke's argument, and find logical flaws, it does lead Sreenivasan to make some statements that one might well suggest that he is working at the very edges of Locke's argument. For example, he comments that 'the source of the difficulty is Locke's almost complete silence on the details of this question', where the question is what 'the specific rights... one of Locke's landowners enjoys in virtue of his property right.' Sreenivasan, *The Limits of Lockean Rights in Property*, 96-97. Later Sreenivasan suggests 'Lockean property is an impermanent right in two senses, first because, subject to a limited right of maintenance, the goods in which it holds revert to the common on the demise of the owner. And second, with reference to land, because the size of the holding is always open to modification, even within the owner's lifetime.' Sreenivasan, *The Limits of Lockean Rights in Property*, 118. It would seem entirely odd that Locke - who Sreenivasan has already indicated was concerned to allay the fears of property owners - would sincerely produce a theory in which land reverted to the commons, or be continually reshaped.

¹¹⁰ See Dunn, "Consent in the Political Theory of John Locke", 171.

instead such normative evaluations are beyond our capabilities, since we do not have a theory which theorises the steps a legitimate political authority would take in such a situation. It would seem also to trouble contemporary political philosophies exploring distributive justice. After all, when we have no idea (or set of ideas) of how property came to be, and so no theory of property's function in a legitimate political authority, how can we be clear about how the distribution of that property impacts on politics? Hence the impact of Sen's question, 'Equality of What?'¹¹¹

There is an important coda to add to the criticisms offered above of the standard interpretation that clear title originating from Locke's labour theory is established in his civil society. The point is that that the preservation of property is the reason that individuals leave a state of nature and form civil government:

124. 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 a State of Nature there are many things wanting.

First, There wants an *establish'd*, settled known *Law*, received and allowed by the common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them (II, §124)

What is one to make of this tension between Locke's view that property rights can be settled in a state of nature, and his idea that government is necessary for the preservation of that property? As Laslett pointed out, the problem lies in the different ways in which property is being used:¹¹² Property as a thing to be owned by one's labour, but also an individual's 'Lives Liberties and Estates, which I call by the general Name, *Property*' (II,123).¹¹³ I do not think it necessary to deal with confusion here since the very fact that Locke has defined property as 'Lives, Liberties and Estates' means that the standard argument is already lost. For if Locke meant all rights were indeterminate in a state of nature and following the standard interpretation became fixed in civil society by consent, then we are dealing with a much wider concept of 'property' than that generated by the labour theory of value.¹¹⁴ Also,

¹¹¹ Amartya Sen, "Equality of What?" in *Tanner Lectures on Human Values*, ed. S. McMurrin (Cambridge: Cambridge University Press, 1979), 197-219.

¹¹² Locke, *Two Treatises of Government*, 102.

¹¹³ Part of the problem here may lie in the political tensions and languages of the day. As indicated earlier, Schochet indicates that a careful study of the language Locke uses suggests that he is using property in both senses. Schochet, "'Guards and Fences': Property and Obligation in Locke's Political Thought".

¹¹⁴ Sreenivasan notes this difficulty when discussing Tully's argument against the continuity of property between the state of nature and civil society. He argues, however, that since liberty is 'not abjured', Tully's

given this chapter's assumption that the labour theory is simply a defence of the institution of private property, not its specific detail in individual cases, we return to the earlier point that people form civil society to defend their property against arbitrary attack, not only against governments.

The inconveniences, that they are therein exposed to, by the irregular and uncertain exercise of the Power every Man has of punishing the transgressions of others, make them take sanctuary under the establish'd Laws of Government, and therein seek *the preservation of their Property* (II, §127)

Egoism in Locke's theory

This chapter's last criticism of the standard interpretation is that it persists with a view of Locke's theory that highlights or forces an unwarranted egoism upon the Lockean individual during the transition from the state of nature to civil society. The indeterminacy argument, to restate it, is this: there is a lack of determinacy of title because there is disagreement over titles, so the moral right to private property in a Lockean state of nature needs civil society to be established to determine property rights at law. This argument suggests Locke justified civil society via a moral right to private property, not on the contractarian grounds of consent, but on individual utility. That is, the move to 'political society and government' is for egoistic reasons. This has been a plausible reading of Locke for many interpreters who, while condemning Macpherson for his obvious blunders,¹¹⁵ still allocate a reasonable degree of self interest to individuals in the state of nature as the only feasible reason for their

argument fails, because 'it must issue the absurd conclusion that a man's actions and person also belong to the community'. Since Locke has started the Chapter in the preceding paragraph, 'If Man in the State of Nature be so free...why will he part with his Freedom?' (II, §123), it would seem that Sreenivasan's attempt to have society codify already existing property rights as though they exist in some sense, against the rest of society, has left Locke's explicit statements on the matter behind. Sreenivasan, *The Limits of Lockean Rights in Property*, 91, n. 66.

¹¹⁵ I should note here that I am not agreeing with Macpherson's overall thesis. Rather I am following Ashcraft's excellent point 'that a society orientated toward amassing national wealth through trade - to which Locke was committed - cannot simply be equated with a society characterised by social relations of capitalist production.' Ashcraft, "The Politics of Locke's Two Treatises of Government", 16. Another view is that 'not only are Locke's people economic men in the broad sense of the term, but they are also men who specifically produce for and trade in organized markets. When CB Macpherson claimed that Locke's argument in the Second Treatise was at base an economic one, he was partially correct. His mistake was in using a Marxist framework for trying to understand Locke's economic premises. There have been many refutations of Macpherson's interpretation of Locke as a "possessive individualist," most of which focus on the claims Macpherson made about the moral interpretation of Locke's system...Was Locke really trying to justify unlimited accumulation? Was he really an apologist for capitalism? Did he really think workers belonged to an inferior class possessing limited rationalist? The answers to these questions are interesting, but they are besides the point of the economics of Locke's *Treatises*. Locke was writing a defence of limited government in order to justify a revolution.' Vaughn, "The Economic Background to Locke's *Two Treatises*?", 125.

moving toward the social contract.¹¹⁶ As an example of this assumed egoism, Yolton suggests Locke's concept of property is 'striking' to modern ears because it includes individuals and their desires ('every Man has a *Property* in his own *Person*' (II, §27)).

Labour is also property, the property of the Labourer (II,27). In other passages, the scope of what is to be protected in civil society covers such items as life, health, liberty, and possessions (II,6), life or property (II,65), property and actions (II,65). Some of these lists seem to distinguish between property and , for example, life or actions, but section 123 is explicit: "the general Name, *Property*" refers to "Lives, Liberties and Estates". What all these have in common is the fact that the items on these lists are private; *my* actions, *my* life, *my* labour, *my* liberty.¹¹⁷

Ashcraft contends such an egoistic interpretation of Locke's argument is a brutal misreading of the *Two Treatises* in the context of Locke's other work.

Those who attribute to Locke a political perspective grounded in the pursuit of subjectively defined self-interest have failed to grasp the ontological foundations of Locke's cosmology or the ethical implications of his theologically centred worldview...¹¹⁸

Ashcraft argues that Lockean politics is dependent upon the idea of man as a reasonable self-willing political actor, not a self-interested hedonist. While much has been done to undercut Macpherson's attempt to generate a capitalist defence from Locke's conception of the individual, the implications of Ashcraft's argument are still not considered fully in contemporary literature on Locke and property.¹¹⁹ In a sense this chapter has aimed to address that problem. Ashcraft radically reshapes Locke's concepts of property and consent, and more particularly for this thesis, their ability to work together cohesively to produce a stable political society. This interpretation suggests that a Lockean society would re-imagine their property holdings according to stable normative principles, rather than capitulate to the Humean mutual advantage.¹²⁰

Ashcraft, on the basis of both the *Two Treatises* and the *Essay Concerning Human Understanding*, argues that the individual in Locke's *Two Treatises*

...is not only capable of making and obeying laws; he is also capable of suspending the

¹¹⁶ Ashcraft, "The Politics of Locke's Two Treatises of Government", 15.

¹¹⁷ John W. Yolton, *Locke, an Introduction* (Oxford: Basil Blackwell, 1985), 68.

¹¹⁸ Ashcraft, "The Politics of Locke's Two Treatises of Government", 23.

¹¹⁹ This is most obvious in framing the motive that individuals have for entering government. See for instance, Sreenivasan, *The Limits of Lockean Rights in Property*, 90-92.

¹²⁰ See Barry on Hume as a justice-as-mutual-advantage theorist and the instability of that conception of justice Brian M. Barry, *A Treatise on Social Justice* (Berkeley: University of California Press, 1989). At pages 148-9 Barry classifies Hume's theory as mutual advantage: for Barry's comments on the instability of justice as mutual advantage see pages 162-3.

gratification of a desire in his immediate self-interest in order to realise a greater good, such as the preservation of mankind.¹²¹

So, Ashcraft continues, the individual in Locke is capable of normatively reshaping property rights with others. That reshaping of property rights, that deciding upon the normative basis of property rights, is possible because a state was entitled to take property in order to change the property regime. The oft quoted line “...the *Supream Power cannot take* from any Man any part of his *Property* without his own consent” (II, §138), is taken, rightly, to embody Locke’s attack on arbitrary government. Less noticed is that this implies that *property can be taken with consent*. At this point, the property rights of the individual turn on consent. That consent, Ashcraft argues, was based upon the practice of elections.¹²²

A careful reading of §138 of the *Two Treatises* is used by Ashcraft to justify his claim about the links between property, consent and elections. This section can be easily read as an absolute defence of property rights. For instance Locke made what appears to be an absolute claim that individuals cannot have their property taken from them without their consent.

Men therefore...have such a right to the goods, which... are theirs, that no Body hath a right to take their substance, or any part of it, without their *own* consent (II,138).

Locke immediately restated the point in the following sentence

For I truly have no *Property* in that, which another can by right take from me, when he pleases, against my consent (II, §138).

Broadening his theme, Locke then argued that no ‘Supream or *Legislative Power* of any Commonwealth can...dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure.’ (II, §138) To this point in §138, one can identify a thorough-going argument for absolute individual property rights (of the kind supported by Nozick and other libertarian thinkers). Yet Locke went on to qualify his statement, writing that the arbitrary

¹²¹ Ashcraft, “The Politics of Locke’s *Two Treatises of Government*”, 26.

¹²² ‘What I wish to stress in this essay is that strong case for representative government that Locke makes in the *Two Treatises* once we understand – as his readers surely did – “consent” to refer to the institutional practice of holding elections’ Ibid., 43. See for a broader defence of this position Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government*. For a complete argument on Locke’s concept of consent as elections see Dunn who provides an interpretation at once less sympathetic to the normative qualities of Locke’s argument and is stronger than Ashcraft on the actual point that, ‘[t]here is an extraordinary elision [in the *Two Treatises*] between the consent of each property-holder and the consent of the majority of the representatives of the property holders, as chosen according to the English franchise in the late seventeenth century.’ Dunn, “Consent in the Political Theory of John Locke”, 171.

loss of an individual's property is not likely where parts of a Government are elected from its citizens by regular elections. The arbitrary taking of property...

is not much to be fear'd in Government 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 (II, §138).

Just in case the reader of his work had not seen the moral difference between an unelected unchanging authority to take property (with arbitrary power), and a regularly elected government to take property (with consent of society), Locke repeated his claim that without a representative government, an individual's property is insecure as the government may not act in the interests of the individual as a member of society.

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...For a Man's *Property* is not at all secure, ..., between him and his Fellow Subjects, if he who commands those Subjects, have Power to take from any private Man, what part he pleases of his *Property*, and use and dispose of it as he thinks good (II, §138).

This last part of §138 finishes with again what appears to be Locke's affirmation of absolute individual property rights. However, the following paragraph makes it clear that the quoted material instead ought to be read as noting that property is unsafe in an unelected government – such as an everlasting assembly or Monarch – because that government may well 'use or dispose' of an individual's property however 'he thinks good'.

But *Government* into whatsoever hands it is put, ..., intrusted with this condition, ... that Men might have and secure *their Properties*, the Prince or Senate, however it may have power to make Laws for the regulating of *property* between Subjects one amongst another, yet can never have a Power to take to themselves the whole of any part of the Subjects *Property*, without their own consent (II, 139).

Locke's point was that a ruler cannot make such arbitrary choices, for it is unreasonable (against the law of nature) to expect an individual to remain within a Commonwealth which did not take as a primary function the '*the Preservation of their Property*' (II, §27). Such a responsibility on the government necessarily means that 'the Prince or Senate' must 'have power to make Laws for the regulating of *Property* between Subjects one amongst another.' (II, §139) Locke here again draws a distinction between property regulation by law which is morally defensible, and its arbitrary taking which is not.

To this point in the chapter under scrutiny (Chapter Eleven ‘Of the Extent of Legislative Power’) there is a relatively plausible argument that Locke argued for a minimal government that can regulate property; people have absolute rights to their property, but since law must be settled to avoid conflict, government can regulate property as long as those governments are regularly elected and drawn from citizens to whom the law applies. This creates some difficulty in Locke’s position, both practically and more importantly for this thesis as a whole. Practically, there are clearly examples where simply regulating property may remove property from an individual (changing a boundary in a dispute between neighbours or shortening the time copyright applies). Theoretically, for a minimal government to have a power to regulate property, Locke needed a mechanism by which individual’s property rights could be changed or taken by government.

To further advance his point about sanctity of property, and the necessity of that sanctity, Locke used the example of the property of a soldier. A soldier can be commanded, on punishment of death, to obey ‘the most dangerous and unreasonable’ order, so as to ensure ‘the Preservation of the Army, and in it of the whole Commonwealth’ (II, §139). Yet that same army, that can ‘Condemn to Death for deserting his Post’ cannot ‘dispose of one Farthing of that Soldiers Estate, or seize one jot of his Goods’ (II, §139). To further emphasise the reason for this separation between the person and material property of the soldier, Locke concludes §139 with an explicit argument that such a separation is based on the preservation of the Commonwealth

Because such blind Obedience is necessary to that end for which the Commander has his Power, *viz.* the preservation of the rest; but the disposing of his Goods has nothing to do with it. (II, §139)

In separating the material property of the individual from the person Locke has clearly moved beyond his generic idea of property “property etc...”. He has done so because once in society, the individual is no longer concerned only with the defence of their property and person. Instead, individuals in society are governed by law, a law ‘enacted’ by those ‘whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution’. (II, §41)

So far, so good. Locke has given a consent based argument for legitimate political authority. Libertarians would still have support from the text since Locke has nowhere suggested that private property rights are able to be taken by the state, even with the consent of the legislative. But nor does he suggest that the state does *not* have the ability to take private property rights. That he has not done so is important: it rules out anachronistic readings of his intention. To be very clear: in the chapter of the *Two Treatises* on the ‘extent of legislative power’ where Locke was most explicit on the functions of legislation power, he did not rail against consent based law making which alters property rights. Rather, he railed against the personal abuse of government powers to take property, and hoped that the legislative would be a bulwark against such abuse. For Locke, The ‘*Fundamental Law of Property*’ was that it cannot be taken from an individual, ‘without such consent of the People’ (II, §140); a consent which is ‘the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them’. Those representatives set the laws to regulate property, ‘for in Government the Laws regulate the right of property, and the possession of land is determined by positive possessions.’ (II, §50) For Locke then, as Ashcraft puts it,

Not “possession,” but “consent” is the source of authority in Lockean society. Hence, political equality and natural rights manifest through express consent can coexist with various forms of social and economic inequality.¹²³

This argument excludes a libertarian interpretation of Locke such as Nozick’s, or any other that neglects to explain the development of property rights in political society.

Membership in political society, in other words, is in no way dependent upon ownership of property; on the contrary, the individual’s ownership of property is conditional upon his having consented to be a member of political society, and the latter, in Locke’s argument, follows directly from the presumption that *every* individual has a natural right to dispose of his “person” as he sees fit.¹²⁴

Allowing Lockean society to reshape their normative principles of property holding is important in two ways. First it rebuffs libertarian arguments that a legitimate government must ensure the sanctity of property holdings as impenetrable rights (thus making property arguments more plausible in a world where property can be reshaped at any moment by a government acting on behalf of a majority of voters who want such a change). Second, it forces us to consider what a normative principle of property holding would look like, given a property regime decided by a legitimate state. That is, Locke allowed that differing forms of

¹²³ Ashcraft, “The Politics of Locke’s Two Treatises of Government”, 35.

¹²⁴ *Ibid.*, 29.

property holding could exist in different types of government because consent – in a particular society – legitimises via understandings of property via natural rights. As Ashcraft puts it, ‘...political equality and natural rights manifest through express consent can coexist with various forms of social and economic inequality.’¹²⁵

Indeed, since this is *the* problematic issue built into the structure of liberalism as a political theory, not to recognize its appearance in Locke’s political thought as *he* formulated it reflects a serious misunderstanding of his perspective and of the legacy he bequeathed to the tradition of liberalism.¹²⁶

The question as to the type of property regime Locke, and by implication much of liberalism, would approve turns on ‘what is a property regime that is *not* arbitrary?’ In Locke’s definition, it was one decided upon by a government elected regularly by the people. That is, while Locke did justify the right of a political authority to regulate property, the indeterminacy of an individual’s property in Locke is not solved by his normative theory of political authority. Locke simply justified private property as an institution. Once society is formed, Locke’s views on property do not play a part in his arguments as to how a political authority achieves legitimacy. Only when that legitimacy is jeopardised through the loss of the consent of the people does property re-emerge as salient in his argument, and that is because society – for that moment – is back in a state of nature where preservation of the self (and thus individually held property) becomes again the primary motivation for individual action. In this way, the distributive justice debate, as Rawls’s ‘original position’ makes clear by throwing individuals back into a hypothetical state of nature (albeit with more information about the society that is to come), advances little further than Locke’s theory in postulating the normative connections between legitimate political authority and property.

¹²⁵ Ibid., 37.

¹²⁶ Ibid.

Chapter Five

Property rights and liberal egalitarian justice theory: how do egalitarians allocate property rights?

For this reason, it is worth noting that liberal theories of equality tend to possess no theory of inequality. They do not, that is, tend to analyse the origins of the forms of inequality or oppression that they try to eradicate. The ‘obstacles’ to be overcome, the ‘mounds and hollows of the playing field’ that people face and which thwart equality of opportunity are described as if they were deposited by forces of nature rather than being the product of human interaction. But inequality of opportunity is produced by structural inequalities in society and in the market, not by glacial movements in the last Ice Age.

