Beyond Liberty Alone

A Progressive Vision of Freedom and Capitalism in America

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To my wife, Carroll,
who brings out the best in me.

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The Original Theft and the Wealth of Nations

Why should one nation have more wealth than other nations? This question is related to the prior question of why one individual should have more than another. This is a question that is almost never asked here in the United States today, where we simply take for granted our vast resources and our right to have them. Instead, political rhetoric focuses on how to preserve the wealth and position of the United States in the world and how government's purpose is to prevent the United States from losing its power and prestige in the world and to ensure its people are prosperous and happy. We have had such a privileged position as a country that few people stop to think about what right there is that our nation is so blessed with wealth and resources. But if liberty is all about rights, as many liberty-first advocates argue, then by what right does America have such wealth and so much land? Is there a moral justification that legitimates our country's wealth compared to another? How does a nation legitimately acquire wealth, and how is that related to individuals' rights to property?

As we might anticipate, the issue of national wealth has been inextricably linked in the modern period to the property rights of individuals. In fact, an important if not the central purpose of government is often understood as protecting citizens' rights to life, liberty, and property. Locke, representing the view that has come to dominate, is often

quoted to the effect that "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property"* and the *"enjoyment of their Properties in peace and safety."*[1] For Locke, "property" means more than just material possessions, since people unite into political societies "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general name, *Property."*[2] Since the purpose of government is the protection of property broadly construed, the *"Supreme Power cannot take* from any Man any part of his *property* without his own consent. For the preservation of Property being the end of Government, and that for which men enter into society."[3] In this view of government, we can see that the distribution of resources among nations is intimately related to the question of property's distribution among individuals as well as the role of government itself in protecting rights.

Popular discussion of individual rights often overlooks and ignores this larger question of a nation's moral foundation and its jurisdiction over resources and land, as if this latter problem does not exist. Debates tend to focus only on the internal-facing question of whether government is overstepping its bounds by infringing the rights of individuals inside the nation. In asking that question only, we take for granted that our nation has the rights to the land and resources over which it watches. Little attention is paid to the flip side of the same coin, namely, the external question of how my government has the power to command control over the extensive resources and territories over which its laws extend. This is one of the deep, hidden problems in rights theories that liberty-first advocates don't want to acknowledge or talk about.

But we will acknowledge it here. The notion of a nation's wealth is built on top of the notion of individual property rights, which we have previously discovered needs to be substantially revised. In the classic natural rights theory, political institutions emerged as individuals came together to form larger communities with political institutions called "commonwealths." Not all kinds of social groups or communities are political in this way. A political society or "commonwealth" differs from other types of communities, such as a church group, club, or other informal community, by having a sovereign power that creates and judges law and enforces its rules through punishment of its members. It is this "sovereign" power to enforce law that distinguishes a political community from one that is not.

In the modern period, as natural rights theories emerged and reshaped the understanding of nations, the state's authority over lands needed justification and could no longer be attributed to the divine right of kings. In the modern version of the natural rights theory, states or political communities emerged when individuals explicitly or tacitly agreed to form one body and live under one set of rules that could be enforced by a sovereign political power. This was the classic "social contract" theory, in which individuals made voluntary decisions to live life under a commonwealth with its rules and regulations and to forgo life outside a commonwealth in the "state of nature." In the view that individuals already acquired legitimate rights to property in nature, the commonwealth or political state represented an extension of individual property rights and the raison d'être of the state was at least in part to protect an individual's property. Everything fit nicely together. The story went something like this:

Individuals first spread across the earth, legitimately acquiring their property rights through labor or by agreement and consent. Living as individuals, however, was unsatisfying for a variety of reasons, including fear that one would or could lose one's life, liberty, and property. The fear arose because there was no overarching power that could protect their lives and property from others who used power to steal and plunder.[4] There also was no impartial judicial system, with the result that justice was not meted out fairly.[5] People also lived together in informal communities out of a desire for sociability and because God made the human being as a creature who was not intended to be alone and "put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into Society as well as fitted him with Understanding and Language to continue to enjoy it."[6] To protect their lives and property, however, people quickly developed political institutions that could protect themselves and their properties and enforce justice fairly.[7] The development of political power was thus thought to be in line with the law of nature and

natural reason, because living without a political power was dangerous, fearful, and threatening to one's life, liberty, and property.[8]

There were two complementary theories about how states came into being, and both explained how the state legitimately had jurisdiction over the territory that it oversaw. According to the first theory, commonwealths came to have power over the land that their citizens had legitimately and rightfully acquired as individuals. The state's territory thus became coextensive with the properties originally owned already by its citizens. Since the citizens acquired their property legitimately, either through labor or through human convention, the territorial boundaries of the state were themselves thought to be legitimate and defined by individual property rights.[9]

In a second complementary theory of commonwealth development, individuals came together as a group and together moved into and settled what had been previously uninhabited lands. In this case, the whole community as a body took possession of vacant lands and then divided the territory up among individuals based on laws in the commonwealth.[10]

The first commonwealths were often thought to be those of the patriarchal family, since the father somewhat naturally fell into the role of leader in the early clans.[11] These grew into hereditary or elective kingdoms not because the father had political power mandated by God or nature, but simply somewhat organically, since clans naturally chose the father as the patriarchal leader of the clan. Smaller commonwealths that were legitimately formed in either of these ways merged with other commonwealths until larger political bodies or states were formed.

In all of these cases, even though the individuals who formed or joined commonwealths continued to own their own properties, the commonwealth itself now had a supervisory power or jurisdiction over their lands and properties. That was the deal that individuals made when they entered into a social contract. They would turn over the right to set laws about property to the commonwealth. The power to rule and punish for harm to property was part of what political sovereignty involved. Individuals gained the protection of the commonwealth but only on the condition that they would abide by the rules that the state would create to

govern land and property. Indeed, it was through oversight of the land that states exercised control over individuals. While individuals were free to enter and leave the commonwealth if they were not citizens, they had to obey a state's rules in general if they enjoyed benefits from the property that was under the state's control.[12] If individuals chose to leave the state, they could not take their lands with them, since the lands belonged to the state. Some theorists even denied them the right to leave a commonwealth once they explicitly assented to the social contract.[13] In either of these theories of state formation, the boundaries of the state are legitimate. In the one theory, the state's territory is identical with the lands of the individuals who originally formed those political entities. In the other theory, the state comes into being as a group of individuals together settled vacant lands.

This close relationship of the individual, the land, and the state is not thought about very deeply today by many of those who speak about protecting their rights. The state exists as a fait accompli, and people argue about their rights within the state, forgetting the equally important question of what the foundation of the state's right to exist and control its territories is. In what follows, I want to probe this relationship between individuals, the land, and the state in several different ways.

First, I want to extend my argument from the previous chapter and ask about the legitimacy of the state's jurisdiction over its lands and the distribution of wealth among nations. Since the state's power over land is derived from the logically prior notions of private property, our reconceptualization of private property inevitably must alter the very notion of a state's ownership of wealth and resources. As a result, it will become apparent that the state's jurisdiction over property is not an absolute right, but a temporary right, and more like an executor of a will than an owner of property. That conclusion becomes evident from our realization in the previous chapter that the individual does not have exclusive rights in his or her own labor and also has duties that come from being a member of the human family.

As a corollary, I want to explore the relationship of the individual to the state and consider the proper expectations individuals should have of the

state and the state should have of individuals. In the rhetoric of the "liberty-only" platform, government should be concerned only with protecting an individual's rights and property, and there is little responsibility of the individual to the state. But it shall become evident that the relationship of the individual to government is more complicated than that, for even in the early modern theory of rights, a sacrifice or compromise is thought to occur when an individual agrees to live within a commonwealth and gives up some freedoms for the benefits of sociability and security of living in society. A certain kind of mutual obligation arises that makes individuals subject to the state and thus responsible to the state and the purposes of the community. But neither the state nor the individual is the exclusive focus of moral obligation, which also belongs to the species as a whole.

The State, Land, and Rights

If a thief steals property and resells it, does that property belong to the person who unknowingly bought it? And what if that person now sells it to someone else, and that person sells it to someone else again? And what if none of these buyers knew that the original seller was a thief? Does each of the subsequent people in line legitimately own his or her property? How does the original theft affect the legitimate rights of those who come later?

One may be able to excuse the subsequent individual for not knowing the original property was stolen. But what if the subsequent individual did know or could have known about the original theft? The fact that an act of theft occurred at the beginning of those transactions raises questions about the legitimacy of the property rights of each of those subsequent property holders. Had the theft not occurred, some other sequence of buying and selling transactions would have happened, and other distributions of property would have arisen that were founded on legitimate ownership. And what if the original theft is pervasive, and all private property that exists today ultimately descended from some original theft?

This problem of the original theft is analogous to the situation of how nations came to have jurisdiction over their lands. It is a fiction that

nations' lands and resources are nothing more than the aggregate of the properties that their individual citizens legitimately acquired or that the states themselves came into existence legitimately when a group of people settled vacant lands. It is fiction because there have been few nations that ever came into existence through a social contract among their citizens in the way that is presupposed by natural rights theory.[14] And even in the case of nations that supposedly did come about in something close to this ideal way, such as our United States, it is not the case that the original citizens' acquisition of property was legitimate, reaching back all the way to the beginning of time.

There are thus two separate issues here. The first is whether nation-states come into existence through agreement and social contract. The second is whether individuals who came together to form the state legitimately own their properties and, if not, whether the state has arisen in vacant territories. This is a double-decker problem, but the two issues are intimately related to each other. Let us take up each in turn.

We start first with those individuals who theoretically volunteered to join the commonwealth or state. Let us suppose, following the ideal assumptions of natural rights theory, that the first commonwealths really did form out of a voluntary social contract of the individuals who became members. For the commonwealth to legitimately have jurisdiction over its territory, all the members of the voluntary association must have acquired their properties legitimately. But if they or their ancestors did not legitimately acquire their properties, then the state's territory cannot be thought to be legitimate either.

In the previous chapter, I showed some of the reasons that we cannot suppose that individuals' acquisitions of property rights can be thought to be exclusively their own. Without repeating my argument in detail here, I argued that we labor within a world of knowledge that we received from our human predecessors and thus stand on the shoulders of giants when we labor. I concluded that anything that we create is also at least in part a product of humanity in general, and it would be stealing from humanity in general to say that the entire output of our labor is our own. So even if the commonwealth was in fact created voluntarily by

individuals, those individuals really do not have the right to give their states the exclusive jurisdiction of their property, since the property cannot belong exclusively to them in the first place. Thus the very core claim that the state's purpose is to protect individual property rights is flawed from the outset. It may be true that the individuals who come together to form the state may be doing so at least in part to protect their properties. But those properties do not belong exclusively to them. These individuals are at least in part stewards of property for humanity in general. And while their motivations in joining or affirming the power of the state may be in their own selfish interests, to protect their lives, their liberties, and their properties, the fact is that they do not legitimately have exclusive title to those properties they are wishing to protect. Thus, if we accept the refined notion of private property discussed earlier, we have to also conclude that one purpose of the state goes beyond protecting individual self-interests, for the state also has fiduciary jurisdiction over lands that in part belong to humanity itself, and not to individuals only. There are thus responsibilities that fall to the state, implicit in the individual ownership of the property, that involve duties to the human species as a whole. And just as the state has no right to take what belongs to the individual, so it does not have a right to abuse the property that belongs to the human species as a whole. The state thus has an obligation to balance the responsibilities to individuals under its purview with the responsibilities to humankind as an abstract whole.

To be sure, it may be impossible to say what part or percentage of an individual's property is his or her own versus that which belongs to humanity in general. I shall come back to that difficult practical question again. But saying that this separation is difficult does not do away with the moral insight that both individuals and the state have property that belongs to humanity in general. That is the core point of departure for the very notion of rights that start with the insight that we are all equal in some deep human way.

This reconceptualization of the state dovetails with a second flaw we discovered in natural rights theory: natural rights theory assumed there was an inexhaustible supply of resources in nature and that a later

person's opportunity would not be limited or harmed by the efforts of an earlier or contemporaneous laborer. The early modern thinkers thought there was always more vacant land in America. Since we know clearly now that nature can be and is being depleted, the notion that everyone has the same opportunity for success through his or her labor is mistaken. With that knowledge, it is not clear that the majority of reasonable people standing in the "original condition" would have agreed to the convention of private property and a labor theory of value.[15] For if they did not know in which centuries they or their children would live, or they knew that the future would deplete resources, reasonable people would not self-evidently have agreed to let earlier generations consume all the land, air, fish, and species of the planet before they or their children's children had a chance to live. Instead, reasonable people standing in the original situation would have insisted there be conservation of resources among those who are allowed to use resources before either them or their descendants. They would *not* have alighted on or agreed to the notion of private property that sees the outcome of my labor as strictly my own to control as I wish. Instead, they would have understood, as we now understand, that private property carries a responsibility of stewardship to conserve resources. As individuals appropriate resources, a responsibility devolves upon them to both give something back to the bank of the human species as well as to conserve resources for peers and future generations. These responsibilities that fall on the individual become part of the state's responsibility if, as natural rights theory contends, the state is a creation of individuals. My claim, then, is that even if we work within a natural rights theory and language, we see that the very formation of the state involves a transfer to the state of not simply rights, but also responsibilities that had already devolved on individuals through their labor and in their appropriation of natural resources.

That the state's oversight of its wealth and resources cannot be completely legitimate is evident, ironically, from a contradiction already inherent in natural rights theory itself. On the one hand, natural rights theory assumes the commonwealth or state is really just an aggregation of properties that individuals or groups of individuals have rightfully

acquired. On the other hand, the theory also takes for granted that the proper distribution of property is *disturbed* in nature by human theft, plundering, murder, and conquest. It is, after all, the fear for their properties, lives, and liberties that supposedly drive individuals into a commonwealth or state and lead them to relinquish police powers to that government. In this way, the natural rights theory of the state assumes that the rightful and just alignment of properties based on individual labor, efforts, and convention was frequently disturbed in nature before the commonwealth was created.[16] Otherwise, there would have been no need to join a state at all.

What we see, then, is that the natural rights theory of the state has a deep contradiction in it. It assumes the state has legitimate ownership over properties because the individuals or group who formed the state acquired their rights legitimately, through labor or convention and not force, and they voluntarily joined their political commonwealths. Yet at the same time the theory assumes the state exists as a remediation for the fact that human ambition and desire led many individuals to plunder and steal property and thereby disrupt the rightful and fair allocation based on labor or first occupation of vacant lands. The state, according to traditional theory, is the best way to remediate this inherent problem in nature.[17] In this view, the state or commonwealth represents an attempt to create and protect a just allocation of land and resources and to prevent further erosion of a rightful alignment of labor, efforts, and property.

What seems right about the perspective we have been exploring here is that it seems to align more closely with the actual messiness of history. If we take a historical perspective, commonwealths and nations appear to have come into being in many different and complex ways that often involved power and conquest, among other historical forces. The natural rights theorists were not naïve in this regard. Looking back into earlier human history as well as at the periods in which they were writing—with religious wars and an emerging European colonialism and empire building—they recognized that political conquest was a recurring historical phenomenon. But in recognizing that political conquest and war existed,

the natural rights tradition undermined its own contention that nations had a rightful control of their territories. For if conquest and theft occurred regularly, as the theory presupposes, the allocation of resources among individuals and nations was invariably disrupted from what should have been a proper and legitimate allocation of resources among peoples. It is irrelevant if the individuals among the vanquished agree after the fact to become members of the political entity that emerged postconquest.[18] The dislocations of property and resources and the loss of life caused by conquest and war make clear that the supposed neat alignment of property distribution among individuals based on labor or human convention is fundamentally a myth. We cannot see the boundaries of nations as natural or rightful, as natural rights theorists wanted, but rather as pragmatic consequences of historical forces that are complex, multifaceted, and frequently if not usually unjust in some fundamental ways.

It is not possible to get around this problem, as both Locke and many of his modern interpreters try, by claiming that in the ideal case, *rightful and peaceful* government involves the consent of the people. For even in the ideal situation of consent by the parties to the state, the properties those individuals bring to the state have a history behind them that involved theft and conquest. There is almost always some figurative theft or act of violence lurking historically in the background of any piece of property. The consent of individuals to a state does not absolve either the state or those individuals of the moral burden of history and the history of the human species. Even if the majority of individuals acted in good faith in purchasing property according to the law, the historical backdrop against which those transactions have taken place is already sullied invariably by a history of violence, conquest, theft, and war. One transacts in waters that are not clear.[19]

While there might be significant pragmatic obstacles to the reallocation of wealth and resources between individuals and nations, that does not remove a moral burden of our realizing that we live in a world that does not live up to its own aspirations and its own language of rights.[20] In other words, we have to see ourselves in a "fallen state" or "nonelevated" state from where we would like to be. This notion of a fallen state, of

course, resonates with a Catholic view of the human world after the Fall and with a view of other religious traditions, such as Jewish Kabbalah, which assume the world needs *tikkun*, *or* repair, after the fragmentation of light in the Creation. One need not see this in religious terms, nor do we have to see ourselves as "fallen," but simply as not yet having achieved our aspiration of equality. The argument is that our vision of what's right and good is not yet where we would like it and feel it should be. This is in fact the burden of individuals who live in states: the protections that the state offers of our properties and our lives have to be understood with moral duties that the state has to humans in general, both present and future, and to the historical insight and burden that all property has an element of theft lying behind it.

On Native Rights and the Conquest of America

The moral burden that surfaces but is not fully explored or appreciated in natural rights theory is one that includes but also goes beyond the question of native rights.[21] When we realize that the property we own was touched by theft and conquest, the question naturally arises as to who are the rightful owners for which piece of land.

Some of the rights thinkers, such as Locke, sensed part of this problem, with Locke claiming that

> The *Inhabitants* of any Countrey, who are descended, and derive a Title to their Estates from those, who are subdued, and had a Government forced upon them against their free consents, *retain a Right to the Possession of their Ancestors*, though they consent not freely to the Government, whose hard Conditions were by force imposed on the Possessors of that country. For the first *Conqueror never* having *had a Title to the Land of that Country*, the People who are the Descendants of, or claim under those, who were forced to submit to the yoke of a Government by constraint, have always a Right to shake it off and free themselves from the Usurpation, or Tyranny, which the Sword hath brought in upon them.[22]

Locke here exposes the problem at the root of a theory of property and statehood. He must argue that native populations do not lose the right to their land in a conquest, for his whole theory of the state rests on labor being the means to acquire property. In doing so, he rejects the views of those who held that just war can justify taking away a native population's land, at least if they have settled upon it and cultivated it. And thus in this line of thinking, native populations reserve the rights to their ancestral lands.

But Locke apparently did not see or work through the full implications of his insight. Had he thought more deeply about conquest, he might have seen that any notion of rightful ownership of property and the territorial sovereignty of most states was thrown in doubt. While there is something that feels right about recognizing native populations' prior claim to the land, the problem is more complex, since it is hard to see where the native right begins and with whom. While natives were natives before Europeans, if we look all the way back in history, we are unable to get back to the beginning and trace the true descendants from Adam and Eve or from Lucy (to invoke a Darwinian theory of evolution that most of us believe in) into the currently living populations. We cannot, in other words, get back to the true original natives. While some may argue this means that we cannot do anything about the history of conquest at all, I would argue that, on the contrary, it means we all are complicit in the problem and all bear the burden, though some may bear the burden more than others. The moral burden of the theft is shared and distributed. It certainly belongs to colonial powers, as we shall see, but it also belongs to native populations, who themselves stole and invaded the lands of natives who lived contemporaneous with them. Conquest, theft, and invasion have been with us all the way back in time to the beginning.[23] It is a shared human problem that conflicts with our aspirations and ideas.

Americans will find it particularly difficult to swallow the perspective put forward above. After all, Americans know that our nation was one of the first to be founded on an individual's rights of "life, liberty, and the pursuit of happiness." While many nations may have come about

through conquest in the past, Americans have always seen themselves as having created a state that was founded on consent and a social contract. America, in American minds, is the nation par excellence, created for and by the people. It is thus the nation that, in the view of many, first lived up to the vision of the natural rights tradition.