Chris Armstrong, “Opportunity, Responsibility and the Market: Interrogating Liberal Equality”.¹

The idea that there is any difficulty in allocating property rights has vanished from major justice theories under debate in contemporary political philosophy or theory.² There is something of a paradox in this; contemporary justice theories seek to justify redistribution of property, but offers little guidance to the political institution that is most likely to accomplish that redistribution; property rights. The short way to demonstrate the paradox is to allow Rawls’s idea of distributing property rights to speak for itself. In *A Theory of Justice*, he sets the distributive branch of the just government the task of preserving

... an approximate justice in distributive shares by means of ... the necessary adjustments in the rights of property³

This chapter seeks to ask the frankly obvious question: how? The longer way to demonstrate the paradox is to say something like this. Each object that is considered property by a society, requires a set of rules to solve co-ordination problems over its use. In Chapter One,

¹ *Economy and Society* vol. 32, no. 3 (2003): 416

² See for instance Williams subsuming property in the larger idea of ‘goods’. Bernard Williams, “The Idea of Equality” in *Problems of the Self*, ed. Bernard Williams (Cambridge: Cambridge University Press, 1973), 230-49.

³ John Rawls, *A Theory of Justice*, paperback ed. (Oxford: Oxford University Press, 1973), 277.

it was suggested that those rules can be summarised as rules of exclusion over an object.⁴ Contemporary theories of justice, such as Rawls's, propose some 'just' distribution across society of those objects, or of the goods generated by those objects. In Rawls's case, the principle of distribution is that the primary goods should be distributed equally unless an unequal distribution was to the advantage of the least favoured.⁵ The task of government in Rawls's theory is to ensure that the distribution of these resources complies with the principles of justice. Rawls confirms that this would need changes in property rights. This would suggest that Rawls's theory should indicate what rules of exclusion would change due to the change in distribution. I argue below that no normative guidance on the intended rules can be garnered from Rawls's theory of justice.

There are two possible ways to read this neglect of property rights. First, the theories may intend to leave property rights as they are. The theorists would have to argue that the effects of new distributions liberal egalitarians proffer would not impact on property rights in ways that required normative justification. In this chapter, that defence for the neglect of property rights will be known as the 'status quo option'. Second, contemporary justice theory may assume that property rights are, as Rawls suggests, the realm of economists and technicians, the problem of technical drafting and economic analysis being one that required no normative guidance.⁶ Neither reading is sustainable. The first reading – the status quo option – would require a belief that the property rules in society, up to the point of redistribution, have had no impact on inequality, or that they would have no impact on equality in the future. While either assumption would seem practically implausible, they might be theoretically possible. Until, that is, we ask the theory to justify the assumption that those property rights themselves are morally just. If distributive theory assumes the justice of property rights as they exist in a given society, and it wishes to persuade using the requirements of moral reason, distributive theory will have to provide the justification for the existence of the institution of property rights. It will have to be able to provide that

⁴ See Chapter One.

⁵ Rawls, *A Theory of Justice*, 303. It is more complicated than this because Rawls's theory posits that the primary goods to be distributed are actually 'liberty and opportunity, income and wealth'. Rawls, *A Theory of Justice*, 303. For this summary, however, the focus is on the distribution of income and wealth, and the access to property rights that underlie those distributions.

⁶ There is a third possibility; contemporary political philosophy simply managed to assume away the problems of property and its rights.

moral reason based on the distribution it so cherishes, and continue to provide that moral reason each and every second from the initial distribution. That is, if property rights are assumed to continue to function in exactly the same way after the equalisation of individuals has occurred, each exercise of those property rights, especially alienation, would create a different distribution. In order to retain legitimacy, in order to provide the necessary political rationale for the distribution, each exercise of property rights that changes the distribution has to be normatively defended, since the distribution itself generates justification of that system of property.⁷ The need for normative justification of changes to the distribution provides the reason why the second explanation for the neglect is unsustainable. Property rights are not only a technical issue, since the technicians will require a normative justification for the changes they are to make in order that they can ensure the rights achieve the desired aims.

The need for contemporary distributive theory to generate a theory of property rights is made more compelling by the historical failure to maintain property entitlements in the face of changing circumstances. This was demonstrated by an examination of Waldron's supersession thesis in Chapter Three. In that chapter I discussed Simmons's proposal to circumvent this normative problem with a historical theory of fair shares. Rather than a particular entitlement, each individual held a right to a particular fair share of property rights. This seemed to deal with most of Waldron's objections to historical theories of justice, excepting the need to specify the property rights such a theory would defend in a justificatory account of legitimate political authority. The basic idea of historical theory is that political authority is justified by its ability to stop indeterminacy over property (or Simmons's 'fair particularised shares') in the state of nature. In Chapter Four, that justificatory principle is shown to be implausible because the indeterminacy problem is not solved in historical theory. Historical entitlements, had they been plausible, could have been relied upon by those justice theorists using the status quo option for their property rights. They could have provided normative guidance on the existing structure of property and its

⁷ As in Chapter Three, I understand Simmons's point that distributive theorists don't think Christmas time would be an especially busy time for the redistribution police. Again my point is, I don't think that is their intention, but it may still be the result of their theory. The onus is on those advocating distributive justice to explain why not. I think this is especially so given the horrors that occurred when that the last major redistributive theory was practically implemented. Simmons, "Historical Rights and Fair Shares", 161, n. 20.

rights to a society which embraced contemporary distributive justice. Instead, since historical entitlements have to be superseded in the interests of justice whenever circumstances change. In the waterhole example, when a new group of people entered another group's vicinity because the immigrants' waterhole had dried up, it was in the interests of justice that the original inhabitants realised that the circumstances of justice had changed, and they were now required to share their waterhole. For our intuitions are clear that the people should not die of dehydration. The question that is begged by Waldron's supersession thesis is: how is that redistribution to occur? I do not mean whether it should be done equally, as that much is obvious since we are dealing with ideal liberal egalitarian justice theories. I mean that an ideal theory ought to provide normative arguments and conclusions about the type of property rights provided to both the original inhabitants of the waterhole and the newcomers. Having demonstrated that historical theories are unable to help us, Waldron's supersession thesis begs the justification and legitimacy of those institutions that are to issue the new distribution of property rights to the original inhabitants and the newcomers. In other words, contemporary justice theory needs to justify a legitimate political authority's right to regulate property in order to redistribute property rights. Simply put, what rights of property are to be justified and how? This chapter argues that such questions remain no matter what the distribution of resources demanded by the change in circumstances. This leads to the conclusion of the chapter that contemporary distributive justice cannot produce a plausible justification of the treatment and regulation of property rights by a political authority.

Within contemporary political philosophy, some scholars have suggested that ideal theory of the type used in the debates of liberal equality might be unable to deal with such questions, and that a move toward a more pragmatic, potentially 'realist' position might be needed.⁸

⁸ For an interesting argument on this see Colin Farrelly, "Justice in Ideal Theory: A Refutation", *Political Studies*, vol. 55, no. 4 (2007), 846. Farrelly suggests that one can detect the degree of idealisation in political philosophy by its 'fact sensitivity'. So, for example, Rawls' 'realistic utopia' is mildly ideal theory, whereas Cohen's is an extreme ideal theory. The moderation of Rawls is because he takes certain non-ideal considerations seriously, such as moderate scarcity, limited altruism, and in his later work (such as *Political Liberalism*), pluralism. Though this is a useful scale, in this chapter I am only intending the word 'ideal' to signify that the theory should be able to give normative guidance on its central problems, without recourse to non-ideal theory or conflicting theories that would undermine its original intention. For example, the use by Nozick of the indifference principle to sort out problems in his historical entitlement theory directly contradicts the self-ownership argument on which his theory rests; his ideal theory is defeated. Farrelly's scale of idealisation also makes it easy to show why for the purposes of this chapter there are no important differences between the 'comprehensive liberalism' of

Bernard Williams has argued that the priority of the moral over the political that can be seen in Rawls's work, 'cannot plausibly explain, adequately to its own moral pretensions, why, when, and by whom it has been accepted and rejected.'⁹ The argument of this chapter could be read as in support of that position, but these are methodological issues that will not be further explored here.¹⁰ Rather, this chapter suggests that political philosophy has not moved beyond Locke's justification of ownership of property against the common in the state of nature. That is, while contemporary philosophy can opine on justice at length in its contemporary versions of the state of nature (ideal theory), it has not been able make further inroads than Locke in suggesting institutional arrangements that allow substantive (rather than political) equality to be realised while justifying property rights held against the common. As with the interpretation of Locke proffered in the earlier chapter, once civil society is considered, property rights become difficult and cumbersome things to be disregarded. The chapter does not join the criticism of ideal theory, in that no conclusions are able to be drawn from its argument on the use of idealising situations. It is the lack of consideration of property rights in the ideal world of the liberal egalitarian project that is analysed in this chapter, not the method itself. It is entirely possible that ideal theory could, in the hands of political philosophers, work out the co-ordination problems of allocating property rights through an institution that retains the justificatory schemas of contemporary end-state theory of a liberal egalitarian kind. Until justice theory can do that, any account of egalitarian justice that considers property rights will fail in its mission to provide the moral reasons necessary to justify a society based on its norms. The reason is simple: unless one takes property rights seriously, and provides a normative account of property rules, there is no justification of the institution that will enforce the desired egalitarian distribution.

Rawls's *Theory of Justice*, and his *Political Liberalism*. It is the ideal theory conception of justice that is examined here, so the appeal to pluralism is discounted as importing non-ideal attributes. Though it would be relatively simple to argue that Rawls's embracing of plural perspectives in *Political Liberalism* simply makes the search for normative justification of property rights that much harder, given the introduction of multiple arguments for autonomy. Cf. Will Kymlicka, *Contemporary Political Philosophy*, 2nd ed. (New York: Oxford University Press, 2002), 232-44, and in particular his comment on the cases of religious freedom and its impact on property rights, 37-8.

⁹ Williams, *In the Beginning Was the Deed*, 9.

¹⁰ That is, the position taken here could be read as a critique of idealist thought based on the implications of philosophy, rather than, for example a critique based on its treatment of those who society considers less fortunate. See Elizabeth S. Anderson, "What Is the Point of Equality?", *Ethics*, vol. 109, no. 2 (1999), 287-337; Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990). I hope I am somewhat closer to the position of Bernard Williams when he raises questions around the ability of Rawls's theory of justice to cope with the 'basic legitimation demand' of a state, in Williams, *In the Beginning Was the Deed*.

Without a justification of property rules, individuals in the proposed liberal egalitarian society would have no necessary or sufficient reason to accept the distribution itself. This chapter shows where and why the liberal egalitarian theories of justice fail to take property rights seriously, a failure which results in the collapse of the theories themselves.

A note on the use of property

I argued in Chapter One and as defended in the Chapter Four on Locke, because I think that the term ‘private’ is misrepresentative and more especially in this chapter, in the context of distributive justice, misleading. The use of the word ‘private’ gives the impression that property is held against a state powerless to intervene in its rights. As I argued in the chapter on Locke, and as the failure of historical entitlement theory made clear, property rights in civil society in both ideal and non-ideal theory have to be governed by laws made by the civil society. Those laws need to be justified by reasons which do not compromise the legitimacy of society’s governing institutions. Laws of property, like other necessary laws that emerge from normative political argument (ideal or non-ideal) as in Locke’s civil society or Rawls’s realistic utopia, are those that are required by moral reason. ‘Private’ suggests that those particular privately held property rights have some sacred status, but they do not. Property rights are created (somehow) by public reason with ‘private’ merely a superfluous adjective that injects a sense that they are somehow prior to the morality that is otherwise guiding the laws. As I have argued, Locke is at the very least unclear in his argument on this point. As I argue below, it is certainly not the case in distributive justice that property rights are constructed prior to the laws (and so the normative justifications) that define it. So, at a literal level in political philosophy there is no *normative* difference between the moral reasons used to argue for an individual’s property right to exclude other members of society and their *private* property right to exclude other members of society.¹¹ Indeed, the need for the adjective ‘private’ implies that property, without the adjective, is the whole world held in common. In this sense the need to use the adjective ‘private’ is one indication that political philosophy has not provided a justification for the right to regulate property and so has not moved past the basic moral problem of how property emerges from the commons.¹² In

¹¹ As Waldron has shown at length, there are reasons for considering ‘the right to private property’. Waldron, *The Right to Private Property*, 46.

¹² The strangeness of this point is clear only when one considers how long the social institution of property held *in rem* has existed in world history.

summary, either a right is established as required by moral reason or it is not. Whether one assigns property the adjective ‘private’ may be descriptively interesting, but in the context of the logic of a particular theory of justice it merely – unjustifiably – prefigures the normative reasons for assigning rights to particular groups or individuals against the common.¹³

The removal of ‘private’ from an individual’s property rights should indicate that the idea of an individual generating a right to property through their labour (i.e. a self-ownership thesis) will not be used in this chapter. Nor will any other moral defences of the right to own property. This is because the origin of a property holding is not a constraint on distributive justice, since historical theories of entitlement fail in the face of a distributive argument. This point holds insofar as side-constraints on distributive justice are supposed to be based on moral reason. This I take to be one of the conclusions arising from Waldron’s ‘supersession thesis’. To be very clear, moral defences of property rights (labour, desert, utility) rely on historical entitlement theory, since moral right to ownership defends the initial determination of that property right. Since such defences of property rights are moral claims they suffer an indeterminacy question. As Locke pointed out one of the justifications for political authority is that they solve this indeterminacy. So the justification of a political authority’s right to regulate that property is a separate question from the particular morality of a claim to a property right. That indeterminacy question is normally thought to be solved by historical theories of justice. I suggested that this was not the case. Until a general justification of the right to regulate property can solve the indeterminacy problem, historical theories of justice, and their moral defences of property are simply moral philosophy. I make this point to ensure that this chapter is not be read as anti-egalitarian. In fact, the chapter is far more radical, since the argument suggests that we have no theories of justice that justify the regulation of property rights by legitimate political authorities. To say this more frankly, neither historical nor contemporary justice can plausibly incorporate property rights, either on the assumption that they will continue as they exist in the actual world and so are excluded from the theory, or as the product of the theory. Given its supersession of historical rights, contemporary justice theory presently rejects property rights as a way of ordering society. This would suggest that contemporary justice theory is more of the utopian

¹³ See William A. Edmundson, “ ‘Review of Justification and Legitimacy: Essay on Rights and Obligations’ by A. John Simmons”, *Law and Philosophy*, vol. 22, no. 2 (2003), 213.

and less of the realistic in the ‘realistic utopia’ of Rawls’s imagining. Indeed, the lack of property rights makes distributive justice appear rather more like Marx’s communism, with all the problems of that ideal theory. In the end, then, contemporary justice theory returns us to the problem identified in the chapter on Locke. We may well know that individuals accumulate property rights held against each other, but we can’t seem yet to reconcile it with the equality of that original commons.¹⁴

Rawls : Legitimacy, justification and contemporary justice theory

Perhaps the best way to illustrate the need for contemporary justice theory to discuss property rights more fully is to examine its attitude toward justification of the state. The distribution, after all, will need to be given legal protection by the state, in the form of various rights which it allocates to people, including property rights. Unless justice theory is willing to do without a state, those legal protections must be part of a coercive legal system.¹⁵ Property rights, as part of the larger schema of rights in a society, can be interrogated through the way in which contemporary justice theory justifies the coercive legal powers of the state.

The first option for examining Rawls’s dealings with property rights, since he does not defend or justify them explicitly, is to presume that he takes laws, and so property rights, as already justified.¹⁶ Such an interpretation would have Rawls assume that he is seeking a better

¹⁴ From this point of view, it might be considered that I think all property is wrong. While the findings of the thesis so far may well give pause for thought, the aim is to explain more plausibly how politics work. Since property rights are a dominant political institution across the globe, I am merely puzzled by our inability to theorise them in a way that does not conflict with the requirements of justice.

¹⁵ I am following Michael Blake, “Distributive Justice, State Coercion, and Autonomy”, *Philosophy and Public Affairs*, vol. 30, no. 3 (2001), 281-82. See also, Bernard Williams who puts this “‘first political question” in Hobbesian terms as securing the order, protection, safety, trust, and conditions of cooperation’. Williams, *In the Beginning Was the Deed*, 3. Even given Rawls’s assumption of a well-ordered society, he notes that ‘Political power is always coercive power backed up by the government’s use of sanctions, for government alone has the authority to use force in upholding its laws.’ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 136.

¹⁶ It might be imagined that this is an unfair characterisation of Rawls’s position on property, so it is worth noting that in the comprehensive index of John Rawls, *A Theory of Justice*, there is one mention of the word property, under the heading ‘private property economy’ and there are four pages of discussion and a footnote in another area of the book. There is some further allusion to property rights in a discussion of various economic systems. If it is true that this is the book that represents political theory in the twentieth century, and any search will reveal that it is at least the most discussed academic treatise on political theory in the last century, it says much about how late twentieth century political thought saw property. The four page discussion in Rawls amounts to little more than a suggestion that market mechanisms are helpful in rationing

form of – distributive – justice within the state itself, based on the existing laws. Those laws, he could presume, are already given justification through the existence of the state. That is, he might separate out legitimacy and justification.¹⁷ Rawls would be arguing then that the state and its existing set of rights including property rights, in which the distributive justice was to apply, were already justified. Justified, that is, against other forms of social organisation such as anarchism. He might argue that the rights provide order and cooperation; in doing so he would argue that the state ‘has (or has had) certain kinds of morally unobjectionable relations with those it controls.’¹⁸ The point of his theory of justice would then be to question the legitimacy of the governance of existing states, rather than to argue the states were unjustified. This would be to argue that states could be justified against other forms of social organisation, or anarchy, but that justification did render the state automatically legitimate. For instance, a state could be justified in claiming the right to a monopoly over coercive power, but its use of that power might not be legitimate. That is, the use of the power by a minimally justified state would need the consent of its subjects to be legitimate. As Simmons puts it,

Political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have freely consent to the exercise of such power and only where that power continues to be exercised within the terms of the consent given.¹⁹

goods and that use of such mechanisms is not wholly the province of market democracies, but also social democracies. Rawls, *A Theory of Justice*, 274-8. The whole discussion comes under the title ‘distributive shares’ and prefaces a broader discussion of the necessary ‘background institutions for distributive justice’. For anyone with a cursory reading of transaction cost economics, this section on the private property economy will be a restatement of old saurian truths such as markets delivering efficiencies and the necessity of removing impediments to such markets. ‘Background Institutions for Distributive Justice’, brings such conclusions into Rawls’s theory of justice, given his statement that ‘the main problem of distributive justice is the choice of a social system’(274). The background institutions are four branches of government; the allocative; the stabilization, the transfer, and the distributive. All are clearly associated with ensuring a just distribution of property. However, the almost single indication that property rights will be changed by the distributions is his comment that: ‘the allocation branch is also charged with identifying and correcting, say by suitable taxes and subsidies and by *changes in the definition of property rights*, the more obvious departures from efficiency caused by the failure of prices to measure accurately social benefits and costs. To this end suitable taxes and subsidies may be used, or the *scope and definition of property rights may be revised*’ (276 italics added). Exactly how they are to be revised is left to the imagination since the distributive branch of the just government is to ‘...preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property’ (277). Rawls also helpfully adds that the “wide dispersal of property...is a necessary condition it seems, if the fair value of equal liberties is to be maintained.” (277)

¹⁷ ‘Chapter Seven: Justification and Legitimacy’ in Simmons, *Justification and Legitimacy*, 122-57. I am following Simmons in separating these ideas out, but not, as will be seen, his conclusions on Rawls.