This story, however, is misleading in some critical ways, some of which I have explored in another context. It is true that the American founders were influenced significantly by the natural rights tradition and may have been influenced most by John Locke's theory of government, though they also had doubts about natural rights theory and were aware of European intellectual critiques of such theories from figures such as David Hume.[24] The American founders were also aware that anyone's rights had to originate ultimately in the right to the land. If they did not have a right to the lands they lived on, then by what right could they create a state that had sovereignty over their territories? At issue in the entitlement of Americans to their lands was not only the relationship of the American colonists to the British government, but also and less obviously their rhetoric to the native populations of America. The former problem overshadowed the latter question and for this reason obscured and hid the issue of how Americans came to have a right to their lands in the first place. This is one of the hidden dilemmas in the American myth about liberty.

The colonization and conquest of the Americas was part of European expansion and colonialism in general in the sixteenth and seventeenth centuries.[25] Yet by the time the Americans were debating their rights under British rule in the 1760s, the colonies were already well populated and secure on the east coast of the North American continent, though they had not yet expanded far westward into the interior. The question of what gave the European settlers the rights to have property on this American continent was not one that had a great deal of prominence for the colonists at this point in time, though the problem had been voiced in the early period of settlement. By the time Americans asked about their own identities and rights as colonies, the logically prior question of the settlers' rights to American lands had already been decided in

many ways by a fait accompli and was peripheral to their concerns. They were focused instead on themselves as colonists being suppressed by an existing sovereignty. They did not think as deeply about themselves as a colonizing and conquering people and thus were able to avoid facing that question, since the European powers had already settled and conquered American lands, at least those along the Eastern seaboard. Lands further inland would remain for Americans themselves to conquer without the benefit of being able to hide behind what European colonizers had already done. By the time the American colonists broke away from Great Britain and declared their independence, they did not examine as carefully the question of how they came to have rights in the American lands in the first place. In some sense, the downplaying or disappearance of the original theft or conquest from the thinking of the American founders is itself a metaphor for all of us who each have forgotten all the murders, conquests, and thefts that reach back into early history and on whose backs our current rights properly sit. This history must somehow figure into what we name as our rights.

It is clear that to some extent the American founders were aware that this thorny question lurked in the background of their own search for American rights. This is part of a much larger and morally disheartening story that cannot be fully told here.[26] But the story is relevant to the construction of rights in America, for if the acquisition of land was not legitimate and rightful in the first place, then on what basis can subsequent descendants claim their rights under their governments to their property? What is the nature of rights, if they rest on an earlier theft and conquest?[27]

To briefly summarize the main themes, the colonists themselves debated the basis of their own American rights. Some argued they had rights because they were British subjects and therefore entitled to the rights and duties of British citizens. On this view, the settlers came to the Americas under British auspices and with full British rights. Another less popular position, espoused by Thomas Jefferson, among others, held that the settlers were not British subjects at all but were independent Europeans settlers who had come to America and started new states under their

own sovereignty.[28] Such states were *not* beholden to the British Parliament, though the settlers had voluntarily chosen to adopt the British king as their elected executive. They were British subjects of the king but not under the authority of British Parliament. A third position emphasized the natural rights of all people and justified the American resistance to British rule on that basis.

While each of these positions justified American rights vis-à-vis the rule of British Parliament, the American thinkers also took for granted a background theory of how the settlers came to have rights in the lands they now occupied. They knew that rights, property, and sovereignty were all tied together. These background assumptions were mentioned in passing in the founding literature in the decade leading up to 1776 but were not examined nearly as deeply as other dimensions of their rights, for some obvious reasons.

There were a couple of ways to justify American rights to the lands on the North American continent. First, some founders assumed that it was through a rightful conquest that the European settlers had acquired a right to their lands. That conquest, they believed, was either under the auspices of the British, who led the conquest, or under the initiative of the settlers themselves. In fact, part of the debate between the colonists and the British was precisely over who had sacrificed the most blood and resources to create the new settlements and thus who owned the benefits of the conquest. What legitimized the conquest in the first place was not discussed as openly, though we can discern reasons hovering in the background of their second justification.

The second justification rested on the assumption that American lands were uncultivated and therefore in a state of nature. Since they were "vacant" and uncultivated, the founders assumed they could be settled on a first-come-first-served basis, just as in the original state of the world, when land was in given in common to all humankind. On this view, American natives were thought to lack any rights to the land since they were nomadic and moved with the herds and did not cultivate the land. Since natural rights theory held that nature had been given in common and only became property when it was seized, settled, or cultivated,

depending on one's theory, the American lands were understood to be available rightfully to any who would settle and cultivate them.

A third position articulated by the founders was a blend of the first two. This position assumed that a conquest of the Indians was justifiable because the Indians lacked rights to the lands. Since they had not settled on or cultivated the land, they were wrong to resist the colonists or settlers who landed on their shores and wanted to settle the land. Those uncultivated lands belonged to everyone in common. The conquest of the Indians was therefore understood to be morally right, since the Indians were defending property that did not belong to them. It was they and not the colonists who were in the wrong.

These natural rights rationales for taking American lands had a number of similarities to earlier Catholic religious justifications for the Spanish conquest of the Indians in the Southern Hemisphere in the previous century. In fact, the British Puritan colonizers of North America had learned much from and saw themselves as competitors with the Spanish Catholic colonizers of Latin and South America. This was the historical backdrop when the American founders, 150 years into the British colonization of America, began to write about their rights.[29]

Let us take a deeper look at a few of the American founders' positions. The view that American lands were conquered was one theme that runs through the writings of the founders in the period leading up to 1776. Thomas Jefferson, for example, held the view that the settlers' rights to lands came via a conquest through their own blood. It was this conquest, and not any official activity of the British government, that gave the settlers the rights to the land that they occupied and thus grounded their rights to create political territories on those lands. In Jefferson's view, the settlers' rights to create new states rested not just on the natural right to leave their countries of origin but on their legitimate claim to the land that they conquered through their own efforts.[30] The emphasis was that the settlers had spilled their own blood to occupy American lands without the financing and help from the British Crown. Here is how Jefferson put it in his first major piece of political writing, called *A Summary View,* which was written in 1774 and was intended for the meeting of the First

Continental Congress, only two years before he wrote the Declaration of Independence. This essay established the young Jefferson as a respected intellectual of caliber among his political peers. Although Jefferson was too ill to attend in person, he sent his essay on to Congress to share with this colleagues. In the essay, Jefferson has this to say:

> America was conquered, and her settlements made and firmly established, at the expense of individuals, and not of the British public. Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual. For themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.[31]

Jefferson's intent is clearly to show that the settlers did not come to North America under British auspices, expense, or sacrifice, and consequently should not be understood to be under the rule of British Parliament. To make this claim, he argues that it was the settlers as free individuals and not as British subjects who conquered the North American lands.

In Jefferson's view, the settlers' claims to the land flowed from the fact that the conquest was at their own effort and sacrifice. On the land that they rightfully occupied, they set up a society with political and civil institutions. "From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject to their allotment only."[32] Jefferson is here alluding to the supposition discussed earlier that if individuals had legitimately acquired the rights to the land, or a group of people had settled on unsettled land, then the society they erected around themselves has jurisdiction over those lands. In articulating this view, Jefferson was rejecting the British claims that they had planted, financed, and protected the settlements, and therefore the conquest was under British auspices and that the settlers were thus "colonies" under British rule. The argument over who "owned" the conquest of North America, therefore, was an argument within colonial theory

about whether the Americans were British subjects conquering America or independent individuals risking their lives to settle in and conquer new lands.

In this first major foray into political writing, Jefferson was silent on the question of why the settlers' conquest gave them rights to the lands, even though we know Jefferson was intimately familiar with some of the natural rights thinkers who had written on the subject of conquest and just war, to which we return below.[33] In this essay, Jefferson does not *explicitly* acknowledge the presence of the natives in America, though in passing at one point he describes the "settlements having been thus effected in the wilds of America" as if to imply that the lands were unoccupied and thus up for grabs, consistent with the natural rights theory assumption that lands that had not been settled or cultivated were still in a state of nature and were owned in common.

Only a few years before writing the Declaration of Independence, which was the public justification to the world for the American Revolution, we see two different presuppositions in Jefferson's justification of American rights: there was a right based on conquest and a right based on settlement. We can surmise that the two positions were not incompatible for Jefferson. If the lands were unsettled and uncultivated, then Europeans had a right to settle them, at least according to one stream of thinking in natural rights theory. And if the natives resisted, Europeans had a right to take the land by force. The conquest itself was justified.

Jefferson was not the only American founder to pause over the American right to the native lands. A similar concern is evident in the early writing of James Wilson, one of the brightest legal minds in the founding generation and on a par with John Adams. Wilson served in the Continental Congress, was a signer of the Declaration of Independence, was a key contributor to the Constitutional Convention, and eventually was appointed by George Washington as one of the original justices of the Supreme Court. Wilson touched on the question of conquest in writing one of the earliest important pamphlets on American rights.

The pamphlet, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,* may have been written as early as

1768 but was not published until 1774. In it, Wilson drew an analogy between the conquests of America and Ireland. He argued that if the Irish, who had been conquered, were not under the authority of British Parliament, certainly the American colonists should not be either. As we shall see below, the English Protestants in fact had first developed and tried out their colonizing practices in the conquest of the Catholic Irish and would later transfer and expand that theorizing to the colonization of America. Wilson was therefore leveraging a well-understood analogy that was already familiar to the British public. Wilson does note in passing his own doubt about whether the conquest of Ireland was just. He writes: "If the idea of conquest must be taken into consideration when we examine into the title by which America is held, that idea, so far as it can operate, will operate in favour of the colonists, and not against them. Permitted and commissioned by the Crown, they undertook, at their own expenses, expeditions to this distant country, took possession of it, planted it, and cultivated it."[34]

Wilson is clearly less comfortable than the young Jefferson in justifying the American rights on the basis of conquest. But in some sense he felt he had no choice. If the idea of conquest must frame the terms of the debate, he says, then it operates in favor of the colonists' rights, since they took possession and cultivated the distant country at their own expense. Those who funded the conquest and took the risk deserve the fruits of its reward. Though uncomfortable arguing on the basis of conquest, Wilson feels compelled to do so, for his opponents argued that British powers over the colonies derived from the British sponsorship and investment in the conquest.