¹⁸ *Ibid.*, 128.

¹⁹ *Ibid.*, 129.

On this interpretation Rawls's argument would be for a 'specific justification for a particular authority's being the authority', as opposed to 'a general justification for having political authority'.²⁰ The hypothetical consent generated by the veil of ignorance would then be the legitimating device of Rawls's theory to fix the ends of the state. The state itself would provide the necessary justification for its existing property rights. The theory of justice as fairness would provide the opportunity for greater legitimacy for a government. Simmons suggests that Rawls achieves a similar result, not by separating justification and legitimacy, but instead by advancing 'a very distinct narrowing of the differences between the argumentative grounds for claims of justification and legitimacy'.²¹ For Simmons's 'justification' in Rawls's sense is about what kind of state is best for those who have already accepted a kind of state. 'They select... the best form for a state, not the state itself.'²² This narrows the field too much. Rawls, even while viewing the state as a 'closed system isolated from other societies',²³ is aiming to justify more than just a particular governmental form. As he states,

A conception of political legitimacy aims for a public basis of justification and appeals to public reason.²⁴

This statement by Rawls indicates he accepts the need for justification of a state's coercive power, and that it would be too simple-minded to interpret his theory as a 'status quo option'. He does not then, blindly accept the normative justifications of property rights. Rather, the account of legitimacy he offers is one in which consent is based on the hypothetical agreement, an agreement which gives the reasons for citizens to accept the coercive powers of the state.²⁵ This means that Rawls needs to explain how his theory will arrange property rights in a just way. There are really two problems here. First, given the conflation of legitimacy and justification in his ideal theory, Rawls cannot escape justifying any laws that call for the consent of those subject to those laws, since laws necessarily enable the coercive power of the state. Property rights need justification by public reason, because

²⁰ Ibid., 128, n. 15.

²¹ Ibid., 143.

²² Ibid.

²³ Rawls, *A Theory of Justice*, 8.

²⁴ Rawls, *Political Liberalism*, 144.

²⁵ The various views on whether such an account of consent succeeds is vast. For the purposes of this Chapter, I am assuming that it is possible to theoretically justify a state with public reason. For a discussion of the literature on this point see Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), 125-6.

they in particular are subject to change in a theory which seeks to redistribute the resources governed by those laws. As Rawls states, 'laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.²⁶ So, if property rules are found to contribute to an unfair distribution they will be subject to reform. This makes clear the second point about justification: the need for an evaluative frame for his claims. If his background institutions are changing property rights for a better distribution, Rawls's theory needs to provide the basis on which public reason may evaluate the changes. It could be supposed that in many cases the pre-existing laws of property rights might be co-opted by his theory. The normative justification for those property rules, however, would still need to be given, and they would need to flow, not from any particular justificatory frame, but from his two principles of justice. That Rawls is aware of this can be seen in his comment on one of his background institutions: the distribution branch will derive from the two principles of justice 'the legal definition of property rights, ...to secure the institutions of equality liberty in a property-owning democracy'.²⁷ However one interprets Rawls on justification and legitimacy, the justification of the justice-as-fairness society rests, amongst other things, on whether or not his theory contains guidance on changes in the property rights. Unfortunately it does not.

Rawls does not even consider the justification of property rights necessary and is reasonably frank about his dismissal of the problem, noting on such matters that 'the theory of justice has nothing to say. Its aim is to formulate the principles that are to regulate the background institutions'.²⁸ The trouble is that those background institutions, to appeal to public reason or even to make sense of the original position, have to be able to provide a justification based on the principles for their actions (or inactions) over property rights. Rawls himself is very clear that the coercive power of the state needs justification.

Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of the principles and ideals acceptable to them as rational and reasonable.²⁹

²⁶ Rawls, *A Theory of Justice*, 3.

²⁷ *Ibid.*, 279.

²⁸ *Ibid.*, 278. See page 125 for the full quotation.

²⁹ Rawls, *Political Liberalism*, 77.

So the enforcement of property rules should be in accordance with a constitution based on the two principles of justice. Those rules must obtain from the two principles. A simple example will show why that derivation is impossible. Imagine that person A wants to put a tent in person B's backyard. Erecting the tent would be illegal. The reasons for the tent placement are immaterial. The point is that if A goes ahead with his plan the state will be, most likely, asked to intervene on behalf of B. Cohen used this example to point out the 'banal truth' that private property rights are a restriction on other people's freedom.³⁰ The justification of the political power exercised in the exclusion needs to be given, and according to Rawls own conception of his theory it should arise from his two principles of justice.

Before moving on to an examination of the guidance or public reason that the two principles of justice might provide for restriction of freedom, there is an objection to be dealt with. The objection is this: since Rawls's theory assumes perfect compliance, a dispute that would require state enforcement of property rights would never arise; people would act justly.³¹ The objection is relatively simple to discard, for it revolves around too simple a view of property rights. Even with no disputes over property rights, changes in circumstance, or the discovery of a new resource will require decisions about old or new property rights. As the waterhole example demonstrated, a drought may occur, there may be a visitation of the plague. But to use a more mundane example, perhaps person A, rather than erecting a tent, wanted instead to grow vegetables since, as a soil expert, he had noticed that it would provide copious amounts of much needed food in this time of moderate scarcity. B, however, rather enjoyed his small area of ground, and did not want it disturbed. B, in this second example would not be upsetting the distribution of equality as it was. A, on the other hand would be changing the distribution. Indeed across the state, it might make the worst off in the society a little better nourished. This new example of the exclusion of A demonstrates that changes in circumstance, allowing for a closed society and strict compliance, may occur at the most mundane levels.

³⁰ Cohen, *Self-Ownership, Freedom, and Equality*, 55.

³¹ Rawls, *A Theory of Justice*, 8.

Does Rawls's theory tell us anything about the property rights of A and the exclusion of B? Let us take Rawls's theory one step at a time. First, given Rawls's assumption that either a property-owning or market socialist democracy is a plausible society for his theory of justice, there are rules of access to property. So initially, we may assume that A's action would simply be illegal and, given strict compliance, he would obey such a presumption. Second, A and B are in a situation where circumstances have changed, and the historical entitlement of A has perhaps been superseded. Yet if A looked up Rawls's constitution, he might wonder whether the rules were justified; that is, he might search for a reason for his exclusion. He would be justified in requiring a reason for his exclusion, since Rawls has suggested that the political power which creates and upholds such rights is required to justify itself by public reason. The question then becomes, what principle would justify B's particular property right? If B's rights were justified as a basic liberty under principle one, A might wonder at the impingement of his own liberty, and indeed the liberty of others for more nourishment.³² Alternatively, A might suggest that the inequality inherent in B retaining the property was unjustifiable given that principle two of the constitution suggested that inequalities could only be justified if such inequalities were of the greatest benefit to the worst off.³³ In this case, the worst off are palpably not helped by the inequality of nobody having access to the resource of B's backyard. One way to get around the confusion generated here, would be to suggest that the strict compliance assumed by Rawls would lead to B giving up his property in the interests of equality.

Suggesting that B simply gives up his backyard may sound far-fetched, even for this example, but once this property dispute is posed as a question of justice this is an option, given Rawls's assumption of 'strict compliance'. Rawls assumes, for the purposes of his theory,

³² 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all' Ibid., 302. 'Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.' Rawls, *Political Liberalism*, 5.

³³ 'Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.' Rawls, *A Theory of Justice*, 302. 'Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society.' Rawls, *Political Liberalism*, 6.

that everyone will act justly and ‘do his part in upholding just institutions’.³⁴ Included in the topics excluded from the assumption of strict compliance are ‘questions of compensatory justice and of weighing one form of institutional injustice against another’. These questions belong in the realm of ‘partial compliance theory’.³⁵ So if the principles were to establish what is just in this situation, the individual can be assumed to comply. Perhaps this is one of the reasons that Rawls has not considered property rights in his theory; if individuals do what is just, then property rights are not necessary, insofar as there will be no disputes over property. But that assumes that the rules of property are only a co-ordination device for disputes that arise when people are placed in overtly unjust distributions. In noting that we cannot discuss the competing institutional injustice, Rawls is presuming exactly that. So Person A and Person B are left standing in the original position, asking for guidance on the justice of their situation, and are told that such a situation is excluded from the theory of justice to which they appealed. But they might wonder why it is that a theory designed to achieve fairness in distribution has nothing to say to them except, ‘fool, that’s excluded’. The distribution of primary goods has become the distribution of nothing, except perhaps (since no guidance is forthcoming and so distribution remains static) the status quo. As Rawls notes, when a conception of justice is unable to generate support via public reason perhaps it is time to move on.

If a conception of justice is unlikely to generate its own support, or lacks stability this fact must not be overlooked. For then a different conception of justice might be preferred.³⁶

Mention was made earlier in this chapter of Rawls’s assumption of strict compliance.³⁷ It was noted that such an assumption makes disputes over resources non-existent. Rawls’s assumption might then suggest a more general objection to the argument of this chapter. The objection would be that the Rawlsian theory of justice excludes dealing with property rights at an ideal level, with the result that the criticism levelled in this chapter is without foundation. To sustain such a line of defence it would need to be shown that Rawls considered justice could make sense without discussing property and its rules. Rawls *may* make this assumption in his section titled, ‘some remarks about economic systems’.³⁸ That

³⁴ Rawls, *A Theory of Justice*, 8.

³⁵ *Ibid.*

³⁶ *Ibid.*, 145.

³⁷ *Ibid.*, 8.

³⁸ *Ibid.*, Section 42, 265-74. The modifier ‘may’ is italicised to indicate that I am stretching Rawls’s argument here, both in its structure and in its interpretation. At an interpretative level, it is difficult to tell what Rawls’s

is, Rawls's may suggest that property can only be examined once his conception of justice has been developed in ideal theory. Then the conception of justice can be examined in non-ideal theory.

In Section 42, Rawls sets out to examine the necessary background institutions for his theory of justice. He does so using the ideas of political economy, on the justification that 'political economy is importantly concerned with the public sector and the proper form of the background institutions that regulate economic activity, with taxation and the rights of property, the structure of markets, and so on.'³⁹ Rawls thinks it important to examine these background institutions of the economic system, because

an economic system regulates what things are produced and by what means, who receives them and in return for which contributions, and how large a fraction of social resources is devoted to savings and to the provision of public goods.⁴⁰

On the non-ideal interpretation, Rawls suggests that he wants to examine the implications of his theories of justice for the economic system and the background institutions that regulate it. He notes, however, that it is the moral questions that are of interest,

It is essential to keep in mind that our topic is the theory of justice and not economics, however, elementary. We are only concerned with some moral problems of political economy. For example, I shall ask: what is the proper rate of saving over time, how should the background institutions of taxation and property be arranged, or at what level is the social minimum to be set?⁴¹

This may indicate that Rawls would move to define the moral problems associated with property. The next sentence suggests that this would not be his next move. Rather than his declared intention of examining the moral problems associated with the implications of the introduction of his two principles of justice, the theory of justice-as-fairness, he suddenly decides that he actually only intends to illustrate how they might work in an economic system. He states

In asking these questions my intention is not to explain, much less to add anything to, what economic theory says about the working of these institutions... Certain elementary parts of

section on economic structure adds to *A Theory of Justice*. The difficulties of the section are developed below. On a structural level Rawls, in his writings, simply does not deal with property in a satisfactory way; this is either a flaw or can be worked around. Here I am examining whether the omission can be worked around.

³⁹ Ibid., 264.

⁴⁰ Ibid., 266.

⁴¹ Ibid., 265.

economic theory are brought in solely to illustrate the content of the principles of justice.⁴²

So his main concern is to illustrate the workings of his ideal theory. He notes that the use of political economy for this purpose is not without its possible flaws in another sentence that re-emphasises the illustrative purposes of the section. The assumptions of political economy, Rawls writes, 'are bound to be inaccurate and oversimplified, but this may not matter too much if they enable us to uncover the content of the principles of justice and we are satisfied that under a wide range of circumstances the difference principle will lead to acceptable conditions.'⁴³ From this introduction, a discussion of markets (and thus property rights), is conducted within the realm of political economy, but it focuses solely on production and distribution, not the normative aspects of property rights.⁴⁴ Thus Rawls goes on to explore the relationship and differences between socialist and private-property economies, under various topics such as the size of the public sector, public goods, ownership of production, and the degree to which each relies on markets. He comments along the way on the advantages of the market system, since 'it is consistent with equal liberties and fair equality of opportunity', but leaves this comment without justification, excepting that 'citizens have a free choice of careers and occupations'.⁴⁵ He concludes, since 'market institutions are common to both private-property and socialist regimes ... Which of these systems and the many intermediate forms most fully answers the requirements of justice cannot, I think be determined in advance...since it depends in large part upon the traditions, institutions, and social forces of each country.'⁴⁶ This conclusion means that when he chooses an illustrative economy for the next section on the actual background institutions, he has to state that he chooses a 'property-owning democracy' only because it is 'better known'.⁴⁷ The only difference between that economy and the market socialist model is that the distributive function of prices is greatly restricted in socialist economies because of the public ownership of the means of production and natural resources. That is, there is

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Or as Waldron puts it 'On Rawls' view, the question of private or collective ownership of the means of production is a question of practical political judgement not a matter for a theory of justice. (At first sight, this appears to conflict with his view that the right to own property is one of the basic liberties protected by the first principle of justice. However, he does not explore this tension and there is no space to go into it here.)' Waldron, *The Right to Private Property*, 14-15.

⁴⁵ Rawls, *A Theory of Justice*, 272.

⁴⁶ Ibid., 274.

⁴⁷ Ibid.

no illustration of the effects of the two principles on property rights. It is hard to know what to make of this section of *A Theory of Justice*, since Rawls equivocates as to whether its purpose is merely illustrative of the ideal theory, or is an examination of the conception of justice produced by the ideal theory. Yet at the start of the section he suggests that it is important to examine the political economic arrangements because ‘ethical principles depend upon general facts and therefore a theory of justice for the basic structure presupposes an account of these arrangements’⁴⁸. One might have thought that the actual rules governing property (and thus the arrangement of the market) would be discussed but they are not.

The examination of Section 42 (the section most substantially discussing property rights in *A Theory of Justice*) was undertaken to see if normative implications for property right might be placed by Rawls in non-ideal theory. The idea was that Rawls might assume that the rules of property, dealing as they do with disputes over property, are excluded on the basis of the strict compliance assumption. In that section Rawls explicitly intends to illustrate the workings of his two principles of justice; he examines whether socialist or market economies would best satisfy the principles of justice. The strict compliance condition then, does not rule out an investigation of property rights. Simply because Rawls considers private ownership in comparison with state ownership of production does not indicate he has considered the normative justification of property and its rules, within the original position. Clearly, he considers an economy based on private property most suitable for satisfying the principles of justice but such a reading of the text is based on one clause of a sentence. As indicated above, since the adjective ‘private’ adds nothing, so the type of property rights he is discussing remains vague (given the great variety of rights conceivably placed under the term ‘private’). So the objection is not plausible. Rawls is not assuming property away in ideal theory, all the better to examine property as an illustration of his theory. The only other possible way to interpret the section which allows Rawls to have some – implicit – discussion of property rights is to assume that in his discussion of political economies of existing regimes he is using the status quo option (property rights as they exist). This will not do for two reasons. First, as noted earlier, distribution justice supersedes historical entitlement with any change of circumstance such as a change of distribution, so that new property rights would have to be defined. Second, if Rawls is using partial compliance

⁴⁸ Ibid., 265.

theory, private property in his illustrative examples is in greater need of definition rather than less as the status quo option suggests. With only partial compliance of individuals to a conception of justice, Rawls can no longer rely on an individual obeying the dictates of the two principles. Thus, in his illustration of the principles in non-ideal theory, Rawls needs to explain how conflicts over property would be adjudicated by the principles of justice. A matter, on which I have already confirmed, the principles could offer no guidance. Rather surprisingly, Rawls admits as much when discussing the distribution branch of his background institutions. The task of that branch 'is to preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property'.⁴⁹ He does not discuss how those adjustments are to be guided except to say that the institutions of liberty and fair equality of opportunity, along with the political liberties, are put in doubt when the 'inequalities of wealth reach a certain limit'.⁵⁰ That limit he suggests

is a matter of political judgement guided by theory, good sense, and plain hunch, at least within a wide range. On this sort of question the theory of justice has nothing to say. Its aim is to formulate the principles that are to regulate the background institutions.⁵¹

Yet, this is circular and too glib. If the property rights are regulated by the background institutions, and those institutions in turn are regulated by the principles of justice, at some point the principles of justice will have to give reasons as to why property is arranged the way it is by certain rights. The assumption in his theory of strictly complaint individuals makes the provision of such reasons necessary. Without agency, individuals will not have the wherewithal to regulate property: they will need guidance on what constitutes a just action in order to be able to act.

One last note on Rawls before we move on. In the original position, persons are assumed to 'understand political affairs and the principles of economic theory; they know the basis of social organisation and the laws of human psychology'.⁵² If those standing behind the veil of ignorance are this insightful, it is strange that they do not realise they need rules of exclusion for the things they want to distribute fairly. The question then becomes: why do they not

⁴⁹ Ibid., 277.

⁵⁰ Ibid., 278.

⁵¹ Ibid.