In contrast to Jefferson, who sees the settlers as independent Europeans who conquered America, Wilson views the American settlers as British subjects who colonized on behalf of and under the auspices of the British Crown. "Secure under the protection of their king, they grew and multiplied, and diffused British freedom and British spirit, wherever they came." Since for Wilson the conquerors acted on behalf of and under the auspices of Great Britain, they were entitled to all the rights and privileges of British subjects. How and why the British were justified in that

conquest is not a question that Wilson takes up in this context, though he signals his discomfort with reasons justifying the conquest of Ireland.

It is clear from Wilson's language that he feels uncomfortable arguing that American rights derive from a conquest. He thus picks up more clearly on the second justification in the natural rights tradition, that people have a right to settle and claim as their own any uncultivated land. The colonists undertook "expeditions to this distant country, took possession of it, planted it, and cultivated it." The theme of possessing, planting, and cultivating alludes to the view that any uncultivated lands are still held in common and up for grabs by the first to settle and cultivate them. Wilson's views, like Jefferson's, were firmly rooted in the natural rights justification of property.

Another important American founder, John Adams, expressed still more discomfort with the theme of conquest than did James Wilson and actually went so far as to recognize the Indians' rights to property. Like Wilson, Adams was one of the key intellectuals in the colonies, and he participated in the First Continental Congress, edited Jefferson's Declaration of Independence, participated in the Constitutional Convention, went on to be the first vice president of the United States, and eventually second president of the United States. A year before James Wilson published the essay quoted above, Adams offered one of the more profound statements on the moral question at stake. The larger context is a 1773 essay that Adams wrote in response to the claim of the Massachusetts governor, Thomas Hutchinson, who claimed that the colonies were under the supreme authority of the British Parliament. Hutchinson wrote that "at the Time that our Predecessors took Possession of this Plantation or Colony, under a Grant and Charter from the Crown of England, it was their Sense, and the Sense of the Kingdom, that they were to remain subject to the Supreme Authority of Parliament."[35] Although Adams uses pejorative language to describe Native Americans in his response to this claim, he makes several telling points showing his discomfort with a justification based on conquest.

First, Adams takes a position against one stream of the natural rights tradition, arguing that the natives had rights to their lands even though

they had not settled on or agriculturally developed them.[36] If that is the case, Adams wonders, then on what basis is there a legitimate foundation for the conquest of the natives? Adams first casts doubt on the "papal" views used extensively in the preceding centuries that justified conquests against heathen and barbarous people. Adams was no doubt also aware that many of the English Puritans who settled Massachusetts often offered similar religious justifications for destroying the Indian heathen. Indeed, the British colonial project had been modeled in some respects after the Spanish Catholic one, as we shall see. In rejecting the justice of a conquest and in arguing that the Indians were rightful owners of their land, Adams implicitly denies that the British Parliament should have any jurisdiction over the American colonists.

Furthermore, Adams argues that even if we assume that the conquest was justified, it would mean that the *Crown of England (*i.e., the king*)*, and not the *British Parliament*, had jurisdiction over the Massachusetts territory and people. In saying this, Adams means that the conquered lands would belong to the Crown (the sponsoring sovereign) but would not come under the supervision of Parliament, the legislative body. Adams here is arguing a technical point in the law of conquest about what rights the Crown and Parliament each had over conquered and colonized territories. As discussed below, there were differing views in the natural rights tradition about the rights to conquered territories and peoples. Here are Adams's words in his own language, referring to the charter granted to the colony of Massachusetts.

> We would take a View of the State of the English North American Continent at the Time when and after Possession was first taken of any Part of it, by the Europeans. It was then possessed by Heathen and Barbarous People, *who had nevertheless all that Right to the Soil and Sovereignty in and over the Lands they possessed, which God had originally given to Man*. Whether their being Heathen, inferred any Right or Authority to Christian Princes, a Right which had long been assumed by the Pope, to dispose of their Lands to others, we will leave to your Excellency or any one of Understanding and impartial Judgment to consider. It is certain they had in no other Sense forfeited them to any Power in Europe. Should the Doctrine be admitted that the Discovery of Lands owned and possessed by Pagan People, gives to any Christian Prince a Right and Title to the Dominion and Property, still it is vested in the Crown alone. It was an Acquisition of Foreign Territory, not annexed to the Realm of England, and therefore at the absolute Disposal of the Crown. For we take it to be a settled Point, that the King has a constitutional Prerogative to dispose of and alienate any Part of his Territories not annexed to the Realm.[37] [italics added]

Though Adams's primary intent is to argue that Parliament did not have absolute authority over the colonies, he grasps that the real question of the settlers' rights turns on the prior question of who has legitimate entitlement to American lands in the first place. Adams's language goes further than either of his colleagues in recognizing native American ownership over their lands. Adams was clearly going against the grain of one strong stream of natural rights tradition in assuming that natives did have legitimate ownership over their lands, and probably, given the breadth of his scholarship, in full knowledge that he was doing so.

All three positions described above were articulated just a few years before the Declaration of Independence was penned by Jefferson in June 1776. When the First Continental Congress met in September 1774, the focus was on debating the foundation of American rights, and Congress issued a series of "resolves," which at the time were called "the American Bill of Rights." After debating those resolves for over a month, Congress rejected Jefferson's theory of American rights and chose instead that of Wilson and Adams, holding that the American colonists came to North America as British subjects and thus with all the rights and obligations of "natural-born subjects within the realm of England." In this first American Bill of Rights, Congress was completely silent on the underlying question of why the settlers had a right to the land in the first place. Was it a conquest or a settlement, and what reasons justified the Americans'

rights to the land? The question of the colonists' rights to the land was also passed over in silence in the Declaration of Independence itself, the document justifying American rights and the right to revolution against their oppressors.[38] This silence was characteristic of many American colonists, who were focused on their rights vis-à-vis the British and who turned a self-serving blind eye to the question of their rights with respect to the natives. They looked "up," in other words, at their oppressors, but didn't look "down" at the way they and their predecessors were oppressors themselves. The same issue, of course, was true of slavery itself, with the founders arguing for liberty from British oppression, but many, though not all, thinking slavery was compatible with their own appeal to natural rights.[39] This silence on the actual history of what happened is something that we have to now, rightfully, peel away. It matters how we acquired our American lands, even according to the very theories by which we claimed to make it our own. A brief look at the historical background of the American conquest is thus in order to situate the various American declarations of rights in a broader historical context. Claims about rights have a history, and there are often positives and negatives of that history that have to be examined and talked about.

Conquest and the Right of Taking Land

The American founders, of course, were not inventing their justifications to American lands. Their positions were in line with various strands in the natural rights tradition as it had emerged in the seventeenth century. We know, for example, that Jefferson was familiar with the positions of Hugo Grotius, who at the start of the seventeenth century had argued that "just wars" included those against people who were committing grievous acts against the laws of nature.[40] In taking this stance, Grotius was in fact refining a position analogous to what had already been articulated by the Catholic Church, reaching back to Pope Innocent IV and heavily influencing the Crusades. On the one side, Grotius rejected the earlier Catholic position that a just war could be "for no other Reason but because they reject the Laws of Christianity." On the other hand, Grotius

did justify just wars against those who violated the laws of nature.[41] Violations of the law of nature replaced the prior violation of Christianity as a justification for war. As examples of grievous violations of natural law, Grotius identifies people who are "inhuman to their Parents" and "those who eat human Flesh," ways incidentally in which Europeans were often characterizing the Indian populations from the time of Columbus. Grotius thus concluded that the "justest War is that which is undertaken against wild rapacious Beasts, and next to it is that against Men who are like Beasts."[42] By the time Grotius penned these words, Spanish conquerors had for over a century decimated Indian populations, justified, at least in part, by the fact that they were not Christian and no better than wild animals. Grotius also argued that the conquerors in a just war could keep the properties they conquered, a position that the Church had also earlier taken. "But now as Property, or Right to the Goods of an Enemy, may be acquired by a lawful War, the Word *Lawful* being taken in the Sense I had before mentioned, so may also Civil Dominion, or an absolute right to command and govern the Enemy."[43] On Grotius's theory, then, a just war ends with the victor taking the property of the vanquished and also acquiring the right to rule.[44] Grotius's views were key in shaping the tradition that provided the younger Jefferson with a justification of the American conquest of Indians. Yet Jefferson was also a reader of others in the natural rights tradition, such as Pufendorf and Locke, who were more circumspect in their views of conquest. Pufendorf, for example, rejected the European view that Indians could be conquered because of their barbarous practices:

> My Lord *Bacon*, in his *Advancement of Learning*, gives this for a *sufficient Reason* to make War upon the *Americans*, which I must confess, I cannot agree with him in: "That they be look'd upon as People proscribed by the Law of Nature, because they had a barbarous Custom of sacrificing Men, and fed upon Man's Flesh. For it ought to be distinctly considered, whether a Christian Prince might invade those *Indians*, as People proscribed by Nature, only because they made Man's Flesh their common Food? Or because

> they us'd to eat the Bodies of those of their own Religion? Or because they devoured Strangers and Foreigners? And then again, it must be asked, whether those Strangers [i.e., Europeans] came as Enemies, and Robbers? Or as innocent Guests and Travellers, or for'd by Stress of Weather? For this last case only, and none of the others, can give any *Right of War* against them, and this to those only whose Subjects have been used with that Inhumanity by them?[45]

Pufendorf takes the position that Europeans have no right to conquer Indians simply because their practices deviate from natural law. Barbarity alone does not justify conquest. In taking this position, Pufendorf also notes that European visitors didn't come as innocent guests or travelers lost in a storm. They came with a purpose of settling and taking land. Only in cases where Europeans were forced onto American lands by storms could they justify a right of war if so needed to protect their own lives.

If barbarity did not justify conquest, lack of property rights was another possible justification. The claim that Indians did not have property in their lands was tied into the natural rights arguments about the origin and nature of property and human history.[46] As we have discussed earlier, natural rights thinkers had discussed the rightful way in which various people had come to have their rights to territories. They had assumed that in the early state of humankind, there had been a division of property based on either human agreement or through individual labor that cultivated land and provided the basis for property. By general accounts, lands that had not been allocated in the original division of land were vacant spaces that could be subsequently taken in one of two ways: either by individuals who settled on and cultivated the land or by groups of people who together moved into a vacant territory and formed political communities. If a group of people settle a territory together, all lands within that settlement belong to the community as a whole and are under the control of the sovereign. The one exception is land that remains uncultivated. Such vacant lands could still be rightfully taken by outsiders, even if such lands were inside the sovereign territory of a people.[47]

Natural rights thinkers pointed to the American Indians as examples par excellence of a people still living in a state of nature, taking natural resources as needed but never settling on and cultivating the land.[48] Since cultivation was the key to making property one's own, the Indians never achieved private property rights that were characteristic of more advanced societies. Speaking about the early history of humans, Grotius again provides an early example of this line of thought.

> From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that Time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself; which is well illustrated by that Simile of *Cicero*, *Tho the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own.* And this State of Things must have continued till now, had Men persisted in their primitive Simplicity, or lived together in perfect Friendship. A Confirmation of the first of these is the Account we have of some People of *America*, who by the extraordinary Simplicity of their Manners, have without the least Inconvenience observed the same Method of Living for many Ages.[49]

Grotius is here arguing that private property did not exist in the beginning of human civilization and "use" fulfilled the role that would later be enlarged to "ownership." A similar perspective was espoused by Pufendorf and Locke, among others. Locke, we recall, had said that "Thus in the beginning all the World was America," meaning that in early human history, people lived simple lives in the state of nature like the American Indians without the invention of money.[50] On the one hand, Locke also had an idealized view of these peoples who lived closer to nature. For "want of power and money," they had no "temptation to enlarge their possessions of land." Yet on the other hand, Locke assumes

that Europeans had the right, and possibly even a kind of duty, to take these lands and cultivate them.

Recall that Locke cites the vacant lands in America as proof that even in his day anyone could still have lands who wanted them.[51] He also implies that a person who settles and cultivates vacant property actually does good for humanity by increasing nature's bounty. "And therefore he, that incloses Land, and has a greater plenty of the conveniencys of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind."[52] Locke is making the point that by taking uncultivated land and making it into private property, individuals benefit humanity. His rhetoric may also suggest that there is a moral duty to actually cultivate vacant lands. Here again is Locke: "God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniencies of Life, they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational, (and Labour was to be *his Title* to it)."[53]

In 1759, nearly a century after Locke had written the above statements, Swiss philosopher, legalist, and philosopher Emer de Vattel had this to say in his influential *Law of Nations*, a book that James Wilson, James Otis, and others read and quoted:

> There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations, whose scanty population is incapable of occupying the whole? We have already observed (§ 81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants.[54]

To summarize, we have thus seen that those American founders who did not feel comfortable justifying American rights to land on the basis of conquest could appeal to the theory of the vacant and uncultivated land. In European theory, even if the American Indians claimed the land as their own property, their claims would have been meaningless, since in European eyes they left it uncultivated, though we shall see below that even this view is a distortion and misrepresentation of Indian culture and practice. In European Christian views, humans were intended to expand on the earth and the resources of nature were given for their support and nourishment. Leaving land uncultivated wasted what God and nature had given. It was these sorts of views that hovered in the background of Jefferson's and Wilson's claims that the American lands could be taken by Europeans who settled and cultivated them.

History Versus Philosophy of Conquest

Having looked at how some of the important founders thought about their rights to the land, and the European philosophical positions that hovered behind them, it is important to ask about the actual history since, as I have said, theft and conquest are often everywhere lurking in the past. For those who know something about the history of European colonization, it is appropriate to use the word "conquest" and, according to some, even "holocaust" to describe what the Spanish, British, and eventually Americans did to Native American populations.[55] Starting with Spain in the late fifteenth and continuing throughout the sixteenth century,

conquerors beginning with Columbus had decimated Indian populations throughout what became South and Latin America. Through a combination of European diseases, such as smallpox, and wholesale slaughter by the European conquerors, Indian populations were reduced by as much as 90 percent or more in only a matter of a few decades.

The conquest was justified originally by a series of Catholic papal bulls giving Spain ownership of the lands of South America. As early as the thirteenth century, Pope Innocent IV had written a legal commentary on the question of when Christians could legitimately take away the political authority and property of pagan peoples. Innocent was one of the first great medieval legal theorists who attempted to systematically address the questions raised by Christian contact with non-Christian nations. He defined the essential terms of the debate by providing European legal theory with a fully elaborated legal discourse for determining the rights and status of pagan people.[56]

Papal authority over infidels, he wrote, applied to those instances where it was clearly necessary for the pope to intervene in order to protect the infidels' spiritual well-being. Such circumstances obtained when infidels clearly violated natural law and their rulers refused to punish them, as required by God's divine law.[57] For example, those peoples who were sexually promiscuous or who worshipped idols could be compelled by secular force and conquest to obey the laws of nature, which were understood to be synonymous with the Catholic vision of civilization. Natural law and Catholicism were understood to be one and the same.

In 1492, the basic framework articulated by Pope Innocent in the thirteenth century was extended to the discoveries in America in a series of three papal bulls issued by Pope Alexander IV (originally the Spaniard Rodrigo Borgia) confirming Spain's title to Columbus's discoveries.[58] The bulls granted Spain virtually all of North and South America and blessed the expansion of Christian rule. Motivated in part by a search for gold and slaves, and justified in the name of Christ, the conquest of Indians was both religiously and racially justified. Following closely on the heels of the Spanish Inquisition of the Jews, and using some of the same rhetoric by which Jews, witches, and Moors had been demonized by the Catholic

Church reaching back to the Crusades and earlier, the Spaniards justified the savage ravaging of Indian men, women, and children.[59] When Columbus could not find the gold he expected to find, which would have justified his expeditions, he began enslaving Indians as the only resource he could export back to Spain. For the action, Columbus lost his governorship, and the queen forcibly recalled him. But the Castilian Crown was unable to stifle the conquerors' impulse to enslave Indians. The outcome was a political system called "encomienda," which justified coerced labor and the enslavement of Indians as part of the civilizing and conversion process. Only by denying the Indians their freedom and appropriating their labor could the work of Christianization take place.[60]

Columbus initiated and framed the European discourse on the Indians by describing the backward state of their civilization and practices. He characterized the Indians as being uncivilized, naked, lacking private property and religion, and not having iron and steel weapons. In his rhetorical tropes, Columbus set out many of the themes to dominate European discourse for the decades and centuries to follow. The view that Indians lacked property, of course, played into the European view that uncultivated land was available for the taking, even in God's eyes. Of course, no one understood at first that the people who had been discovered occupied a "new world" that was unknown to Europeans. Nonetheless, as Spanish accounts of Indians developed over the sixteenth century, Indians were at times portrayed as barbaric heathens who ate human flesh, had promiscuous sexual behaviors, worshipped the devil, or had no religion at all. For some Europeans, the Indians were thought to be the ten lost tribes of Israel (thus explaining why they didn't have a more sophisticated religious understanding but did have practices, such as sacrifice, and food taboos that resembled those of the Jews).[61] A pernicious racial theory also developed that portrayed the Indians as a separate type of animal created by God, somewhere on the hierarchical tree of being between apes and humans. This type of "beast" was not descended from Adam and Eve, according to some, but was created by God to be a beast of burden, a view that dovetailed nicely with Aristotle's position that some people were natural slaves. The horrific tales of Spanish slaughter, torture, rape,

and enslavement cannot with justice be recounted adequately in this context and has been done more ably by others.[62]

Through the first half of the sixteenth century, while Indians were being decimated and the continent was being conquered, Spanish Catholics were periodically debating whether the Indians were sufficiently rational to be entitled to the protections of natural rights. The view that the Indians' heathenism justified their enslavement and torture dominated Spanish practice. There were some notable Dominican challenges beginning in 1511, when a Dominican friar named Antonio de Montesinos gave a sermon challenging the prevailing views and prompting King Ferdinand to convene a council in the Spanish town of Burgos to deliberate on the question of whether Indians could be saved in ways other than being enslaved. Debate focused on whether the Indians had sufficient reason to be governed by the laws of nature, which are only discernible through reason, and on the possible applicability of Aristotle's notion of "natural slaves" to the natives. The council promulgated seven propositions and a legal code by which Spaniards were to manage the domination of Indians. The code mandated peaceful means by which to Christianize the Indians unless peaceful means failed, in which case the code authorized the use of force. The debate over the right way to Christianize the Indians, and the debate over the applicability of natural law and reason to them, continued throughout the first half of the sixteenth century and reached its peak in the 1550s.

Of particular note for our purposes was an emerging intellectual countercurrent articulated by Spanish Dominican scholar Franciscus de Victoria (1480–1546). Inspired by an interpretation of natural law by the Catholic theologian Thomas Aquinas, Victoria challenged the justification of the Indian enslavement and conquest under papal authority. His most important work on Indian rights was a three-part lecture in 1532 called "On the Indians Lately Discovered." On the one hand, Victoria challenged the stream of thought that said Indians lacked rationality. On the other hand, he provided a new, more secularized justification for Indian conquest, under the umbrella of natural law and the emerging laws of nations that he helped conceptualize.[63] This

justification of conquest on a foundation of natural rights would be taken up by seventeenth-century natural rights philosophers and British colonizers.