⁵² Ibid., 137.

realise they need to define property rights? Why do they not ask, in Sen's acute, though differently aimed phrase 'Equality of What?' One answer is that Rawls has already decided for them; Rawls has decided that the primary goods are what people need and his concern is that they be distributed in accordance with justice.⁵³ He notes that how the index is drawn up is a key concern but seems to fail to see that the way in which decisions on the content of the index should be evaluated by justice as well. The decisions on what is to be distributed cannot be made without knowing how the people behind the veil conceive of the material to be distributed and normatively justify those conceptions. Rawls seems to have presumed that work involved to develop an overlapping consensus on what constitutes the matter to be distributed, what constitutes property and the rights that control it, was unnecessary when considering political philosophy concerned with distribution. This particular overlapping consensus he either presumes or eschews and this leaves his theory without a key ingredient in distribution: the rules that explain what is and is not to be distributed, or more properly, what property is exclusive to its owner, and why.

Dworkin: equality of resources

Rawls argues that justice is to be found in an ideal distribution of primary social goods. The basic liberties were to have priority, but little else about the primary social goods was made explicit. I have argued above that Rawls should have made some attempt to define what justice might say about the rules that would be needed to control access to the primary social goods that might be called property. Rawls's focus on the social primary goods in some ways obscures the role of property rights, especially in a society assumed to be 'well-ordered' with individuals who strictly comply with the edicts of justice. One might hope that other forms of liberal egalitarianism, or distributive justice, are more sensitive to the need to incorporate a theory of property rights that gives normative reasons for particular rules of property. Equality of resources, with its emphasis on ensuring 'equality in whatever resources are privately owned by individuals',⁵⁴ may well offer a conception of liberal egalitarian justice that is more sensitive to the need for coherent normative justifications of property rights. Indeed, it would seem it has to since as its foremost exponent, Dworkin, notes 'private

⁵³ Rawls, *Political Liberalism*, 93.

⁵⁴ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 65.

ownership,... is not a single, unique relationship between a person and a material resources, but an open-textured relationship *many aspects of which must be fixed politically*.⁵⁵ Quite so. Unfortunately, though such an opening is promising, Dworkin's discussion then descends into the same exclusions as Rawls. After admitting that property is a subject of political consideration (and therefore of some import to a theory of justice concerned with the distribution of that resources that are normally labelled 'property'), Dworkin dismisses its relevance with this opaque sentence.

...however I shall for the most part assume that the general dimensions of ownership are sufficiently well understood that the question of what pattern of private ownership constitutes an equal division of private resources can be discussed independently of these complications.⁵⁶

Unpacked, this sentence suggests a number of issues to be interrogated but mainly it signals that Dworkin is not likely to consider property in terms of its normative justifications. First, the sentence suggests that ownership of private property is well understood and easy to normatively justify. Remembering that the adjective 'private' is a superfluous, let us assume that Dworkin meant that property rights (especially of allocation and exclusion) are understood. Second that Dworkin thinks that property rules are understood well enough for us to be able to discuss the equality of property, without reference to the rules that define it as property. Last, that though the rules that define property are subject to a political process, we can exclude them from the political process that examines equality since we all understand what constitutes property rules. Dworkin's position on the place of property rights within his theory is more defined than Rawls's position, in that he simply excludes them. Yet, like Rawls, he seems to confine the question to the realms of some type of expertise or prior knowledge of property rights. This raises the question as to whether property rights are understood well enough to forgo their normative justification in Dworkin's ideal theory; the auction.

While it is not clear that Dworkin's theory of equality of resources is ideal theory of the same ilk as Rawls, the critique below is based on that assumption. Some of Dworkin's comments, for instance, suggest the use of non-ideal tests for his theory:

We reach a useful, practical theory about what equality requires by constructing and testing

⁵⁵ Ibid., 65 (Italics added).

⁵⁶ Ibid., 65-6.

concrete interpretations – conceptions – of that principle, to decide which conception is, all things considered, the best.⁵⁷

Certainly his work on the practicalities of his insurance scheme, in the later part of *Sovereign Virtue* suggest an approach bordering on what could be described as political theory. Yet his initial description of equality of resources, especially as he contrasts his approach with equality of welfare, is based on a hypothetical auction. It is the auction that I examine below. The reasoning that lies behind such an approach is that should equality of resources be implausible, or otherwise fail as a theory of justice because of objections set in an ideal or a non-ideal frame, the theoretical failure would need to be traced to flaws in the original conception of the ideal theory. If a theory fails in its ideal setting then its logical failure, or incorrect assumptions, should be pointed out. Second, if it fails in a non-ideal setting, then the reasons for that failure need to be identified in the logic and assumptions of the ideal setting anyway. So, it is better to cut to the chase immediately and explore whether Dworkin's auction can assume that property rights are well enough understood to do without the normative argument of this theory of justice.

Dworkin's hypothetical auction is well known, so the details need not detain us too long. A number of shipwreck survivors are washed up on a deserted island. The island has abundant natural resources, no native population, and no chance of escape. Conveniently, any attempt by the first survivor ashore to claim original acquisition rights is removed as they all agree 'no one is antecedently entitled to any of these resources, but that they shall instead be divided equally among them.'⁵⁸ Conveniently also – they must be a little naïve – 'they do not yet realise, . . . , that it might be wise to keep some resources as owned in common by any state they might create'.⁵⁹ They also, in a remarkable piece of reasonableness, decide to place the 'envy test' on any distribution they might decide in the allocation of the island. The envy test is this:

No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle.⁶⁰

⁵⁷ Ibid., 184.

⁵⁸ Ibid., 66.

⁵⁹ Ibid., 67.

⁶⁰ Ibid.

Dworkin also assumes that the resources are able to be divided up by a ‘divider’ into bundles that were different but equal, which would pass the envy test. He notes that a problem with this equal distribution still occurs; some of the survivors would prefer different ways of cutting up the resources, which will make the resulting terms of trade between them all unbalanced. To solve this problem, the divider would realise that an auction of the resources would be the best possible solution. The divider hands out 100 clamshells to use as counters in the market.

Each distinct item on the island (not including the immigrants themselves) is listed as a lot to be sold, unless someone notifies the auctioneer, of his or her desire to bid for some part of an item, including part, for example, of some piece of land, in which case that part becomes a distinct lot.⁶¹

The auction then proceeds, and is rerun continually until all lots are cleared, and everyone is satisfied with the auction. The clear advantage this theorem of justice has over Rawls’s original position is that there is no philosopher king or government attempting to aggregate all the choices. Rather, the citizens of the island society are able to choose their conception of equal resources ‘against a background of information about the actual cost their choices impose on other people and hence on the total stock of resources that may be fairly used by them.’⁶² Dworkin has, on first appearances, incorporated the market into the very foundation of his notion of equality; each person’s bundle of resources is measured, not against some pre-ordained principle, but against what others consider is worthwhile. There are a number of difficulties with the further development of the argument, most notably its use of talents as property, luck, and to what extent it indemnifies participants against later misfortune through an insurance scheme.⁶³ Those points need not detain us here, as we seek the less grazed upon and so somewhat greener pastures of the auction.

Having set out the auction, the question of whether Dworkin’s theory can assume that property rights are well enough understood to disregard their complications is more defined. It is the participants that must know enough about property rights to set the auction on its path to equality. To explain, it is one thing for Rawls to assume that political economists can deal with the question of property rights when ensuring a fair division of the basic primary

⁶¹ Ibid., 68.

⁶² Ibid., 69.

⁶³ See for instance the criticisms of Anderson, “What Is the Point of Equality?”; Michael Otsuka, “Luck, Insurance, and Equality”, *Ethics*, vol. 113 (2003), 40-54.

goods. In Rawls's theory the problem of property rules was at least given to an institution. It is quite another to assume, as Dworkin seems to, that the shipwreck survivors know enough to work out how to allocate not just resources, but the rules of exclusions over those resources. Unfortunately Dworkin leaves to our imagination the answer to this question. Happily, we have seen the basic problem expressed as the castaway island example in the chapter on historical theory. So his extrapolations from the auction can be examined. The first point of note is that within the auction Dworkin makes no attempt to suggest that the rules around property (such as access) might be important to a valuation of that property by its participants. Indeed, our intuitions of the fairness of the auction are based on our assumption (upon which the theory preys), that property rights are straightforward over every resource on the island that is auctioned.⁶⁴ Yet, even if the property rights are relatively straightforward, and they do not affect the auction in a meaningful way, what is the normative justification for the property rights allocation? The simple Dworkian answer is choice. But this is a sleight of hand in the auction. Auctions in the everyday world are embedded in property law. Where there is any chance of a property being under dispute, that property is not sold. In Dworkin's auction, even though nothing is yet sold, the assumption is basically the status quo option discussed above (that is, property rights as they exist today). Dworkin's theory thus begs the question of the equality of resources. The survivors are assumed to have the talents to divide everything that exists on the island into lots that everyone wants, and allocate rights of exclusion to which everyone agrees. The whole question of the normative justification of those rights is excluded from the theory since they exist prior to the morality of equality. To put it another way, one can accept that the critique of Rawls regarding the need to justify consent to the division of property rights is not applicable here. Dworkin's starting assumption is that private property is understood as it exists today (and so, one assumes, has the consent of all those participating in the auction). But what of property disputes in the future? Dworkin's ideal theory must maintain, at least as regards property, that there is no question of future disputes since the initial disbursement of property is just, and every other inequitable eventuality that proceeds from the just

⁶⁴ If this is true, the lawyer among the shipwrecked needs only to keep his or her own counsel on this problem during the auction to ensure work for weeks and probably a lifetime sorting through the claims and counterclaims that will inevitably arise over what constitutes a person's property. To take a simple example, suppose someone works out that the surfer is using their land to get to the sea? How much is that new property right worth to the surfer?

distribution is dealt with by the insurance scheme. Take for instance person A and B to whom we were introduced earlier in the chapter.

Person A wants to dig the garden, while person B wants to exist like Dr Pangloss and sit in his backyard contemplating the fortune that awaits him. In Dworkin's conception of justice, we do, unlike Rawls have something to say on this problem. B has his rights. A and those he hoped to help have Dworkin's system of insurance upon which to fall back. But the exercise brings out something counter-intuitive in Dworkin's equality of resources – the actual result of inequality in resources further down the track and, surprisingly, the resulting failure of the distribution to meet the envy test (and notably not because wealth has become an issue, nor luck neither). If Dworkin's insurance works, then his egalitarian project has not failed. But this is not of concern here. Rather the point is that the auction does not provide a device for the continual evaluation of equality of resources, since it assumes just transfers of those resources once the auction is run. This means the justification for Dworkinian property rests once the auction is done, not on equality, but on some type of original-acquisition argument (admittedly one that in turn justifies itself through the claim of equality in the auction). The rights of properties sold following the auction rest on justice in transfer being upheld. So we have two normative justifications of property rights at this point – justice in acquisition, and justice in transfer arising from Dworkin's ideal theory. Dworkin himself, notes the similarity of his view of property with historical rights theory commenting that

there is no place in a theory such as Nozick's for anything like the idea of an equal distribution of abstract economic power over all goods under social control.⁶⁵

The trouble with this statement is- whose social control? Since all choices are made by the market (and then insured), who is to decide which property rights are to be considered as part of the property bundle for each of the resources sold? Given justice in transfer becomes a necessary assumption, Dworkin needs to provide it with a normative justification.

To put it another way. Dworkin deals with changes in circumstances by insuring against those for which we are not responsible.⁶⁶ But this does not prevent the conception of the ideal of equality resources depending on the auction to equalise resources at the start.

⁶⁵ Dworkin, *Sovereign Virtue : The Theory and Practice of Equality*, 111.

⁶⁶ *Ibid.*, 77.

Logically, that equalisation depends on the assumption that the politics of property rights are well enough understood to be divided equally. To illustrate why this is more difficult than Dworkin might imagine, the example of the surfer and the gardener will suffice. Let us imagine some of the questions each might have about the resources that they individually want to bid upon. For instance, the surfer may want to know that the beach is free for him to surf but this implies the surfer has access to the beach. Likewise, does the gardener have a road on which to travel to sell his goods? Can he own the distribution network? Can the surfer have exclusive rights to the waves? Or is the 'break' considered public property? If the beach is public property, what protection has the surfer for his way of life should the public ownership be put in jeopardy? If the participants of the auction are going to take the envy-free test seriously then they must sort out these questions before the auction.⁶⁷ One imagines that such questions would take longer than a day. So the survivors will need to eat and sleep. This presents some of the normal co-ordination problems that humans always face; so it is likely that the survivors, while they await the outcome of the deliberations that are necessary to start the auction, will develop a typical human response to co-ordination problems. Whatever that response is, it will involve allocating duties and rights to each of the survivors, and as days turn into weeks, and the survivors draw up the property rights for each bit of property that they desire, they will be acquiring more and more governmental rules. Perhaps, they might even have to develop property allocations (since complications may arise over sleeping arrangements and kitchen facilities), and a division of labour and trade may break out. Since it is taking so long to place all the property rights in the appropriate way – where all private property is completely understood, as per Dworkin's instructions – they may well decide on another system of allocating property until such time as they have the auction. The arrangement of the existing property rights may well arise from an earlier run of the auction. A dispute may arise, so they will need a court of law (if they follow Locke), or a dictatorship (if they follow Hobbes).⁶⁸ This would require a reasonably good normative justification for the property rights as they exist until the auction. This suggests that by the time the auction is run, there is likely to be the problem of historical ownership of property already existing, and those ownership rights might have some reasonable normative justification. Indeed, it may be that at some stage the

⁶⁷ Ibid., 141.

⁶⁸ I use these two, since we are after all, chasing a liberal egalitarian goal here.

complexities of co-ordinating the various issues around property rights make the participants give up on the efficiencies offered by the auction, and return to the central problem of the legitimacy of their governing body and its justifications for the rulings it has made on property rights so far. This is all a bit far-fetched, but it draws out several points that Dworkin's theory glibly assumes away and also some problems with his use of the auction.

Joseph Heath has argued that Dworkin overestimates the ability of the auction to produce a fair resource distribution and underestimates the strictness of the various conditions of the auction in order for it to produce the egalitarian results that he desires. First, it is strictly not true that Dworkin's auction achieves equality of resources. As Heath points out, the participants in the auction already have an envy-free equal resources, unless they are jealous of someone's particularly pretty clam shells. This means that the result the auction achieves is the most efficient outcome of equality.⁶⁹ Second, Heath notes that the auction effectively, to use the economic language, internalises all externalities. The perfect competition that characterises Dworkin's optimisation of the resources can only occur when there is perfect market competition. The conditions, the pareto conditions, for that to work include a complete, perfect set of property rights.⁷⁰ This is why Dworkin must assume that all resources are able to be made into separate, equal lots. Dworkin's assumption that these rights are understood today will not do. Rather, he is actually assuming in his ideal theory of the auction that all rights that could ever conceivably be needed, wanted or thought about, would need to be included in the auction, far beyond what we today conceive of as property. So, Dworkin cannot merely assume that we understand private property just as it is today, but as it could ever be. As Heath puts it, the set of property rights necessary for the auction to generate equality

... extends far beyond the set of rights that are legally recognized in our society – not just land, but also air, water, security, green space, and so on. But it goes further. Imagine any sort of externality – such as making a lot of noise that keeps neighbours awake. In a perfectly competitive market, there would have to be a property right that fully internalised

⁶⁹ '...since the bidding power of each individual is determined by the number of clamshells that each is given at the beginning of the auction, any equality of bidding power must be a function of the equality of the initial distribution. In other words, the auction does nothing to guarantee everyone an "equal role"...the outcome that results from the auction is neither more nor less equal than the initial allocation. It is simply more efficient.' Joseph Heath, "Dworkin's Auction", *Politics Philosophy Economics*, vol. 3, no. 3 (2004), 326-7.

⁷⁰ *Ibid.*, 330.

the cost that this action imposes upon others.⁷¹

Dworkin fails to see that the auction he describes is circumscribed by the typical and well known problems of a perfect market. In assuming that his auction can be used to comment on the world around us Dworkin would be drawing an analogy between the behaviour of the perfect market and the world as it is. The problem here is that the analogy presumes the market, or the auction, to be a part of the achievement of equality. It does not. At its best the auction is neutral as regards equality. The auction will always produce an economically efficient outcome, but it will not produce an equal option since, without perfect competition and equality as starting points, it will produce unequal results. Thus, for the auction to achieve equality in the manner he describes, Dworkin would need perfectly internalised property rights, not the mere human knowledge which he assumes. The mistake Dworkin makes, in suggesting that the auction is useful for achieving equality is that he continues to

...overlook results in economic theory which show that *in principle* conclusions derived at this level of idealization have no normative implications for real world institutions. General equilibrium theory simply cannot be used as a platform for the development of a theory of justice.⁷²

So when Dworkin suggests that we use his ideal theory to look at inequality of resources, the comparison is wrongheaded. His auction will tell us nothing except that (as we know) the world has not yet managed to become a perfect market, with equal starting resources for all. These are basic points of market economics.⁷³ Dworkin's ideal theory fails to increase our knowledge of the conditions of equality or our intuitions of justice. Alternatively, Dworkin could propose and defend an equal distribution of property rights, which via economic and game theory, could then be run through the hypothetical auction with the imagined participants starting with equal resources. The externalities which he internalises at the start of the auction via his assumption of property rights would need to be explained, or more

⁷¹ Ibid.

⁷² Ibid., 332.

⁷³ 'this view arises from what is known as the "general theory of the second best". This theorem shows that, in a situation in which one of the Pareto conditions is violated, respect for all the other Pareto conditions will generate an outcome that is less efficient than some other outcome that could be obtained by violating one or more of the other conditions. In other words, while perfect competition generates a perfectly efficient outcome, a situation that is as close as possible to perfect competition will not generate an outcome that is as close as possible to perfect efficiency. Thus the analogy between perfect competition and a frictionless plane is a fallacy.' Ibid., 330-31. Cf. Richard Lipsey and Kelvin Lancaster, "The General Theory of the Second Best", *Review of Economic Studies*, vol. 24, no. 1 (1956), 11-32.

precisely given normative justification. Only then could it be judged as to whether or not his auction achieves the preference-satisfaction and envy-free distribution that he desires.

To be clear then, without the assumption that our knowledge of property rights is perfect, Dworkin's auction fails. The auction fails because without perfect knowledge, it must fail to produce equal resources. Since it fails to produce equal resources, Dworkin's ideal theory of equality fails. The auction succeeds in equalising resources, with the assumption of perfect knowledge of property rights and equality of resources to start it, as would any perfectly competitive market. However, the assumption of perfect knowledge of property rights in Dworkin's ideal theory would undermine much of the appeal 'equality of resources' might have as a concept since it would remove its ability to inspire normative justifications of equality.