To begin with, Victoria challenged the Spanish view that the Indians lacked reason and therefore could not own property or run their own government. Running counter to dominant Spanish colonial views, he thus argued that the Indians had just ownership over the territory they possessed, and he rejected the Spanish Catholic view that "discovery" of American lands gave Europeans possession of them. We saw echoes of a similar view in the writings of John Adams, who had similar doubts about the papal association of discovery and property. By the time Victoria wrote, of course, Columbus had already claimed ownership of discovered lands on behalf of Spain, and the tradition continued throughout the next two centuries with both Spanish and British explorers claiming ownership for their respective Crowns on the basis of discovery.[64] The association of discovery with possession would be a position that ultimately was made into the law of the land by the early American Supreme Court, as it contemplated the very question of how Americans had rights to Indians lands.[65]

If, on the one side, Victoria challenged the Spanish Catholic portrayal of Indians as irrational beings and natural slaves, he nonetheless found grounds for the European conquest of the Americas based on natural law.[66] Victoria argued that the relationship between all peoples was governed by a universal law of nations that was derived from natural law and was obligatory on both Indians and Spaniards alike. If the Indians violated the law of nations, Spain would have a right to use force against them. Although Victoria rejected the papal justification of conquest, he still recognized a Christian duty for Christians to preach the gospel in barbarian lands and instruct those who are ignorant of civilized Christian faith.[67] Seemingly unaware of what appears as a contradiction today, Victoria concluded that the pope had the authority to assign the role of educator to the Spanish nation, which thus had the authority to bring the gospel to the Indians. If the Indian princes created barriers to this mission, they had put up an obstacle against what was naturally right. The

natives' resistance to being educated in the Christian faith thus furnished the Spaniards with a justification to make war and seize their lands.

The debate over whether the Indians were natural slaves and rational creatures reached a peak intensity in 1550 when the controversy became so intense that Spanish King and Holy Roman Emperor Charles V suspended all expeditions to the Americas and called a group of leading theologians, jurists, and officials to the royal capital of Valladolid to listen to the arguments between Las Casas and the scholar Sepúlveda on the nature of the Indians.

Since 1519, Bartolemé de Las Casas had been a leading Dominican spokesperson for the view that Indians were rational men "not demented or mistakes of nature, nor lacking in sufficient reason to govern themselves." And he was guided by the view that "our Christian relation is suitable for and may be adapted to all the nations of the world, and all alike may receive it; and no one may be deprived of his liberty, nor may he be enslaved on the excuse that he is a natural slave."[68] In 1527, La Casas had started a compendium on Indian customs called *Apologetic History*, in which he advanced the idea that astonished Spaniards of his day: that the American Indians compared favorably to the peoples of ancient times, were rational creatures, and met Aristotle's criteria of living a good life.[69] In 1547 at the age of seventy-three, Las Casas was back in Spain after spending most of his life involved in Indian affairs.

What prompted the debate in 1550 was a treatise written by the respected Aristotelian scholar Juan Ginés de Sepúlveda, who argued that wars against the Indians were just and even necessary as a preliminary first step to their Christianization. Sepúlveda was a leading, well-respected scholar of his day, enjoyed great prestige with the royal court, and was involved in the European intellectual recovery of Aristotle and a translator of Aristotle's *Politics*. Las Casas's challenge to Sepúlveda's manuscript prompted King Charles V to summon a council of fourteen scholars and jurists to Valladolid to consider the question, "Is it lawful for the king of Spain to wage war on the Indians before preaching the faith to them in order to subject them to his rule, so that afterward they may be more easily instructed in the faith?"[70]

Las Casas spoke for five days, and the judges had to assign one of their members to boil down his arguments into a succinct summary to which Sepúlveda could answer. Sepúlveda, for his part, had taken the position that wars may be waged justly when their cause is just and that the war with the Indians was just due to their idolatries, the gravity of sins against nature, and in order to protect the weak among the natives themselves. Drawing on Aristotle and appealing to the rudeness of the Indians' natures, Sepúlveda argued that the Indians were examples of Aristotle's natural slaves and that Spaniards had the right to rule over them because of Spanish superiority. Las Casas, for his part, took the position he had held throughout the century. He argued that to treat Indians like natural slaves and torture them into conversion was immoral and offended God. Since 1512, he had been promoting the position that Indians should be won to Christianity by peace, love, and good example, when no danger threatened. The council members took the summaries of the debate home with them and agreed to reconvene in early 1551 for a final vote. The judges, however, never issued a formal decision and left the question over the Indians' nature unresolved.[71]

For our purposes, there are a number of insights to draw from this fascinating yet disturbing historical moment in 1550–1551. On the one hand, one can be encouraged that ideas of the natural law tradition were beginning to resist and challenge pernicious views of Indians that had been based on Aristotle's notion of natural slaves and the views of the Roman Catholic Church, which justified conquests, enslavement, and torturing of other peoples because their religions and cultures differed. Remember, this was still more than a hundred years before early moderns such as John Locke had fully articulated the modern natural rights theory of the seventeenth century, as we understand it today. But lest we naïvely conclude that the light of natural reason was beginning to triumph over the darkness of Catholic orthodoxy, we should remember that the natural rights tradition was itself being shaped so as to provide a new justification for the conquest of America. In that justification, though the Indians were rational creatures and had rights of nature, Europeans had rights to conquer them and to take their lands.

Lest we blame Spain's Catholics alone for the conquest of the Indians, it is important to realize that British Puritan settlers would use very similar kinds of justifications in their settlement of North America in the seventeenth century and in fact were influenced by Spanish Catholic thinking a century earlier. The British Puritan settlers were relative latecomers, arriving after the Spanish had spent a century decimating Indians in much of what is now Latin and South America. Diseases introduced farther south had already spread to the North American continent, where they continued to destroy Indian populations even before the British settlers arrived. Encountering already weakened Indian populations, the British settlers in North America were also brutal to the Indians.[72] Like their Spanish predecessors, they too justified the murder of native populations in religious terms, this time fueled not by Catholic religious sentiments, but by a Puritan Christian zeal to eliminate the heathens.

In fact, the British understood their colonial settlements in North America as part of the competition not only between Spain and England as European nations, but between Catholicism and the reformed Protestant Church of England, which had broken from the Catholic Church during the Reformation. English translations and abridgements of the writings by Spanish and Portuguese explorers and historians of the Spanish conquest, such as explorer Amerigo Vespucci, introduced the British public to stories about the strange new world inhabited by flesh-eating barbarous peoples who had no laws, manners, or civilized religion.[73] Vespucci had described the Indians in themes already familiar from Columbus as lacking money and desiring only what they needed. Early historians of the conquest, such as Pietro Martire, had described the Indians as lacking core concepts of "Mine and Thine" (i.e., they lacked the conceptual foundation for property).

The British people themselves were already developing their own framework for dealing with what they regarded as rude and backward peoples in their conquest of the Irish.[74] Ireland had been part of the realm since the Norman invasion, and as Catholics, the Irish provided a nearby opportunity to work out the beginning of England's own colonial empire building framework. Under Protestant Queen Elizabeth's rule, British discovery and colonialism began in earnest in the 1570s. Rejecting Spain's papal justification of conquest, Elizabeth asserted the right of her subjects, based on the law of nations, to establish colonies in any region of the world not inhabited by Spain. In essence, discovery became the justification of colonization among competing European powers.

British writers justified the overseas colonization based on a number of factors, including economic opportunity, an outlet for natural resources, and advancing the true version of Christianity (Protestant, not Catholic) to the savages of America, and thereby countering the influence of Spain in the New World. Thus the two themes of Indian conversion and anti-Catholic/-Spanish sentiment were merged into a single discourse justifying the British Puritan colonization.

Early descriptions of Indians emanating from the early colonies, such as those sponsored by Sir Walter Raleigh, portrayed the Indians as using their land inefficiently. Throughout the early settlement days and what amounted to a British invasion sponsored by the Virginia Company, Indian "idolatry" and their reported failure to settle and cultivate the earth served as biblically sanctioned justifications for the British settlers to take their land and in many cases to massacre them.[75] The claim that Indians lacked the idea of private property reached back to Columbus and continued throughout the North American conquest, even though Indian tribes did live in settled villages surrounded by agricultural plots and the British colonists would have starved in early days of the colonies without the help of food grown by Indians.[76] Ironically, it was the Indians who knew how to live off the land, not the early colonists.

In the early British colonies, there were debates on whether the Indians owned their land, and these debates continued throughout the first hundred years of colonization. The Virginia Company, which sponsored the settlement of Jamestown, decided not to publish a justification of the colonization in part because colonization of an inhabited land was controversial. In general, however, the theory of sovereignty by which the English government embarked on colonization assumed that the land in North America was unowned and available for the taking.[77] One can find contradictory positions among the settlers themselves on their rights to

Indian land, and the position that Indians lacked land ownership was not a unanimous position. Some, like William Crashaw in a sermon in 1609, pondered "the doubt of lawfulness of the action" and concluded that the colonists must "take nothing from the Savages by power nor pillage" but "we will *exchange* with them for that which *they may spare*, and we doe need."[78] Other sermons, such as that by William Symonds, argued that conquest was legitimate and that human history is full of invasions and wars, with the winners taking the land of the losers.[79]

There is substantial evidence that in practice, colonial policy treated Indian land as though the Indians indeed owned their property, and therefore Europeans purchased land from them.[80] But the context of the purchases was complex. Often Indians were pressured to sell under increasing expansion of European settlers, especially as colonization proceeded; the Indians felt in some sense as if they had no choice, since settlers would take the land from them anyway. In addition, the Indians had a different concept of property that did not match precisely the European one, and therefore the meaning of the transaction was often understood differently by the parties. There were numerous instances as well of trickery and deceit involved in these transactions, to the loss of the Indians. Often individual Indians and individual colonists would try to sidestep the rules of both the tribes and of the British and colonial governments to conclude a transaction. In part because of such problems and because Britain was trying to limit colonial expansion westward before the American Revolution, colonists were restricted from purchasing land directly from Indians without government authorization. Intended to protect the Indians, this law ironically undermined the natives' ability to get a fair price by limiting real market competition. Furthermore, colonists would often simply ignore the rules and sometimes simply move onto the land. Neither colonial authorities nor the British government had the capacity to stop them. On the verge of the Revolution, when Jefferson, Wilson, and Adams referred to the status of American lands, there was still not a settled position on the origin of the colonies' rights to their lands. Eventually, the view that European discovery entailed ownership of land would be codified as the official position of the United States in the 1823 decision of the Supreme Court that based American claims to land on the European discovery doctrine.[81]

The conquest of America was thus complex and proceeded in stages. Jefferson's characterization of the settlements of America as a conquest is historically accurate, if completely understated, and unjustified. We do know that by the time Jefferson wrote *Notes on the State of Virginia* in 1781, he held the view that the extensive documentary record of Indian land sales demonstrated that Virginia had been taken from the Indians not by conquest but rather "by purchases made in the most unexceptionable form," though he qualified it with the comment "that these purchases were sometimes made with the price in one hand and the sword in the other," a point he crossed out before publishing.[82]

It would be wrong and too simplistic to say that Americans stole Indian property. But it would be a mistake to characterize this process as a simple set of straightforward purchases. In some sense, the Indians had no choice, especially as the coercive context grew more apparent as the settlements expanded, and it became clear that turning European expansion back was impossible. Furthermore, the ideology that the lands were uncultivated and available did inform and help justify colonization from the start.