The theories of both Rawls and Dworkin, as major contributions to the liberal egalitarian project, demonstrate the pitfalls of disregarding the importance of property rights. What is particularly unfortunate is that though both theorists are aware that their desired equality of distribution will be determined, managed and protected by property rights, they do not concern themselves with the necessary exposition or justification of those rights. They fail to include property as part of the basic justification of legitimate political authority. Since the time when Smith took Locke's idea of the generation of property rights to defend distributive inequality, it has been known that property rights are one of the main rearguard actions against equality. Yet, the recent intense concentration of political philosophies on the ideas of equality has almost entirely neglected the concept of property rights.

In the last three chapters I have argued that historical and contemporary theories of justice leave property rights without normative justification. Or those theories maintain that the justification of property rights will fall easily from the guiding principles of justice that the particular theory has proved. I have shown that there are good reasons not to believe that this is the case. I hoped to demonstrate these arguments within the idealised settings used by modern political philosophy to construct theories of the justice. I used these methods of political philosophy in order to show that weaknesses in the political theory of property arose from problems within the normative constructions of political philosophy, not in their

application to the world around us . In the next chapter I move into what might be called non-ideal theory, or the wider field of political theory. I demonstrate why property is important to the evaluation of the justice and legitimacy of a state via the development of indigenous property rights following colonisation. As I mentioned in the introduction to the chapter, this might be seen as a critique of the method of those theorists I have cited. It is, but only to the degree that I think that the failure to imagine property rights are significant impediments to their political philosophies constitutes a grave mistake. As I mentioned earlier, I am not suggesting that ideal theory is wrong methodologically.⁷⁴ Rather, the next chapter suggests, that any type of political theory, ideal or non-ideal, that does not include a justification of the regulation of property by a legitimate political authority will have difficulty in analysing the basic structure of the state. Another way of putting this is to say that we don't know enough about property in political theory to assume it away quite yet. That is why the comparison with the interpretation of Locke put forward in Chapter Four is apt. Locke justifies exclusive use ('private' property) from the common, but only within the hypothetical device of a state of nature. Before we assume property as a second order issue in our political theory, we must work out how to take property from a state of nature into society. I am unsure that Rawls and Dworkin mean to do so but, given their hypothetical devices, they continue Locke's tradition of placing the justification of property prior to politics. Since that priority results in an indeterminacy problem, property rights have no defence in their political philosophies.

⁷⁴ As say, does Farrelly, "Justice in Ideal Theory: A Refutation".

Chapter Six

States and property rights: conceiving property in political theory

...where history is regarded as a repository of titled deeds, on which the rights of governments and nations depend, the motive to falsification becomes almost irresistible. Thomas Macaulay, *The History of England*.¹

Political moralism, particularly in its Kantian forms, has a universalistic tendency which encourages it to inform past societies about their failings. It is not that these judgments are, exactly, meaningless—one can imagine oneself as Kant at the court of King Arthur if one wants—but they are useless and do not help one to understand anything. Bernard Williams, *In the Beginning Was the Deed*.²

Introduction

So far I have discussed failures in our theoretical understanding property in politics as part of the discipline of political philosophy. In this chapter I turn to the effect these failures have on our understanding of actual politics and history. I have argued that property should be understood in the context of political philosophy not as a bundle of rights but as a right *in rem* to exclude. I argued that the bundle-of-rights idea of property does not allow political philosophy to consider that property rights might have a political role which cannot be reduced to legal or moral constructs. In legal or moral systems, property rights are only one set of entitlements among many options and can be subordinated to normative political goals such as justice or liberty or equality. I suggested that dealing with property rights in this way presumed that a legitimate political authority had the right to regulate property. I moved then to demonstrate that such a presumption was unfounded in either historical or distributive conceptions of justice. I drew an analogy between Locke's reticence on the normative justification of property rights within the *Two Treatises* and contemporary theories of justice. This analogy serves as a reminder of Locke's insight that property was secure only through the creation of government. This suggests that close attention to the justification and legitimacy of

¹ Vol. 1 (London: Longman, Brown, Green, and Longmans, 1856) 26.

² ed. Geoffrey Hawthorn (Princeton; NJ: Princeton, 2005) 10.

political authority should serve as a starting point for the clarification of the role of property in theorising politics.

In this chapter I illustrate the arguments of this thesis with recent work discussing indigenous property rights during colonisation. Newly published historical scholarship provides the possibility that indigenous property rights were not creations of the law and morality of colonial administrations. Rather, indigenous property rights escaped the boundaries of colonial law and political morality during the creation of those colonial states. Indeed, the difficulties surrounding the politics of indigenous property rights were so contrary to any moral or legal justification, that it was politics that shaped the colonial solutions which we find so unpalatable today. It was not, as is normally imagined, only colonial self-interest that steered the course of the resolution of property rights, but rather conflicts over property rights that drove the colonial governments to strive for complete authority within their jurisdictions. This argument has a wider historiographical implication which I note during the course of the chapter. I suggest that the modern or Austinian idea of sovereignty, amongst other reasons, was deployed to end the indeterminacy of indigenous property rights that emerged in colonies during the nineteenth-century. On my argument, property rights are a creation of government, and it was the colonial state that claimed the right to create property rights in order to end the indeterminacy of indigenous property rights.

Such a conclusion should not be read as a suggestion that natural or moral rights do not exist or do not make sense to those who claim them. However, if the core purpose of property rights is the exclusion of others, those moral claims serve no purpose until a political authority determines and enforces them. This does not prevent an individual or group claiming moral or natural rights, but such claims do not in and of themselves provide the justification for property rights to be enforced by a political authority. As I argued in Chapter Four, until property rights are determined by a political authority, property rights suffer from an indeterminacy problem. In the language of political philosophy I have used thus far, property rights must be part of the normative justification of political authority. Freeing property from the cosy confines in moral or legal theory and placing it in the difficult world of politics acknowledges the close link property rights have with the very foundations of legitimate political authority. It is often noted that the founders of liberal political thought, such as Locke and Hobbes,

elucidated the point that the failure to secure property rights for people meant that a government would no longer be legitimate. The implications for property rights seem less noticed; that granting and enforcement of property rights are, to borrow from Bernard Williams, a basic legitimating demand of government (BLD).³

Usually in Western liberal democracies today the divorce of property rights from their function as a basic legitimating demand is plausible when it is a matter of discussing property rights in a state bound by the rule of law. For example, in countries such as New Zealand or Australia or Canada property rights will raise little trouble for those countries' normative legitimacy (however that is defined).⁴ This is because their property rights are deeply embedded in a relatively stable state regulated by a stable legal system. This implies that a properly political theory of property will have little traction, because it is unlikely that the government will grant rights it subsequently fails to enforce to the extent that its right to regulate that property is called into question. However, where several political authorities collide over property rights, as when indigenous peoples and colonial empires occupied the same territory, the function of property as a part of the BLD of legitimate political authority becomes important. So, for example, if indigenous or colonial political institutions could not protect ownership for the indigenous people over whom they claimed that authority through authoritative statements of those rights, and then enforce those pronouncements, indigenous property rights were no longer protected. On this reading both indigenous and colonial political authorities could no longer meet the BLD and so were no longer justified. This is not to say that indigenous peoples did not have political authorities that could determine their property rights effectively. However, in the historical process of colonisation the defence of those rights, or the translation of those rights for the colonial administration was near impossible due to a number of differing circumstances. Not the least of those circumstances was the collapse of traditional indigenous rule structures and the inability of the colonial administration to realise that the legitimacy of future governments would rest upon their treatment of indigenous property rights. I suggest also that the failure of colonial governance on this issue was because that governance relied on political ideas that - like those promoted by distributive justice theorists considered in the last chapter - considered property as merely as an instrument of morality or law with no necessary link to the principles underpinning colonial political authority. Practically speaking, property

³ Williams, *In the Beginning Was the Deed*, 3-4.

⁴ Waldron, "From Authors to Copiers".

was only too tightly woven with the legitimacy of colonial territories. That the colonial administrations were unable to see that, makes the tragedy of colonisation all the more complete.

The conclusion of the chapter is that property, as a political right, is quite different from other such rights, for instance, of liberty, freedom of speech, and religious toleration. Property rights are not only held against the state, as is commonly thought, but are parasitic upon the existence of the state. An individual may well feel entitled to property as a matter of his or her morality, but as Locke pointed out, the determinacy of that entitlement will necessarily rely upon it being recognised and enforced by some kind of political organisation. Without the state, property rights, as rights of exclusion do not exist; since they suffer continually from an indeterminacy problem. They are quite different in this way from a right to liberty or equality. A state may or may not have liberty or equality but it has no normative justification without enforcing rights of property. On this reading, at least part of the justification of the state is that it must enforce the existing property regime. At the same time, as modern indigenous claims of injustice show so practically, and as chapters on historical justice theory demonstrated, political philosophy provides no normative justification for currently existing property rights regimes. So, historical entitlements do not normatively legitimate the enforcement of existing property rights by political authorities. The lack of a theory of property rights in historical theory is compounded by the same failure in contemporary justice theory. As the analysis of the theories of Rawls and Dworkin demonstrated, contemporary justice theory fails to provide a plausible political theory of property. This means we have no normative justification of the right of a political authority to redistribute existing property rights. Therein lies the problem this thesis has sought to elucidate: there are no plausible normative reasons for a legitimate political order to endorse an existing property regime, nor can we plausibly justify the coercive power a political authority would need to create a property rights regime which could be endorsed by a legitimate political order.

The failure of political philosophy to justify the right of a legitimate political authority's to regulate property suggests that if we care about the justice of a society within a state, we must take great care when issuing property rights. Once a property right is granted by the state, the state's legitimacy in the eyes of the owner is closely tied to continuation of

that property. Thus indigenous peoples, promised in literally hundreds of documents their continued enjoyment of existing property, are quite correct, when considering property they once conceived of owning to ponder the legitimacy of post colonial states. In Nozick's theory, the justification and legitimacy of political authority depends on priority being given to the defence of pre-existing property rights. Contrarily, my thesis defends the idea that that a state's legitimacy depends upon the upholding of property rights because the state must enforce those property rights that the state has authorised. Indigenous claims for ancient property rights on this understanding are not of fundamental concern because, as Waldron would have it, they raise the question of 'is your society fair?' They are fundamental challenges for states because they raise the question for indigenous groups of 'why should we obey?' Property then, is greatly disquieting for contemporary theorising on justice, since all redistribution anywhere in the world, would not solve the particular question of political obligation and any change in property rights makes the question of political obligation all too salient.

The failure of ideas of property in the colonies

In the language of aboriginal claims, to claim historical injustice on the basis of the partial or complete dispossession of indigenous people would be to claim, amongst other things, that indigenous property rights were understood and able to be incorporated into the colonial government system of property law. Assessing historical claims of this nature presents some difficulties since the mass of literature on colonial dealings is a kind of scholarly hunt for the moral and legal failings of colonisation based on the belief that it was possible to assimilate indigenous property into the colonial administration. The need to identify moral failings, as Judith Shklar has noted, lies in following the 'normal model of justice' in which agents are generally only responsible for their 'active misconduct'.⁵ In the literature reviewing colonisation, such a prosecutorial model has become dominant and it tends to find a particular administration or government who is responsible for dispossessing indigenous peoples.⁶ This makes it more difficult to perceive the troubles

⁵ Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 41. For a discussion of this point see Paul Muldoon, "Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonization", *Journal of Intercultural Studies*, vol. 26, no. 3 (2005), 240.

⁶ See W. H. Oliver, "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in *Histories, Power and Loss: Uses of the Past: A New Zealand Commentary*, ed. Andrew Sharp and P. G. McHugh (Wellington: Bridget Williams Books, 2001), 9-29; Sharp, "Recent Juridical and Constitutional Histories of Maori". For a similar discussion on North American context, and the failures of justice rhetoric in understanding colonial interactions see Timothy H Breen, "Creative Adaptations: Peoples and Cultures" in *Colonial British America: Essays in the New History of the Early Modern Era*, ed. Jack P. Greene and J. R. Pole (Baltimore: Johns Hopkins University Press, 1984), 105-232. For an impressive analysis of the overriding

of indeterminate property that indigenous and colonial governments faced; such difficulties are forgotten in the search for agents of dispossession, and that search relies on there not being an indeterminacy problem.

Intention and the colonial state

An example of the way in which such moralistic histories obscure the past has been well documented by Bill Oliver in a critique of the historical method of the Waitangi Tribunal, the Commission of Inquiry charged with investigating the dispossession of indigenous peoples within New Zealand. Oliver accuses the Tribunal of creating a counterfactual utopian past against which to judge the historical past.⁷

... [The Tribunal's] interest in the past – for all the minute empirical character of its investigations and discussions – was not to realise the past in its distinctiveness but to indict it for its reprehensibility, and to do that by constructing an ideal (but feasible) alternative.⁸

Oliver is correct that judging historical actors against an imagined utopian past is nonsensical. Oliver is particularly exercised by the Waitangi Tribunal's suggestion that colonisation was ill considered, given that the Crown found itself in a position where it could not guarantee the rights it presumed to impart to Maori in the Treaty of Waitangi.⁹ Oliver, reviewing the assertion of this idea in the Tribunal's Muriwhenua Report, notes that

Inevitably a great deal of irregularity and impropriety is revealed. There is no reason to doubt the correctness of this description; colonisation has never been conducted under conditions of due process, utmost good faith and official accountability.¹⁰

Rather than simply exposing those irregularities the Tribunal suggests that the difficulties of pursuing avowed Crown intentions toward the protection of indigenous rights, meant

focus on moral agency in dealing with the legacies of colonisation see Muldoon, "Thinking Responsibility Differently".

⁷ The Tribunal's moralistic approach is inspired by the legislation under which it operates: The Tribunal is to consider claims, under Section 6 (1) of the Treaty of Waitangi Act 1975, 'Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected... by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown... [that] was or is inconsistent with the principles of the Treaty.' Those principles have been formed in the latter part of the twentieth century by the Tribunal and the New Zealand courts for the benefit of the ongoing relationship between the Crown and Maori. Since the statute directs the Tribunal to judge Crown actions by those standards, they are necessarily presentist. On the principles see Te Puni Kokiri, *He Tirohanga O Kawa Ki Te Tiriti O Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: 2001).

⁸ Oliver, "The Future Behind Us", 20.

⁹ 'Her Majesty the Queen of England... guarantees to the Chiefs and Tribes of New Zealand... the full exclusive and undisturbed possession of their Lands... and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession...' Treaty of Waitangi, 6 Feb 1840.

¹⁰ Oliver, "The Future Behind Us", 19.

that the Crown ‘should have waited upon the availability of a sufficient number of properly and quite highly qualified public servants.’¹¹ As Oliver notes, the Tribunal’s

...historical reconstruction must be considered defective in failing to consider practicalities before turning what is certainly a matter for regret (about which one needs to consider what is to be done) into a culpable omission.¹²

Yet, in the Tribunal’s defence, the failure of contemporary theory to explain adequately how historical property rights might be claimed (as Waldron has demonstrated), has meant there has been little else for a Tribunal to do except turn to the presentist approaches of the common law and moral theory which allow it to cherry pick past government statements on the rights of indigenous people in order to fashion a normative structure against which to judge past government actions toward indigenous people.¹³

The reconstruction of aboriginal title

On dispossession, the moralistic approach – here typified by the Tribunal – has been dominated by the legal doctrine of aboriginal title.¹⁴ The doctrine is a difficult and complex set of laws depending upon a myriad of different precedents from American and Commonwealth court cases, and is used presently to protect aboriginal title that still exists.¹⁵ In its naïve form, however, the doctrine asserts that

the Crown’s territorial title is ... subject to the rights of use and occupancy by the native people. These tribal property rights have moral and legal force on the Crown.¹⁶

So the doctrine is a normative structure with which to indict past governments for their failure to appreciate such forces during the process of colonisation. For example, it has been suggested on the basis of this doctrine, that a fully fledged set of substantive Maori property rights could be found in law at the time of the Treaty of Waitangi.

Historical records of the Crown colony of New Zealand contain abundant recognition

¹¹ Ibid.

¹² Ibid.

¹³ P. G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 15.

¹⁴ For a wide-ranging review of difficulties that have arisen due to the intersection of history and law in the treatment of the colonial interactions with indigenous peoples, see the introduction to Ibid., 1-60, especially 16-37.

¹⁵ In New Zealand the first case usually regarded as recognising the doctrine of aboriginal title is *The Queen (on the Prosecution of Ch McIntosh) V. Symonds*, NZPCC 387 (1847-1932). That recognition, however, did not mean that Maori could protect their ‘aboriginal title’ in court. For a contemporary judgement see *Te Runanganui O Te Ika Whenua Inc Society & Anor V Attorney-General & Ors*, 2 NZLR 20 (1994). where it was held that ‘Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous...inhabitants of a country...rights [that]cannot be extinguished...otherwise than by the free consent of the native occupiers’.

¹⁶ Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory* (Wellington: Butterworths, 1995), 208.

of the legal right of the Maori to the continued use and occupation of their traditional property.¹⁷

With such a legal history, any political debate on the rights and wrongs of colonisation appears superfluous to modern scholars. In terms of the history of land deals between indigenous peoples and colonial administrations, the doctrine would indicate that indigenous people were somehow mischievously denied access to the courts where they might have protected their property rights using the legal precedents grouped under the heading 'the doctrine of aboriginal title'. The colonial administration would then be seen as nefarious or underhand. Scholars who take this position can then find their morally culpable agent. To continue with the New Zealand example: Brookfield, a legal scholar of influence, has suggested Wiremu Kingi, a paramount chief in the North Island whose stance precipitated the Maori wars in 1860, should not have needed to fight to protect his veto over land sales within his tribe's area because law was on his side.