This abbreviated overview of the Spanish and British conquests of America hardly does justice to the details or complexity of the story. But it does provide sufficient background for us to return to the question of rights and their relationship to land that was stolen and conquered in America, our original theft.

Theft All the Way Down

I began this chapter arguing that rights under a state are intelligible only if that state has rights to oversee the territories over which it has jurisdiction. I suggested that the ideal alignment of individual property and the state's territorial sovereignty is and has always been problematic. Individuals do not have exclusive rights to the properties they own or inherit. Their labor is partly their own and partly that of the human spe-

cies as a whole. Thus even if individuals did aggregate their individual properties to form a state, even then the state would oversee property that did not belong only to those individuals who formed the state, since no one can own all of his or her labor. The state would always also be a guardian of property that belonged to humanity in general. Even were this not the case, the actual messiness of history suggests that murder, theft, and other forms of violence were critically important in shaping both the historical allocation of resources among individuals and the boundaries and territories of states.

My intent in discussing the European conquest of America was to show that even in the country that understands itself par excellence to be founded on a social contract and the consent of the people, even here a theft and conquest are at the foundation of the nation. Anywhere we look there is a past that includes conquest, murder, and theft, which have shaped the distribution of resources across the human species. There is no innocent nation that does not have this problem of violence and domination somewhere in its past. And even the native populations that preceded the development of states gathered their lands at times by power and conquest as well. It was not just European nations, Christians, or Americans who have conquered and murdered. Conquest, murder, and theft go all the way back in time. Parts of the native populations themselves have a history of violence one to another.

The question of rights and entitlement to resources has ultimately to deal with this fact of history and the violent past of the human species. There is an "original theft" or conquest at some point behind every state and every individual's private possession. No nation gets off morally scot-free from this burden of history. At the very least, any person who wants to insist on his or her rights and demand protection from the hands of a powerful and overreaching government must also accept the burden of history for the creation of that state. For any property we do have at this moment in time is not simply the result of the efforts of the smart and hardworking people that we are. It includes also the collective result and inheritance of thousands of other persons who labored before us, who contributed their knowledge to us, and on which we built our efforts.

And this piece of land that is temporarily mine in this big nation that is temporarily ours in this larger world that belongs to us all for now is but a temporary place that I occupy that has landed at my feet, after all the thousands of murders and conquests and thefts that have disappeared, lost in time. If we pretend anything else, we are erecting a myth that justifies some notion of ourselves, our religions, and our nations. The question is, what should we do about this truth that has always been present but that our myth of natural rights so conveniently wants to hide?

were it possess'd, without Division, by so vast Bodies of Inhabitants as it now contains: Because it could never afford them Sustenance, unless manur'd and improv'd. Therefore there is plainly this particular Reason, why the extent of the Earth should not hinder its being divided; and yet the same Reason would make the division of the Ocean appear a ridiculous Absurdity."

53. Locke, II § 33 [italics in original]. See also II § 36 and I § 33.
54. E. A. Wrigley, et al., *The Population History of England*, and Hatcher, *Plague, Population*.
55. Locke, II § 36.
56. Locke, II § 40, Laslett, *Two Treatises*, 296.
57. Locke, II § 41. [italics in original]
58. Ibid.
59. Locke, II § 32, Laslett, *Two Treatises*, 291.
60. This point is discussed below in chapters 7 and 8.
61. See, similarly, Nozick, *Anarchy*, 174–177, and also Waldron, *Right to Property*, on this point.
62. Locke, II §§ 30–31.
63. See Waldron, *Right to Private Property*, 190, which raises a similar question.
64. Locke, II § 43, Laslett, *Two Treatises*, 298. [italics in original]
65. See chapter 9 for a discussion of the assumptions of modern economic theory. On Locke's role in the development of early modern economic theory and his impulse to see economics as functioning by natural value and natural principles, and not inherent value, see Letwin, *Origins*, 158–195, particularly on the British controversy over lessening interest rates to 4 percent and the recoinage controversy. On Locke's labor theory anticipating Adam Smith's, see Gough, *Political Philosophy*, 93.
66. Nozick, 175, quoted in Waldron, *Right to Private Property*, 190, asks something similar when he poses the question, "should one's entitlement extend to the whole object rather than just to the added value?" Nozick draws different conclusions from this question than do I.
67. I see Nozick, *Anarchy*, 174ff, posing the same line of critique here against Locke's theory of labor, though coming to very different conclusions ultimately.
68. Locke (I § 92) says property by definition includes the right to "destroy the thing, that he has property in by his use of it, where need requires." See Gough, *Political Philosophy*, 86, which discusses this position of Locke and sees it as evidence of the "communal" or "social" tendency of this thought.
69. Locke, II § 31 [italics in original] and again in II § 51.
70. This position differentiates Locke from the view of Hobbes in which people in the state of nature competed for the same goods and thus were led to seek peace in part out of the competition for goods.
71. See Locke, II § 36, and Laslett, 293 [italics in original]. See also II § 47. See also II §§ 107–108, where Locke talks about the early history of mankind and early forms of government and the Indians. "The equality of a simple poor way of liveing confineing their desires within the narrow bounds of each mans smal propertie made few controversies and so no need of many laws to decide them." For a discussion of Locke's underlying understanding of the transition from simple to more complex societies, and the corresponding complexity in social structure, see Schochet, "Family and Origins of State."
72. See Locke, I § 86 and II § 25.
73. Locke does see some basic inequality arising directly from the nature of labor itself, but these inequalities are amplified by money. "And as different degrees of Industry were apt to give Men Possessions in different Proportions, so this *Invention of Money* gave them the opportunity to continue and enlarge them" (Locke, II § 47, Laslett, *Two Treatises*, 301).
74. Why humans desire more than they need is not a question that Locke reflected upon, though earlier rights thinkers such as Pufendorf spend a great deal of time discussing God's intention in making humans the way they are. Locke simply takes for granted that this is how people are without asking the theological question of why God made humans this way or whether this was related to a "fall from grace." In this sense, Locke, like Hobbes (but in contrast to Pufendorf), sidesteps the theological questions that occupied the theological tradition and simply started with assumptions about human nature itself.
75. Macpherson, *Possessive Individualism*, 194–257.
76. Waldron, *Right to Private Property*, 165, also arrives at a similar conclusion.
77. I take it that this is in part the purpose of Rawls's conception of the "original position." As noted earlier, Dworkin, *Taking Rights Seriously*, 179–183 argues that Rawls's concept of the original position begins already by assuming the principle of equality, which is what makes the original position intelligible. It is beyond the present essay, but one can argue that Rawls gives in too easily to the arguments that market efficiency overrides the impulse to equality.
78. Locke, II § 7, § 8, and § 11 [italics in original]. See also II § 135 for mention of preservation of humankind in general. On this "social" dimension of Locke's theory, see Gough, *Political Philosophy*, 22–25, and Kendall, *Majority Rule*, which carried this interpretation to its logical interpretation.

Chapter 7

1. Locke, II § 124 and § 134. [italics in original]
2. Ibid., II § 123. [italics in original]
3. Ibid., II § 138. [italics in original]
4. See Hobbes, *Leviathan*, 13:3-4, 83; Locke (II § 123) describes enjoyment of property as unsafe and the state of nature as full of fears and continual dangers, and he (ibid., 137) emphasizes the purpose of government as the protection of property as well as peace and quiet. See also II § 127. Locke (II § 21) also says in very Hobbes-like language that "To avoid this State of War…is one great reason *of Mens putting themselves into Society* and quitting the State of Nature." See also II § 94, where Locke refers to leaving the

state of nature for safety and security, and II § 101, where he refers to "inconveniences of that condition [state of nature], and the love, and want of Society" that drove people together. For an interesting discussion and summary of Locke's understanding of the state of nature and the tensions in his view, see Simmons, "Locke's State of Nature."

5. Locke, II § 137. For Hobbes, there was no law in nature anyway and therefore no justice prior to society.

6. Locke, II § 77. For accounts of what Locke meant by the state of nature, see for example, Simmons, "Locke's State of Nature," and Ashcraft, "Political Philosophy."

7. See Locke, II §§ 123, 127, 137, where he assumes the development of political societies out of earlier human social groupings is almost inevitable.

8. If asked why humans were created by God to live in a fearful state of nature, the more theologically oriented, such as Pufendorf, would have said that humans were a distinctive animal just below the angels and thus given free will. And it was the ability to choose good versus evil that distinguished humans from animals. This theological question is one that neither Hobbes nor Locke takes up, in contrast to Pufendorf, who still operates in a more theological mode of thinking.

9. The boundaries of the states, according to Locke, would thus be worked out in similar ways to the boundaries of property between individuals. See, for example, Locke, II § 45, in his discussion of property, where he reflects on how early commonwealths and political groupings were extensions of individual property. Locke envisions it as a two-step contract, where individuals first contract together to form a political entity that now has rights to regulate the territory defined by their individual properties, and then the national entities contract with each other to define and recognize their boundaries. Here is Locke: "The several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, *by Compact* and Agreement, *settled the Property* which Labour and Industry began; and the Leagues that have been made between several States and Kingdoms, either expressly or tacitly disowning all Claim and Right to the Land in the others Possession, have, by common Consent, given up their Pretences to their natural common Right, which originally they had to those Countries, and so have, by *positive agreement*, *settled a Property* amongst themselves, in distinct parts and parcels of the Earth." [italics in original]

Locke seems to be saying here that states or kingdoms first arise around individuals who acquired property through labor. They then go through a process of consenting to the boundaries of each other's territory. He thus envisions the agreements of states about what territories they oversee to follow after individuals already have their own properties. The dispute over boundaries of states is thus independent from a prior right of individuals to land for which they labored.