Wiremu Kingi's chiefly veto of the Waitara purchase, which precipitated the attack by Government troops, may be upheld as a matter of common law, as an incident of the aboriginal customary title recognized in *R v Symonds*.¹⁸

If Brookfield is right, the historical question becomes a matter of discovering why the colonial government of the day was willing to break the law. Brookfield, or any other historian, should be able to find the answer in the government archives. The historian's task in New Zealand is reduced to understanding why the law was not followed and the philosopher's or political theorist's task is void. This is historical anachronism gone mad. In Australia, a need to identify a past government that is morally or legally at fault in colonisation, has generated complacency similar to Brookfield's legal anachronism. The 'humanitarian critique of colonisation', as such readings of history are known in Australia,¹⁹ generated a vehement backlash by those opposed to a reading of history that

¹⁷ P. G. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), 108. A more recent example is the assertion that doctrine of aboriginal rights preserves 'the tribal or other rights of indigenous peoples in colonised territories.' Alison Quentin-Baxter, "Some Pacific Issues: Are They Relevant to New Zealand?" in *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts*, ed. W. L. Renwick (Wellington: Victoria University Press, 1991), 38.

¹⁸ F. M. Brookfield, *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 1999), 112.

¹⁹ McHugh, *Aboriginal Societies and the Common Law*, 21. McHugh cites Henry Reynolds as the most 'prominent exponent of that tendency... [whereby] historians... have adopted what were primarily legal accounts of common law aboriginal title made by lawyers to a legal audience as though the principles were consciously present—or should have been—in the minds of historical actors, officials especially.' For instance, Henry Reynolds, *The Law of the Land* (Ringwood, Vic.: Penguin, 1987). A Canadian example of this tendency in the work of a prominent scholar in that country is Kent McNeil, "Extinction of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion", *Ottawa Law Review*, vol. 33, no. 2 (2001-2), 301-46. Cf. McHugh, *Aboriginal Societies and the Common Law*, 23.

forced moral agency on the state for the injustices visited upon Aboriginal Australians.²⁰ The resulting and ongoing debates are known as the ‘history wars’. As Muldoon astutely notes of the reasons for the backlash, part of the problem lay with an

(over) extension of the concept of moral agency [which] forces us to disregard historical and moral complexities, draw overly neat distinctions between contingency and culpability and to engage in the discursive production of victims (victims who are thereby denied their own agency)...[which in turn]...does little to improve our understanding of the colonial situation.²¹

Recent scholarship in legal historiography has done much to remove the view that law structured the treatment of aboriginal property by colonial governments. For instance, in a subtle but nevertheless damning article, Mark Hickford picks apart the view of the doctrine of aboriginal title as coherent in early colonial New Zealand.²² He demonstrates through a method owing much to Pocock that there was *not* ‘a doctrinal role for English common law and *ius Gentium*, a law of nations, in shaping the form and content of notions regarding aboriginal proprietorship.’²³ After a critical examination of the fulsome records of the early New Zealand colonial period in both England and New Zealand, Hickford concludes that “...‘law’ did not provide a coherent doctrine about aboriginal property,” but instead, the doctrine was one among several foci of debate on Maori property rights.²⁴ He states

...aboriginal proprietary rights were processual, or constructed out of complex intertwining processes, rather than existing as a static category or abstract science generally understood as self-evident or clear in terms of its substance.²⁵

Any doctrine that could be located during that time supported an imperial policy emphasis upon the procedural and performative aspects of the Crown’s practices in acquiring land in New Zealand from Maori. The phrase ‘aboriginal title’ is thus misleading insofar as it pretends that policy-makers disrupted the content of ‘territorial rights of the natives.’ The common law was not even referred to in policy discussions as an intellectual source for the proprietary rights of Maori, since the questions were not

²⁰ See Muldoon, “Thinking Responsibility Differently”, 242-3. The seminal conservative text in the Australian debates was Keith Windschuttle’s provocative *The Fabrication of Aboriginal History, Vol. I, Van Dieman’s Land 1803-147*, (Sydney: Macleay) 2002. For an overview of the debates see Stuart Macintyre and Anna Clark, *The History Wars* (Carlton, Vic.: Melbourne University Publishing, 2003).

²¹ Muldoon, “Thinking Responsibility Differently”, 243.

²² Mark Hickford, “‘Decidedly the Most Interesting Savages on the Globe’: An Approach to the Intellectual History of Maori Property Rights, 1837-53”, *History of Political Thought*, vol. 27, no. 1 (2006), 122-67.

²³ Mark Hickford, “Making ‘Territorial Rights of the Natives’: Britain and New Zealand, 1830-47” (D. Phil., University of Oxford, 1999) 14. See also Hickford, “‘Decidedly the Most Interesting Savages on the Globe’”.

²⁴ Hickford, “Making ‘Territorial Rights of the Natives’” 14.

²⁵ *Ibid.* 7.

directed at that issue. Rather policy concerns were angled toward the ability of the Colonial Office and its representatives to discipline British settlers.²⁶ The doctrine's function did not involve the crystallization of substantive Maori property rights but ensured the propriety of the Crown's acquisition of New Zealand and a disciplinary logic for British settlers.

Another leading writer on the history of aboriginal title across the British Empire, Paul McHugh, has offered a more geographically widespread conclusion: the current use of doctrine of aboriginal title in post-colonial courts is not a doctrine of that law that can be found in past Court judgements.

Common-law aboriginal title does not purport to be an historical explanation of what happened in the past, for one does not find eighteenth- and nineteenth-century lawyers talking in the same terms as late twentieth century lawyers.²⁷

That is, aboriginal title did not exist as law or a set of laws that could provide indigenous peoples with substantive property rights. That form of title did not exist. Rather aboriginal title, as it is used by the Courts today,²⁸ is

constructed from principles that today are seen to have regularly underpinned Crown conduct in the past and that have been given contemporary legal significance in order to protect extant rights of use and occupation.²⁹

So in an inversion of presentist practices – finding fault with past morality based on contemporary morality – the protection of aboriginal property today is dependent not on the judgements about the wrongful actions of the colonial administrations based in a hypothetical law but rather on colonial statements of protection toward indigenous peoples' property rights.³⁰ That colonial administrations did provide such statements will become important later but to return to the issue at hand, indigenous property rights were not defined at law in such a way as to offer a coherent substantive right of exclusion to be enforced by the Crown. To put it bluntly: 'common law aboriginal title is not a

²⁶ Ibid. Chapters 2&3.

²⁷ P. G. McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past", *Saskatchewan Law Review*, vol. 61, no. 2 (1998), 428.

²⁸ Important cases affirming contemporary aboriginal title in the respective jurisdictions are: New Zealand, *Ngati Apa & Anor V Attorney-General & Ors*, 3 NZLR 643 (2003). Australia, *Mabo V Queensland No 2*, 1 CLR 175 (1992). Canada *Calder V Attorney-General for British Columbia*, 3rd DLR 145 (1972). United States (long standing recognition, but this case affirmed constitutional protection) *Santa Clara Pueblo V Martinez*, 436 US 49 (1978).

²⁹ McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights"", 428.

³⁰ Ibid.

historical truth.³¹ It was politics, not law, that shaped attitudes to indigenous property rights. I am aware that this is a vast simplification of the actual legal historiography concerning aboriginal property and other rights. One complicating factor is the difference between pre-nineteenth-century law which was conceived as ‘an integrated normative order immanent in the community itself’ and the ‘late nineteenth century positivisation’ of the common law, such that law was the authoritative command of the sovereign.³² Notwithstanding these difficulties, the point remains – political actors of the period did not have recourse to a settled doctrine of law regarding the treatment of aboriginal property. That is, normative justifications of political authority that rested on the rule of law were unavailable to the colonial administrations because indigenous property was not within that law. Thus, the right to regulate property escaped such normative boundaries at precisely the point that colonial or indigenous political authorities most needed a principled approach to the political problem of property rights. As I explained in Chapter Two, the bundle-of-rights picture of property creates a political philosophy of property that is actually an examination of the moral colour of the laws of property, not a political philosophy. This suggests that in political theory on the subject of indigenous property rights, law and moral philosophy will be used as explanations for the loss of those rights. I have demonstrated that indigenous dispossession cannot be explained by an examination of the law of the day, since it provided no justification for the political authority to regulate indigenous property rights. So I turn now to a demonstration of the inadequacy of examining the dispossession of indigenous peoples through an exploration of the moral colour of a political authority.

Colonial property in political thought

Among the most dedicated attempts to analyse the influence of political theory in shaping colonial conceptions of indigenous property rights is Jim Tully’s examination of the use of Locke in North America.³³ His seminal articles have established that Locke’s theories were used as part of a contestation over the status of Amerindian property rights

³¹ The full quotation is ‘common law aboriginal title is a not a historical truth, although the work of some writers – the early publications of this writer included – has tended to describe it as such.’ P. G. McHugh, ‘Proving Aboriginal Title’, *New Zealand Law Journal* (2001), 304.

³² McHugh, *Aboriginal Societies and the Common Law*, 29 & 23 respectively.

³³ McHugh’s destruction of the doctrine of aboriginal title as a source of substantive protections for indigenous rights in the historical past of law follows a method of historicism which, as he notes, is ‘unexceptionable to modern-day historians, particularly those of political thought.’ *Ibid.*, 49. One might hope, therefore, that a recent champion of historicism in political thought, such as James Tully, would avoid errors presentist errors in work on the influence of Locke and other political theorists of the time on colonist politics.

and political status.³⁴ The historical evidence is compelling that the ideas of the *Two Treatises* were used by litigants and polemicists to advance colonial claims. Tully identifies two ideas from Locke that were critical. First, Locke's use of America as the example of a society in a state of nature gave sophisticated expression to a definition of political society that excluded Amerindian government from sovereign relations with colonial administration. Amerindian government did not qualify as a 'legitimate form of political society.'³⁵ Second, he maintains that Locke's property theory justified the claim that Amerindian 'customary land use' as 'not a legitimate type of property.'³⁶ Tully's research on Locke's use within colonial justifications of indigenous dispossession emphasises my point that the ideas available to colonial administrations meant they were unable to recognise and incorporate indigenous rights into colonial systems of government: 'Western theories of property', including Locke's, contained 'a set of assumptions which misrecognise the political organisations and property systems of Aboriginal peoples.'³⁷

Yet, to make the claims, as Tully does, that these are matters of injustice we must be sure that theorists such as Locke, and the colonists who used his work had recourse to other ideas of politics which allowed them ways of imagining indigenous property other than as extensions of a indigenous polities that were, or could be, in conflict with the authority of colonial administrations. In much presentist work, the notion that aboriginal title – the idea that indigenous property rights existed in colonial law – gives past colonial administration that choice. Reviewing such work on Australian history, Muldoon notes that 'the critical charge comes from the counterfactual claim that a great deal of suffering would have been avoided if only the colonists had acted more adroitly.'³⁸ While not relying entirely on aboriginal title as proving the culpability of colonial administrations, Tully's frame seems to suggest a great deal of wickedness would have been avoided (and

³⁴ James Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground" in *Property Rights*, ed. Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul (Cambridge: Cambridge University Press, 1994), 153-80; Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights". Extensions of this research can be found in Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996); Vicki Hsueh, "Cultivating and Challenging the Common: Lockean Property, Indigenous Traditionalisms, and the Problem of Exclusion", *Contemporary Political Theory*, vol. 5, no. 2 (2006), 193-214.

³⁵ Tully, *Locke in Contexts*, 139.

³⁶ Tully, "Aboriginal Property and Western Theory"; Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights". Hickford, "'Decidedly the Most Interesting Savages on the Globe"', 130 has a for a discussion of the use of Locke amongst others (Grotius, Pufendorf, Montesquieu and Blackstone) in; *Johnson V M'Intosh*, 8 Wheat 572, 568-9 (1823).

³⁷ Tully, "Aboriginal Property and Western Theory", 154.

³⁸ Muldoon, "Thinking Responsibility Differently", 244. Muldoon cites as a source for this idea Tim Rouse, "Historians and the Humanitarian Critique of Australia's Colonisation", *The Australian Journal of Anthropology*, vol. 14, no. 2 (2003), 253-58.

would be avoided in the future) had the colonists followed through with the normative framework that ‘can be theoretically *reconstructed* and defended’ from the ‘classic enunciation of the Aboriginal and common-law system’ provided by the ‘Royal Proclamation, and Chief Justice Marshall’s interpretation of it’ in the 1820s and 30s.³⁹ That is, Tully’s view of the history of ideas of the colonial past suggests there was and is implicit in both the common law judgements of the mid-nineteenth century and aboriginal relations with the land, a normative framework of which we can avail ourselves to give recognition to the ‘juristic’ status of aboriginal nations, their government and property, within the ‘negotiated relations of treaty federalism’.⁴⁰ He maintains that

A theory of property applicable to North America will be just only if it begins from the Aboriginal and common-law conceptual framework as its premise, for this is the just representation of the initial conditions of property at the foundation of Canada and the United States.⁴¹

He then cites a number of influential mid nineteenth-century American court judgements on aboriginal property and self-government to prove his point that aboriginal land and sovereignty were reserved to the control of the aboriginal peoples themselves.⁴² Tully is at least clear that the presentism of this reading of North American history is on the basis of ‘theoretical *reconstruction*’, and is not law.⁴³ Yet he allows himself to claim that his normative frame ‘has been violated, either by ignoring or denying it, on more occasions in the past than it has been honoured in Canada and the US.’⁴⁴ On the basis of the recent legal historiographical work, there is much that could be said about Tully’s reconstruction of North American law. Not least, as McHugh puts it, that ‘Men, not law, caused the suffering of aboriginal peoples.’⁴⁵

However, it is Tully’s normative frame that I wish to interrogate. He argues that it follows from the recognition of aboriginal sovereignty that colonisation should have proceeded on the basis of full recognition of aboriginal property rights stemming from the ‘oldest principle of Western law: the principle of consent (*quod omnes tangit*, or “what

³⁹ Tully, “Aboriginal Property and Western Theory”, 173.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 179.

⁴² *Ibid.*, 172.

⁴³ *Ibid.*, 174.

⁴⁴ *Ibid.*, 173.

⁴⁵ Commenting on the shift from fluidity of common law to a positivistic approach in law McHugh notes ‘abject fate of aboriginal peoples would have occurred irrespective of the change in the method and language of legal practice and thought... unleashed economic growth in two mighty empires, British and American, and its unquenchable thirst for land justified laws explained by a motley, fluid and far from coherent or consistent cobble of intellectualizing... Men, not law, caused the suffering of aboriginal peoples.’ McHugh, *Aboriginal Societies and the Common Law*, 31-32.

touches all must be agreed to by all”)⁴⁶ Tully summarises, and approves of, the Marshall jurisprudence that maintains

[w]hen the Crown discovered and occupied territory in America, it gained a right to continue to occupy this territory, on the internationally recognised title of use and occupation, but only with respect to the exclusion of all other *European* nations. The title of long use and occupation did not, however, confer on the Crown any right with respect to the Aboriginal peoples... Discovery and occupation confers sovereignty only if the land is “vacant” (*terra nullis*), and, contrary to Locke, this was not the case in North America.⁴⁷

The point to note, in the construction of Tully’s normative frame, is the almost indirect inference that indigenous peoples’ property is protected by substantive rights. Such rights arise because aboriginal peoples

are self-governing nations with ownership of their territories; then it follows from the central theory of the *Two Treatises* itself that they have the right to defend themselves and their property, with force if necessary.⁴⁸

This seems a reasonable proposition. It is, after all, the assumption upon which is founded the non-interference doctrine of the modern international state system. In the context of the colonial situation in North America, the situation is somewhat more confused since – as Tully acknowledges – there are literally hundreds of Treaties signed, which often grant the British or other colonial empire rights of sovereignty.⁴⁹ It is perhaps such difficulties that force Tully to claim not complete, modern sovereign status for aboriginal peoples, but to ratchet down his normative frame to the supposition that indigenous peoples were and are entitled to ‘domestic dependent nations’ status, wherein they should be allowed to be ‘independent, self-governing nations with internal sovereignty’.⁵⁰ Why a people, which Tully considers sovereign and independent, should suddenly decide to submit themselves to Federal Canadian or American law, in the past or present, is not explained.⁵¹ There is some suggestion that this dependent status is similar to the Aboriginal idea of two vessels rowing side by side where ‘neither of us will try to steer the other’s vessel’.⁵² Tully’s equation here between the Marshall jurisprudence and Aboriginal ideas rests on a reading of the line from the *Kairanereko:wa* (the Great Law of Peace of the Haudenosaunee (Six Nations of Iroquois) confederacy):

whether a foreign nation is either conquered or has by its own will accepted the Great Peace [i.e. joined the Haudenosaunee confederacy], their own system of internal

⁴⁶ Tully, “Aboriginal Property and Western Theory”, 172.

⁴⁷ *Ibid.*

⁴⁸ Tully, *Locke in Contexts*, 175.

⁴⁹ Tully, “Aboriginal Property and Western Theory”, 173.

⁵⁰ *Ibid.*, 176.

⁵¹ *Ibid.*, 177.

⁵² *Ibid.*

government may prevail.⁵³

It seems to strain the bonds of credulity that Marshall's support of the superiority of British rule and his denigration of Indian political status has much to do with the sense of equality in Tully's indigenous example, a point which Tully does admit.⁵⁴ Whether dependent or equal, Tully's argument is that the "Treaty federalism" suggested by his normative frame of aboriginal self-government means that 'aboriginal peoples cannot be brought under the sovereignty of non-Aboriginal laws, institutions and traditions of interpretation without their consent.'⁵⁵ In turn, this means that the only just theory of property possible is one that combines the common-law approach he has outlined and aboriginal ideas of property. He then criticizes contemporary theorists for ignoring the foundations of property in North America, or for taking as read that European-American institutions and traditions are 'exclusively authoritative'.

To sum up, Tully maintains that in the colonisation of North America, Locke and other theorists provided the political arguments to downgrade the status of Amerindian politics and property. This made it possible for the colonists to disregard their sovereign status and to take their property without consent. Once the racist assumptions and misrepresentations of property are removed from Locke's theory, Tully argues, the consent argument of the *Two Treatises* would suggest that since Amerindians were voluntary subjects of colonial rule the removal of Amerindian property rights was arbitrary property taking.⁵⁶ Tully is of the view that the arbitrary taking of property is more than just morally wrong within Locke's theory. As I also argued in Chapter Four, Tully maintains such arbitrary property taking undoes the legitimacy and justification of a government. Tully suggests that justice therefore requires the reconsideration of the legitimacy of the states of Canada and America over those indigenous peoples on the basis of the moral property rights of indigenous people.

If political theory is to take seriously the agency of indigenous peoples, such that they are seen as self-governing, sovereign nations as Tully suggests, his frame is woefully inadequate to the task. For while the frame demonstrates Locke's use in justifying some colonial actions, it does not explain why the principles that Tully finds in the Royal

⁵³ Ibid.

⁵⁴ Ibid., 178. Tully, "Aboriginal Property and Western Theory", 177-8.

⁵⁵ Tully, "Aboriginal Property and Western Theory", 178.

⁵⁶ Tully, *Locke in Contexts*, 175.

Proclamation and the Marshall jurisprudence were not followed, since both Marshall and the Royal Proclamation, as he wants to show, owe something to the consent based ideas of Locke.⁵⁷ In a sense, Tully begs his own question: why were aboriginal property rights not recognised? Tully suggests that Locke provided the most sophisticated expression of the colonists' argument justification to take property without consent.⁵⁸ Yet, he claims that aboriginal society was sovereign, with its own system of property rights. If such a claim is true, Tully's frame suggests that indigenous governments, in light of their people's dispossession, clearly failed to protect their peoples' rights. That is, Tully only applies his argument to colonial administrations. He does not apply it to indigenous property rights. If Lockean understandings of consent government are applicable to indigenous societies, then under the historical frame Tully provides, where indigenous governments failed to defend their property rights against others arbitrary takings, they lost their right to rule, and indigenous peoples had no legitimate government.

This is not an argument I think should be morally condoned since it singularly lacks any historical understanding of the position, thoughts or actions of indigenous peoples. Indigenous communities and their political authorities were sometimes much stronger than colonial administrations and yet are supposed in Tully's frame to have simply evaporated as the colonial empires entered their lands. Nevertheless, I think the normative argument is worth exploring because it exposes the implications of our lack of knowledge around the political implications of property rights. A fortunate by-product of the argument is that it shows the unpalatable conclusions which arise from the presentist history of indigenous peoples. If it is taken as axiomatic that indigenous peoples were sovereign and that sovereignty entailed responsibility for the protection of property rights against foreigners, then from the perspective of gross indigenous dispossession across the world and presentists' own standards, aboriginal governments across the colonial world lost one of the primary justifications to be a government when they failed to protect their subjects' property rights. If they failed to protect their

⁵⁷ This is notwithstanding the violence Tully does to idea of indigenous peoples as agents in their own right. While he gives them much normative sovereignty, he merely nods via the 'great peace' to their actual intentions and agency in a complex history of 300 years. Using Locke, Tully posits and demonstrates the expressed political actions of some colonial political actors, yet only glances at indigenous actions, neither explaining them, nor assigning them any weight. I suppose we are to take from this that the colonial empire simply subjugated them? Lyndsay Head discussing similar presentist histories in New Zealand suggests that the view that during colonial times indigenous peoples merely acted in traditional terms 'silences Maori history at the point at which it in fact began to speak with a new voice.' Head, "The Pursuit of Modernity in Maori Society", 102.

⁵⁸ Tully, "Aboriginal Property and Western Theory", 159; Tully, *Locke in Contexts*, 149.

subjects, those subjects were effectively without government. The logic of the presentist claims is that aboriginal property rights were ignored, hence the colonists were morally unjust. The presentist argument fails to think through the implications of holding government responsible for property rights for indigenous societies. It is here that one sees the assumed passivity of indigenous peoples and the lack of equality actually granted to indigenous peoples in the presentist argument. It is worth repeating. If aboriginal governments allowed their subjects' land to be taken by foreigners against the will of the indigenous individuals, then on any kind of normative justification for political authority (where the indeterminacy problem of property is solved by that authority), indigenous government failed.

A failure of indigenous government is clearly not what Tully had in mind in making his argument that Locke gave justifications for the removal of indigenous property rights and sovereignty. Tully has described in detail the misrepresentation of indigenous political society and property that occurred in the British mind, but one need not have much imagination to realise that indigenous peoples did not think this way about their own government and property. If indigenous peoples were willing to accept some form of co-operation with European colonists then how are we to imagine it should have worked? This is armchair history at its worst but to get to the point I wish to make, it must be indulged. The presentist approach of Tully is to imagine that British colonial rule and Amerindian political nations should have to co-existed; if this is so, how would it have been possible? Locke cannot provide the answer because that would be to separate nonsensically secure property rights and legitimate governance, an inseparable pair in Locke's theory. Another way of putting this is to suggest that there seemed to be nothing in Locke's text which suggested how to solve the indeterminacy problem so that an individual entering political society might just as well lose property as gain it. I am not suggesting that aboriginal property was, factually, in the state of nature as described by Locke.⁵⁹ Rather, if we except indigenous sovereignty as a premise, then for the purposes of the colonial administration, we must accept that indigenous property suffered from an indeterminacy problem. Colonial administrations faced the same problem with indigenous property as that presented by property in Locke's state of nature between governments, As Locke put it 'all Commonwealths are in the state of Nature one with

⁵⁹ Indeed, Tully is at some pains to make the point that Locke knew his description of America as a state of nature was factually incorrect. Tully, *Locke in Contexts*, 151-2.

another'.⁶⁰ Since indigenous property was granted and protected by indigenous government, bringing it under the protection of the colonial authorities raised the indeterminacy problem I posited in the chapter on Locke: on what basis were colonial authorities to decide the determinate indigenous property rights? In the next section, I want to illustrate that indeterminacy problem, with a small though important example from New Zealand. The New Zealand case is particularly pertinent because there, contra Tully, aboriginal sovereignty was clearly recognised, as were, again contra Tully, indigenous peoples' rights to land.⁶¹ A court was even instituted for sorting through those property rights. Nevertheless, the indeterminacy of indigenous property created political difficulties that ended only with the imposition of an Austinian sovereignty model. That model then allowed the removal of all but the most marginal indigenous property rights.

The difficulties that faced the New Zealand colonial administration regarding Maori property rights are discussed in a pamphlet debate of 1860. The pamphlets argued over the incident created through the use of force by the Governor, Thomas Gore Browne, to secure a land sale in what has come to be called the 'Waitara dispute'.⁶² Gore-Browne, stated at a meeting in the province of Taranaki that he would buy any land of fair title. A chief called Te Teira offered to sell land within what was commonly known as the

⁶⁰ Locke, *Two Treatises of Government*, (II, §183).

⁶¹ The British thought indigenous sovereignty was ceded in the Treaty of Waitangi, but that property rights were given broad protection, since the Treaty confirmed 'to the Chiefs and Tribes of New Zealand ... full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'. There is a striking similarity with the protections offered in the Royal Proclamation of 7 October 1763 where the Crown guaranteed that 'the several Nations or Tribes of Indians, ... should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds'.

⁶² The narrative presented here is kept simple and relies primarily on that presented in New Zealand Waitangi Tribunal, *The Taranaki Report: Kaupapa Tautahi, Wai 143* (Wellington: GP Publications, 1996). Chapter 3, part 6 gives the Tribunal's views of the origins of the Waitara dispute. For those interested in the historiography of Waitara, pieces on it include G. W. Rusden, *History of New Zealand*, 2nd ed. (Melbourne: Melville Mullen & Slade, 1895), 106-71. Alfred Saunders, *History of New Zealand* (Christchurch: Whitcombe & Tombs, 1896), 83. A. W. Shrimpton and Alan Mulgan, *Maori and Pakeha: A History of New Zealand* (Auckland: Whitcombe & Tombs, 1922), 215. J. E. Gorst, *The Maori King* (Hamilton: Paul's Book Arcade, 1959), Chapter Five "The Taranaki War", 85-101. see esp 85-93. Later histories which discuss the origins of Waitara include Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1992), 144-5; Keith Sinclair, *A History of New Zealand* (Auckland: Penguin, 1969), 125-30; Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973), esp. Chapter 8 (Ward's summation is that the dispute originated from the Governor's decision not to defer to senior chiefs on land sales, but deal directly with hapu. Belich contests both sovereignty and land as causes of the war, laying the blame with myths of 'myths of empire' James Belich, *Making Peoples: A History of the New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Penguin Press, 1996), 230 & 35. See also Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams, 1999), 19 & 120. For a reading of Gore-Browne's consistency in his view that the Queen's sovereignty was threatened by Kingi see Mark Francis, *Settlers and Governors* (Christchurch: Canterbury University Press, 1992), 233-5.

Waitara Block. Wiremu Kingi, the paramount chief of the area, then wrote to the Governor and other officials stating that the land was not Te Teira's to sell and that the Governor should not accept the sale. The Government ignored Kingi's claim and accepted the sale from Te Teira. When surveys were attempted of the land, the surveyors were obstructed by Kingi's hapu (sub-tribe). Government troops were then used to protect the surveyors. This eventually led to a battle at Waitara that is commonly portrayed within the historical canon as the start of twelve years of Maori or New Zealand Land Wars. The precise debating point of the pamphlets was the legitimacy of the New Zealand Government's use of troops to enforce the sale to Te Teira.⁶³ Until Waitara, land sales and colonisation in New Zealand had proceeded without undue trouble (subject to the normal failings in the colonial process), though much land and much of the indigenous population were not under the control of the government.⁶⁴ Waitara is the point at which the New Zealand colonial administration started the move toward asserting complete sovereignty and authority over Maori. Not coincidentally, it is also the time when the modernist notions of sovereignty emerged so that law became the instrument of the will of the sovereign, rather than the 'dialogic and pluralist' model of earlier Crown policies and court decisions.⁶⁵ However, the comments and actions of the British government up to 1860 suggest that the removal of Maori sovereignty and property rights was not the intention of the colonial administration. This next section argues that Waitara is an example of the indeterminacy problem of property driving the need for the British to seek an answer to 'Who Heir?', so that the government could decide all property and avoid such conflicts over property in the future. Tentatively also, I suggest that one of the reasons, amongst others such as the rise of scientific racism,⁶⁶ for the move to a modern unified conception of law and sovereignty across the colonial administrations was that it provided a solution to the indeterminacy problems of

⁶³ For ease, I use New Zealand Government to indicate the New Zealand Governor acting without or without the Executive Council, the British Government to indicate where decisions or instructions were issued from Britain, and the Crown to indicate where it would be folly to attempt in this short piece to separate them.

⁶⁴ 'English Law has always prevailed in the English Settlements, but remains a dead letter beyond them... Government has been continually exposed to contempt from being unable to perform its duty, and has been driven to extemporize, and ignore aggression or crime which it could neither prevent nor punish.' Governor Gore Browne to the Duke of Newcastle, 1 November 1860, Great Britain Parliament, *Irish University Press Series of British Parliamentary Papers: Colonies: New Zealand 1860*, vol. 11 (Shannon: Irish University Press, 1968), 393-4. Cf. McHugh, *Aboriginal Societies and the Common Law*, 171.

⁶⁵ See McHugh, *Aboriginal Societies and the Common Law*, generally, 23-42: on modernist notions of the law 29: on the move from dialogue to authority, 149-50. McHugh gives examples of the plural approach with the Marshall Jurisprudence. This fits neatly with the evolution in the New Zealand courts from recognition of indigenous sovereign capacity in 1847 to its denial in 1877. See respectively *R V Symonds*, and; *Wi Parata V the Bishop of Wellington and the Attorney-General*, 3 NZ Jur 72 (1877).

⁶⁶ McHugh, *Aboriginal Societies and the Common Law*, 31.

indigenous property.⁶⁷ Indigenous property had begged the question, ‘Who Heir?’ and the colonial administrations answered emphatically, ‘we are’.

The first locus of indeterminacy of Maori property rights for the colonial governments was the lack of information in colonial policy or law. While the Imperial governments accepted that there was a pre-existing land tenure system,⁶⁸ British policy and British law provided little guidance on how to treat those rights. Governors were left the space to solve their own problems within the realms of an agreed policy.⁶⁹ Mark Hickford following Lord Howick, characterises the British Government’s conception of Maori property rights as ‘vague native rights to land’.⁷⁰ I have already shown that British law supplied no help in suggesting how to accommodate Maori property rights within imperial policy.⁷¹

Given such a context of Crown policy, the pamphleteers had a wide latitude to dispute the intent and method of Crown policy toward Maori property rights.⁷² Sir William

⁶⁷ For instance, the epitome of that positivism was the case in New Zealand that denied that Maori property or sovereignty rights could be held against the Crown, making all law regarding Maori a matter of the will of the sovereign *Wi Parata*. McHugh comments that with this case ‘New Zealand courts thus reached the same positions as the Canadian and the Australian.’ McHugh, *Aboriginal Societies and the Common Law*, 129.

⁶⁸ For a detailed examination of the political machinations of European officials, politicians, and settlers in attempting to solve this puzzle see Donald M. Loveridge, “A Report for the Crown Law Office: The Origins of the Native Land Acts and Native Land Court Wai 674 #O7 (and Wai 100, I3; Wai 686, P1),” (Wellington: 2000).

⁶⁹ On vacuum of British policy see McHugh, *Aboriginal Societies and the Common Law*, 43. As an example, ‘It is necessary that you should possess, and it is far from my wish to withhold from you, an unfettered freedom of judgement as to the choice of the most effectual means for promoting the ends respecting which there can be no difference between us...the protection of the aborigines from injustice, cruelty and wrong...’ Lord John Russell to Governor Hobson, 9 December 1840, Great Britain Parliament, *Irish University Press Series of British Parliamentary Papers : Colonies: New Zealand 1835-42*, vol. 3 (Shannon: Irish University Press, 1968), 154. The point should be made here that tensions in the Crown policy over areas such as the property rights to be accorded to Maori could be latent in the normal practice of the policy because the policy was set at such distances. In the jargon of institutional economics, the agent/principal problem spread between New Zealand’s provinces, Wellington and London, and involved the Colonial Office, Parliament and Cabinet in London, the Governor’s office and the General Assembly and land assessors in New Zealand.

⁷⁰ Hickford, “Making ‘Territorial Rights of the Natives’” 240. Hickford found the phrase ‘in a series of notes extracted from his reading of parliamentary papers’, in the papers of the third Earl Grey [Viscount Howick] at Durham University Library, Palace Green section – Gre/B161/87:[entitled in catalogue, ‘memorandum on New Zealand 1845’]. Earl Grey, (later Lord Howick) was the Secretary of State Colonial and War Departments 1846-52.

⁷¹ As the section on aboriginal title makes clear ‘...there was no ready convergence between imperial policy formulation on aboriginal title and common law opinions concerning proprietary rights’ Ibid. 232.

⁷² The ‘small town’ need for good manners can lead the reader of these pamphlets to believe that it was a gentlemen’s public debate for the good of the country. This would be misleading as the outcomes of these debates could make or break fortunes amassed by the settlers in land. Busby’s efforts to secure title or redress for loss of title to his farm in the Bay of Islands from 1840-68 nearly bankrupted him. See the

Martin's pamphlet, *The Taranaki Question*, started the pamphlet debate.⁷³ His pamphlet's main aim was to raise doubts as to the appropriateness of the Crown's response to Kingi's refusal to sell Waitara. Martin had arrived in New Zealand in the early 1840s, and was for a time the Chief Justice. During his tenure in that position he had presided over cases that investigated the doctrine of native title in New Zealand.⁷⁴ With both theoretical knowledge and practical experience of New Zealand law and politics he wrote from a position of some authority. While both Busby⁷⁵ and the Government⁷⁶ raged variously against the ideas promoted by Martin, only the Government's pamphlet was publicly circulated.⁷⁷ Martin replied to the attacks of Busby and others and was supported by at least one other pamphleteer, George Clarke who would later become a Native Land Court Judge.⁷⁸

article on Busby in *The Dictionary of New Zealand Biography*, ed. Department of Internal Affairs, vol. 1 (1769-1869) (Wellington: Allen & Unwin, 1990), 61-62.

⁷³ William Martin, *The Taranaki Question* (Auckland: Unpublished, 1861). The pamphlet was withheld from public circulation, apparently on request from the Governor or his officials. An edition was published in London by W. H. Dalton, in 1861.

⁷⁴ The most important of these cases was the *R v Symonds*. It was a test case designed (by Governor Grey) to determine the legality of Fitzroy's waiver of pre-emptive right of the Crown. The two judges, Martin and Chapman, decided in different judgments that Maori 'retained a legal right to use and occupy their traditional land, notwithstanding the limitation of the alienability of their land.' McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, 110.

⁷⁵ James Busby, *Remarks Upon a Pamphlet Entitled 'the Taranaki Question', by Sir William Martin, D.C.L., Late Chief Justice of New Zealand* (Auckland: Printed at the Southern Cross Office, 1860). James Busby (1802-1871) British Resident in New Zealand from 1833. Aided drafting of the Treaty, though declined position in Hobson's administration in 1840.

⁷⁶ The Government's notes on Martin's pamphlet "were officially promulgated [as a pamphlet]. The public knew that Richmond and his colleagues prepared them and the Governor's name was withdrawn from a revised edition in Jan 1861'. Rusden, *History of New Zealand*, 131-2. The first edition, New Zealand Government (attrib. Francis Dillon Bell & Thomas Gore Browne), *Notes by the Governor on Sir William Martin's Pamphlet Entitled the Taranaki Question* (Auckland: Published for the New Zealand Government, 1861). The second edition was sixteen pages longer New Zealand Government, attrib. Francis Dillon Bell, and Thomas Gore Browne, *Notes on Sir William Martin's Pamphlet Entitled the Taranaki Question* (Auckland: Published for the New Zealand Government, 1861). Bell was a New Zealand Company Agent 1843-50, and held various administrative and Ministerial responsibilities for 'Native Affairs' in the 1850s and 1860s. Later he was New Zealand Agent-General in London.

⁷⁷ Christopher William Richmond (1821-1895). Colonial Treasurer (1856-61), Minister of Native Affairs (1858-60). Richmond was present in his official capacity when Governor Gore-Browne agreed to buy Teira's land, an act which started the chain of events that led to the Waitara dispute and the Taranaki wars. He was later a Supreme Court and an Appeal Court Judge. Since his notes were in the margins of Martin's pamphlet (this copy held in Auckland Museum), they are referenced here simply as Christopher W. Richmond, "Richmond's Marginal Notes" in *Auckland Museum Library Holding of Sir William Martin's 'the Taranaki Question'* (Auckland: Printed at the Melanesian Press 1860). The page numbers indicated on which pages of Martin's pamphlet his comments have been made. See also his published notes: Christopher W. Richmond, *Memorandum on the Taranaki Question, Reviewing a Pamphlet by Sir William Martin, Late Chief Justice of New Zealand, on the Same Subject* (Auckland: 1861).

⁷⁸ George Clarke, *Pamphlet in Answer to Mr James Busby's on the Taranaki Question and the Treaty of Waitangi* (1861). George Clark (1798-1875). Chief Protector of Aborigines (1840-1846) and various local representative positions (1852-5), Native land Court judge (1865-75).

Martin contended that the Waitara issue turned on whether Kingi had a right to stop the sale and that therefore Government action in forcing a sale was an arbitrary (and indefensible) abuse of power. Martin was of the view that ‘the land occupied by a native Community is the property of the whole community.’⁷⁹ Here Martin used community to mean – in his words – tribe, sub tribe, or family. The corollary of this community ownership is that there are individual holdings for the purposes of cultivation.

The holdings of individual cultivators are their own as against other individuals of the Community, No other individual, not even the Chief, can lawfully occupy or use any part of such holding without the permission of the owner.⁸⁰

So Martin’s view was that Maori could own land individually within the tribe but that the land title, or more properly the right of alienation beyond the tribe, was held by the tribe. As evidence, he highlighted the 1856 advice to the Governor, Gore-Browne, that ‘generally there is no such thing as an individual claim, clear and independent of the tribal right.’⁸¹ From this idea of Maori political and property rights, Martin concluded that the government had violated the Treaty and the English laws of property.

In the reply to Martin by both Busby and the colonial government, there are intimations of both the pre-modern natural law arguments and modern positive notions of sovereignty. First, Busby argued that Maori, whether as individuals or collectives, could not possess rights against British law that arose from Maori land practices and self-government. Though not influenced by the use of Locke in America, the register used by Busby is similar to the Lockean disparagement of aboriginal government and property noted by Tully. For instance, Busby wrote that the idea of Maori customary tenure generating rights recognised by the British Crown was a mis-conception since

the natives, ..., down to the date of the Treaty, had no conception of the existence of a right implying an obligation on the part of others to respect that right.⁸²

Not only did Busby deny that Maori could have a conception of rights prior to the establishment of British sovereignty, he also believed that Maori did not have separate rights arising from their land tenure system, once British sovereignty was established. ‘New Zealand was, in an emphatic sense a country without a law and without a prince’,⁸³ and therefore property rights – and here he separated these from any type of natural

⁷⁹ Martin, *The Taranaki Question*, 1.

⁸⁰ *Ibid.*, 4.

⁸¹ *Ibid.*, 6. The Board’s report can be found at Great Britain Parliament, *Irish University Press Series of British Parliamentary Papers : Colonies: New Zealand 1854-60*, vol. 10 (Shannon: Irish University Press, 1968), 511.

⁸² Busby, *Remarks Upon a Pamphlet Entitled ‘the Taranaki Question’*, 4.

⁸³ Martin, *The Taranaki Question*, 5.

rights – were unable to be recognised as existing.⁸⁴ Busby maintained the position that without a Government in Maoridom that he could recognise, rights were worthless anyway.

Of what use is it, practically, for a man to say I possess a right to my property, when there is no law to define the obligations which are created by such a right, or Government with power to administer the law, supposing it to have existed?⁸⁵

If the Crown was sovereign, and Maori tribal law was outside the Crown-made law, then there could be no (Crown) enforcement of Maori rights. The sovereign, who held the monopoly of force, was bound to obey only the dictates of its own law, not Maori tribal law.

The Government pamphlet, while noting Busby's argument, suggested instead that it was too difficult to recognise pre-existing Maori practice as rights, since these rights 'stand upon the Treaty of which the Crown is, rightfully, the sole interpreter'.⁸⁶ The Courts in other words, had no jurisdiction over pre-existing Maori land tenure systems. As I have already discussed, the then extant British law was that Maori land practice – conceived as tribal ownership – could not be defended in the Courts.⁸⁷ This situation meant that the British Crown could not protect Maori property in the law. It is this position that is so strikingly at odds with the presentist history of Tully. The Crown was unable to guarantee in law, the protections it had offered to Maori in the Treaty. The Crown could not vouchsafe to Maori the 'rights and privileges' of a British subject vis-à-vis land, since Maori land ownership was outside the law. The government pamphlet maintained therefore, that they fought in Waitara to safeguard the rights of the Crown to grant, and more importantly protect, Maori title.

In a second pamphlet Martin offered two arguments against the view of Busby and the Government. First, the colonial government's interpretation of Maori property rights did not fit with the ideas behind the Crown's pre-emptive title. Second, the Treaty guaranteed that such an approach would not be taken. The pre-emptive right of the

⁸⁴ Ibid., 4.

⁸⁵ Busby, *Remarks Upon a Pamphlet Entitled 'the Taranaki Question'*, 4.

⁸⁶ New Zealand Government (attrib. Francis Dillon Bell & Thomas Gore Browne), *Notes by the Governor on Sir William Martin's Pamphlet*, 44.

⁸⁷ The Government pamphlet assumes this to be the legal position of the Crown, both in England and New Zealand stating, 'The Law Officers of the Crown also decided in December, 1859, that the Colonial Courts had no cognisance of questions of native title or occupancy.' Ibid., 46. See also Gipps speech to his council on 2nd reading of the Bill appointing Commissioners to inquire in claims to grants of land in New Zealand, Enclosure no 29 of Gipps to Lord John Russell, 16 Aug 1840, Great Britain Parliament, *British Parliamentary Papers : Colonies: New Zealand 1835-42*, 187.

Crown to buy Maori land, suggested Martin, recognised the rights of Maori over their property; that Maori were a sovereign people with whom only the Crown could treat.

These rights of the tribes collectively, and of the Chiefs have since that time been solemnly and repeatedly recognised by respective Governors, not merely by words but by acts. For, through the Tribes and through the exercise of the Chief's power and influence over the Tribes, all cessions of land, hitherto made by the Natives to the Crown, have been procured.⁸⁸

As both the Government and Martin acknowledged, the Crown had a practice of recognising Maori political sovereignty and property rights. Yet that practice was confounded by such an event as occurred at Waitara. A conflict between two powerful chiefs had to be arbitrated in some way. Martin's solution was to place Maori property rights beyond the Crown's authority.

In fact, the right[of Kingi] is a simple right of property which concerns the enjoyment and alienation of land, and that only, and has nothing whatever to with Government or administration.⁸⁹

In a sense Martin simply refused to acknowledge there were any difficulties in protecting the rights of Maori in property. They simply were.⁹⁰ As Martin pointed out, such problems regarding Maori rights had not been perceived to conflict with sovereignty in any land dealings beforehand.

As to the alleged incompatibility [of indigenous tenure]...with the Queen's Sovereignty, the Queen's Governors for twenty years had not discovered it; but on the contrary had recognised that claim in all their dealings.⁹¹

This the colonial government saw as a quixotic approach because

...The question raised in the original dispute with Wiremu Kingi was one of authority and jurisdiction, and not a question of the title to a particular piece of land. Since... the contest is not whether that piece of land belongs to Wiremu Kingi or Teira, but whether the Governor has authority to decide between the two, and the power to enforce his decision.⁹²

This is not because the colonial administration wanted to make such decisions but because in the absence of other conceptions of property and sovereignty, some authority would have to make such arbitration decisions where there was indeterminacy of property rights. Martin's suggestion that the Maori retained all existing land tenure

⁸⁸ Martin, *The Taranaki Question*, 10.

⁸⁹ *Ibid.*, 27.

⁹⁰ A point followed by Clarke; he asked how could have Busby bought land from Maori, if Maori had no rights in it. George Clark, Esq., *Pamphlet in Answer to Mr James Busby's on the Taranaki Question and the Treaty of Waitangi by Sir William Martin*, 1861, p. 3.

⁹¹ Martin, *The Taranaki Question*, 27.

⁹² New Zealand Government (attrib. Francis Dillon Bell & Thomas Gore Browne), *Notes by the Governor on Sir William Martin's Pamphlet*, 1.

systems (including the governance of such systems)⁹³ was therefore advocating dual land systems, and as Richmond realised that was not the

sort of right or interest which any sane civilized Government should ever have dreamt of recognizing or which could by any show of argument be considered guaranteed by the Treaty of Waitangi.⁹⁴

The indeterminacy of Maori property rights is made explicit at this point in the pamphlet debate and is registered by the pamphleteers. Both sides of the pamphlet debate consider that the solution to the indeterminacy is the affirmation the Crown's underlying sovereignty to the land. The pamphlets of both the government and Martin recognised that dual land tenure created problems with property rights. Martin's solution was to place those problems before the court. In 1865 a Native Land Court was conceived and created to address the indeterminacy problem (though it became an institution through which Maori were much dispossessed).⁹⁵ The colonial administration, like others around the globe, solved the indeterminacy problem by signalling, and then enforcing, a single unitary sovereign. Yet even Martin's dual tenure systems relied on a single authority, the court, to resolve property disputes.

Herman Merivale, as the permanent undersecretary for the Colonial Office from 1847 to 1860, was in a perfect position to view the policy toward Maori in total, and in the 1861 reprint of his earlier lectures on colonisation he commented on that policy and its impact on the Waitara dispute.⁹⁶ He laid the fault for the Waitara dispute and the larger Taranaki wars at the feet of Crown policy and its misplaced notion of tribal ownership of land. In the language of this thesis, and contra Tully, Merivale laid the problem at the feet of the indeterminate property rights that were created by the pre-modern conceptions of co-existing British and Indigenous systems of Government and property. He contended that 'friends' of Maori,

stood up for native rights, forgetting that when a right is established, without at the same time establishing the corresponding power to maintain it, evil instead of good is done to the protected party.⁹⁷

⁹³ Martin, *The Taranaki Question*, 10.

⁹⁴ Richmond, "Richmond's Marginal Notes", 2.

⁹⁵ See on the creation of the court, Loveridge, "The Origins of the Native Land Acts and Native Land Court." On the result see David V. Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Wellington: Huia Publishers, 1999).

⁹⁶ Herman Merivale, *Lectures on Colonization and Colonies*, 2nd ed. (Longman, Green, Longman, & Roberts, 1861), 487-88. Merivale's interpretation of Article Two of the Treaty of Waitangi was that 'the Crown guaranteed "to the chiefs and tribes of New Zealand, and to the families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates."

⁹⁷ *Ibid.*, 488.

Treaty-based property rights for Maori set a schism in New Zealand between Maori (as cautious land-controllers), and settlers (as rapacious land seekers). That is, settlement and the idea of aboriginal right were incompatible. However, Merivale's point in his short appendix on the start of the Taranaki war was that the Government in issuing rights to Maori,⁹⁸ had found itself unable to define those rights with clarity. To put it another way, Merivale was not disputing the 'right' of Maori to their own land, but the ability of the Crown and Maori to set out those rights coherently. And without coherent common language with which to discuss Maori property rights, Merivale considered that a conflict such as Waitara was inevitable. The head of the colonial office saw the indeterminacy problem clearly.

Though Martin's argument might appeal to the presentist side, Merivale as the key official in a position to see colonial problems across the globe saw that the recognition of Maori property in a manner the presentists have suggested was simply impossible. The British saw themselves as having no jurisdiction over property rights until they had been granted by the Crown. To have claimed jurisdiction would have been to overrule Maori sovereignty, on which the British claim to sovereignty in New Zealand was based. If this seems contorted logic, then the practicalities of the situation the British Crown faced were even more so. They had promised security of tenure to Maori, but could not protect Maori from settlers because Maori had no rights in court. When one of the chief government jurists notes an assertion of dual sovereignty, he simply sees it as absurd, since property rights would then have suffered from more, not less, of an indeterminacy problem.

The pamphlet debate would be of less importance were it not that the views of the New Zealand colonial administration prevailed in both legislation and the courts and those views were much the same in colonial administrations around the world.⁹⁹ Thus, the ability to enforce indigenous property rights was intrinsically linked to the justification of political authority. It could be, and has been argued that the colonial government forced such rights to be granted in order to dispossess Maori. That may well be another valid

⁹⁸ While Crown policy may have been to recognise such rights, this is not to say they were legally enforceable. Merely, that the Government acknowledged its duty to treat Maori as a sovereign people. For a recital of the Crown's policy statements from 1839 through to 1858 used by Gore-Browne see the Enclosure 2 'A collection of statements on native land policy' in the despatch of Governor T. Gore-Browne to Rt Hon Sir E. Bulwer-Lynton, 14 October 1858, Great Britain Parliament, *British Parliamentary Papers: Colonies: New Zealand 1835-42*, 660-65.

⁹⁹ McHugh, *Aboriginal Societies and the Common Law*, 31.

interpretation. But Martin's arguments (as with the presentist arguments today), show little concern for the enforcement of those rights, for the governance of those rights, and ultimately, as Locke suggested, the question of 'Who Heir?' The precise rebuttal to the presentist approach is to ask simply: who should have defined and enforced Maori rights. The obvious answer is Maori government and this begs the obvious question: why did they not? In Waitara, Kingi's use of force was both recognition of and an expression of the link between property and his political authority over that property. From this point of view, my argument is simply that colonisation, where property rights were in dispute, was war. At least that is where historical and current conceptions of property lead us. This does not appear much of a basis for reconciliation or justice, but it has the benefit of being clear about the points. Where indigenous people suffered dispossession, both their own political authority, and the colonial administration failed them. During wars this is often the case. The question is how to build a legitimate political authority on the basis of those wars.

Conclusion

Noting the connection between the justification or legitimacy of a state and its enforcement of property rights does not suggest the conflation of sovereignty and property.¹⁰⁰ This thesis does not take such a positivist stance toward property rights. This thesis has advanced a more normative political argument: that property rights are part of the justification of political authority. Once a state endorses property rights, it must protect them. Should it fail to protect those rights, it will fail to meet the basic legitimating demand.¹⁰¹ That is, should a political authority leave its subjects' property rights unprotected that authority has not met the '“first” political question' which was 'the securing of order, protection, safety and trust, and the conditions of cooperation.' This is among the critical insights that Locke provided; without property rights the citizen has no property, and becomes ungoverned. Yet the political theories of distributive justice also remind us that in order to normatively justified political authorities need to take property rights from some and give them to others. I realise that in making these

¹⁰⁰ As, for instance suggested in Morris R. Cohen, "Property and Sovereignty", *Cornell Law Quarterly*, vol. 13, no. 1 (1927-1928), 8-30. He notes, for instance that 'the character of property as sovereign power compelling service and obedience may be obscured for in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment.' Cohen, "Property and Sovereignty", 12.

¹⁰¹ See Williams, *In the Beginning Was the Deed*, 3-4. I realise that Williams is invoking this question in Hobbesian, rather than in the Lockean frames I use in this thesis. However, as Williams notes, 'it was essential to [Hobbes's] construction...that the state – the solution – should not become part of the problem. (Many, including Locke, have thought that Hobbes's own solution did not pass this test.)' Williams, *In the Beginning Was the Deed*, 4. So my use of a Lockean frame for the BLD seems reasonable.

arguments I am adding to the list of justificatory problems faced by modern states produced by recent scholarship.¹⁰² This makes sense since states often do face questions about their justification when they fail to uphold the property rights of their subjects.

The point of my argument is that wherever dispossession occurs, whenever the exclusionary rights of a property holder are not upheld, it is because a government has failed to protect its subjects' property rights; in the colonial case, indigenous governments; in the Balkans, the Yugoslavian government; in Palestine, the Palestinian Authority. It may well be that the indigenous governments were tricked,¹⁰³ or the Yugoslav or Palestinian governments overpowered, but it still remains the case that once they allowed their subjects' property rights to be removed, they lost a vital piece of their justification.¹⁰⁴

The view of property rights as integral to the legitimacy of a state has some helpful explanatory power. For instance, it helps to elucidate the failure of recent attempts to introduce property based markets to areas of the world in which property rights have been indeterminate, such as in Eastern Europe. It is not, as some have suggested, that the introduced systems of property were too different from those states' traditional practices of property.¹⁰⁵ Rather the failure lies in government granting rights which it could not enforce. With the failure of the government, other (private) agencies stepped in to protect their own particular property rights regime. The lack of normative judgement around the type of property to be protected is intended. The theoretical link I am suggesting is prior to judgements about the particular moral justification of property such as desert or liberty. There is simply not enough known about property rights to make that judgement, except in particular cases where the failure to enforce that property right would not affect the legitimacy of the state. Rather, this thesis has demonstrated that where government fails to protect a right *in rem*, no matter the morality of that particular right, the state itself fails a basic legitimating demand. At the present time,

¹⁰² Morris, *An Essay on the Modern State*; Simmons, *Justification and Legitimacy*.

¹⁰³ Something the British administration were well aware could happen. 'As a general rule, however, it is inexpedient that treaties should be frequently entered into between the local Governments and the tribes in their vicinity. Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace' Great Britain Parliament, "Report from the Select Committee on Aborigines (British Settlements) : With the Minutes of Evidence, Appendix and Index," (London: Ordered by the House of Commons to be printed, 1837), 80.

¹⁰⁴ A point the Maori chief Tamati Waka Nene made when debating whether to sign the Treaty of Waitangi. See Head, "The Pursuit of Modernity in Maori Society", 109.

¹⁰⁵ See 'Chapter 5: Post-communist societies in transition' in John Gray, *Enlightenment's Wake : Politics and Culture at the Close of the Modern Age* (New York: Routledge, 1995), 34-63.

theories of justice offer no recourse to that judgement as they fail to cope plausibly with property. This is why contemporary notions of justice are utopian wanderings, a point made clear by the difficulties scholars such as Tully face when applying those theories to the past. Likewise, since contemporary theories of justice do not deal with the existing property regime, and thus do not suggest how those property rights might be changed without undermining the legitimacy of the state, they offer nothing to the contemporary government except status quo property rights. Such theories then, seem to exclude the most unfortunate of society, who own no or little property. This is regrettable in theories that are written with the intention to make individuals within states more equal on the basis of an inequality of property. Theories of cosmopolitan justice are also flawed on this analysis unless they also leave property rights unchanged, since again they have no way of redistributing property rights without questioning the legitimacy of the states between which they seek to redistribute goods.

Property then, is not contrary to equality. At present property exists outside the normative boundaries of equality. The trouble is that property is not a free-floating signifier, but something that exists, in the ground, as a fact - unless you are a true communist or anarchist. It cannot be discarded or ignored. Theories of justice, to advance past Locke's state of nature, need to plausibly account for the role that property plays in legitimating the state. In the popular mind, it was Marx who made property a dirty word. Given the damage that intellectual heritage did to the world, it is perhaps time move on. The idea of property needs to be bought back within normative political theories of the state. Our inability to understand the impact of property upon justice makes us all poorer and allows us to forget that the defence of each individual's property rights depend upon the upholding of the property rights of others.

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