10. See, for example, Grotius, *Rights of War and Peace*, book 2, chap. 2:4, 22.

11. See Locke, II §§ 106–107 and §§ 71–76, and discussion in Schochet, "Family and Origins of State."

12. Locke, II § 121. "But since the Government has a direct Jurisdiction only over the land, and reaches the Possessor of it (before he has actually incorporated himself in the society) only as he dwells upon, and enjoys that: *The Obligation* any one is under, by virtue of such Enjoyment, to *submit to the government, begins and ends with the Enjoyment* [of the land]*;* so that whenever the Owner, who has given nothing but a *tacit Consent* to the government, will, by Donation, Sale or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth; or to agree with others to begin a new one, in *vacuis locis*, in any part of the World, they can find free and unpossessed." [italics in original]

13. Locke, II §§ 8, 121, and 119. For discussion, see Schwartz, *Liberty in American Founding*, 141.

14. This was a standard critique of Locke by, for example, Hume, "The Original Contract," and others. For Locke's reflections on the question whether there ever was a state of nature and a contract that created a nation, see Locke, II §§ 14–15, 100–105. See Hobbes, *Leviathan*, 13:11, 85 where he asks the same question. Hobbes takes for granted a war in the state of nature until hostilities cease through a social contract. Thus he does not have the same dilemma in his theory as does Locke, since he never assumes there is a right to property until the commonwealth comes into existence.

15. Rawls argues that in the original position, people would agree to the principle of fairness, namely, that laws must work to the absolute benefit of the worst-off members of society. But what if the people in the original position could know or become suspicious that natural resources might be depleted? If they asked that question and concluded that it was feasible resources could be depleted, and they did not know in what time period they would live or in what country, they reasonably would not have agreed to rules of private property at all, at least in the form we now know them.

16. Locke, II § 175, feels this contradiction and tries to resolve it in his last chapter. He writes, "Though Governments can originally have no other Rise than that before mentioned [i.e., consent], nor *Polities* be *founded* on any thing but *the Consent of the People*; yet such has been the Disorders Ambition has fill'd the World with, that in the noise of War, which makes so great a part of the History of Mankind, this *Consent* is little taken notice of: And therefore many have mistaken the force of Arms, for the consent of the People; and reckon Conquest as one of the Originals of Government. But *Conquest* is as far from setting up any Government, as demolishing an House is from building a new one in the place. Indeed it often makes way for a new Frame of a Common-wealth, by destroying the former; but, without the Consent of the people, can never erect a new one [italics in original]." In this passage, Locke tries to reconcile his theory of consent with the actual historical nature of conquest and war. He argues that it is always consent that is the legitimate, rightful basis of government, even if it is not the historical basis of government. But Locke does not take up the question that if war and conquest undermine or disturb the rightful relationships of individuals to their property, then consent after the fact can't be based on a prior rightful allocation of property by the labor theory of property. Property is no longer matched rightfully to individuals, and

therefore individuals who consent to the state bring with them properties that they do not completely own.

17. See note 4 above.

18. See Locke, who makes this argument. Locke reflects on the modern just-war tradition that grew out of earlier Catholic arguments about what constitutes a just war. In the modern period, the concept of just war was developed by Grotius, who argued that some wars between nations were just. Locke's position diverges dramatically from Grotius. Grotius (*Rights of War and Peace*, book 1, chap. 2:4, 189, and book 3, chap. 2:8) had argued that a just war would entitle the conqueror to enslave the population, take their lands and property, and institute government or sovereignty.

Locke, by contrast, in one of the most difficult and convoluted parts of his *Second Treatise*, argues that if a people are conquered, whether in a just or unjust war, the state becomes legitimate only if the people who are conquered consent to the new entity. Thus consent in Locke's view remains the criterion of a rightful state, whether or not the war is just. Locke distinguishes a just from an unjust war based on who is the aggressor. The aggressor is always unjust, and if the aggressor wins, then even consent cannot make the state legitimate (II § 176). If the war was just, and those who were attacked won, then the sovereign has absolute authority over those who fought against him and has the right to enslave them. But even in this case the sovereign's power is only over those who fought and not their properties, wives, or children (II § 180). For a discussion of Locke's position, see Moseley, "Political Philosophy of John Locke."

19. Locke tries to make this argument about consent throughout II §§ 175–196. While Locke denies the right of conquest, he doesn't deal with or recognize the deeper problem with "consent." A postwar situation still involves the distortion of property rights from the way they should have been aligned based on the natural right of labor. There is no way to reconstruct the right alignment of property rights and labor. But Locke does not reflect on this problem. Hobbes, for his part, doesn't have this conceptual problem that faces Locke because he assumes that people have unlimited rights in nature, and thus stealing and conquest are right and just in some sense in nature. There is no "unjust" distribution of property caused by war and theft, at least in nature. The political state is the end of that state of war. And political states are still in a state of war with each other until they too conclude a treaty. The equality in nature as conceptualized by Hobbes does not expect a fair allocation of property, but fairness and equity arise only after the state is formed.

20. Nozick, *Anarchy*.

21. I see this question as intersecting with the interesting thinking in what has come to be called "postcolonial" theorizing.

22. Locke, II § 192. [italics in original]

23. In this sense, Hobbes's theory, in contrast to Locke's, seems to recognize more fully the actual messiness of history and the fact that the human species always had the tendency to violence. In Hobbes's view, there was no just distribution of property until the state was created. Justice is thus limited to within the state. The problem, then, is that Hobbes never envisions a solution between states themselves. There is no sovereign power beyond the state and thus no right beyond that of the state, though states may go through the same process as individuals in confronting each other in a state of war and eventually come to the decision to pursue peace.

24. Schwartz, *Liberty in America's Founding*.

25. See, for example, Stannard, *American Holocaust*; Williams, *American Indian*; Bergreen, *Columbus*; Banner, *How Indians Lost Land*.

26. See prior note on discussions of the conquest. I have written about this question from another perspective in Schwartz, *Liberty in America's Founding*.

27. Though Locke does not come to see the significance of this conclusion, it is implied by his very claim that conquest of an aggressor never justifies new government or the taking of property.

28. On Jefferson's views, see Schwartz, *Liberty in America's Founding*, 163–233.

29. See Stannard, *American Holocaust*, and Williams, *American Indian*, 119–125. On the comparison of British and Spanish conquests, see also Elliot, *Empires of the Atlantic*.

30. In my earlier work, Schwartz, *Liberty in America's Founding*, 166–67, I discuss the relationship of Jefferson's natural rights understanding to Locke's. On this point, Jefferson can be seen to be moving away from Locke, who argued that people cannot leave a state once they explicitly consent to become citizens.

31. Jefferson, *A Summary View*, in Boyd, *Papers*, 1, 122. See my discussion in Schwartz, *Liberty in America's Founding*, 39, and a review of the literature there.

32. Jefferson, ibid., 133.

33. See my discussion in *Liberty in America's Founding*, 237–307. While in many other ways Jefferson seems to rely on or align with Locke's view of rights, he passes over in silence in this context Locke's argument (II § 175–196) that conquest does not entitle conquerors, even in a just war, to the property of the vanquished. Jefferson would have known, however, that other political philosophers did think conquest was a foundation of right. As we shall see, Jefferson later will express the view that the Indians' land was purchased from them, though he suppressed his reservations about the legitimacy of that position (Banner, *How the Indians*, 50).

34. James Wilson, "*Considerations,*" 34, and discussion in Schwartz, *Liberty in America's Founding*, 40–41.

35. Taylor, *Papers of John Adams*, 317.

36. This view had been voiced earlier by some settlers throughout the colonial period, though it was not universally accepted in the colonies. See Banner, *How the Indians Lost Their Land,* for a discussion of the differing views on this topic and how in practice the colonies often purchased land from the Indians, recognizing native ownership.

37. Taylor, *Papers of John Adams*, 317.

38. See Schwartz, *Liberty in America's Founding*, 38–47, 61–65, for a discussion of how the question of the right to lands is essentially unanswered and hidden in the Declaration of Independence.
39. Others have discussed this paradox in the founding period, including Maier, *American Scripture*, 191–201; Bowen, *Miracle at Philadelphia*, 197–204; and Ellis, *Founding Brothers*, 81–119.
40. Grotius, *Rights of War and Peace*, book 2, chap. 20:40.4, 239. Jefferson likely would have been familiar with Grotius's theory since he had read Samuel Pufendorf, whose own theory of rights was influenced by and provided a commentary on Grotius. For a discussion of the ideas of conquest in the humanist and scholastic traditions prior to Grotius, see Tuck, *Rights of War*, 47–77, and for a discussion of Grotius's views, see ibid., 78–108.
41. Grotius, ibid., book 2, chap. 20, 48:1, 246. See Tuck, *Rights of War*, 103.
42. Ibid., book 2, chap. 20:40.3, 239; Tuck, *Rights of War*, 103.
43. Ibid., book 2, chapter 3:8, 96. [italics in original]
44. Ibid., book 3, chap. 8:3, 73; book 2, chap. 2:40.1 and 40.3, 238–9. See also Tuck, "Introduction," *Rights of War and Peace,* 16–17.
45. Ibid., book 8, chap. 6:6, 227. [italics in original]
46. Locke, II §§ 14, 36, 37, 41, 43; Grotius, *Rights of War and Peace,* book 2, chap. 2: 2.1, 19.
47. Grotius, ibid., book 2, chap. 2.7, 29, writes, "And if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the antient People."
48. See chap. 5, note 70 and related discussion.
49. Grotius, *Rights of War and Peace*, book 2, chap. 2:2.1, 19. [italics in original]
50. Locke, II § 49. On Locke's discussion of whether there were ever people in a state of nature, see also II §§ 14, 41, 100–102, and his references to peoples of the Americas and Indians in those contexts. See also his allusion to Indians in his discussions of the origins of property, II § 30.
51. Locke, II § 36 and my discussion earlier (chapter 6) on Locke's assumption that resources and land are limitless.
52. Locke, II § 37 and see also II § 37; Laslett, *Two Treatises*, 294.
53. Locke, II § 34, [italics in original] see also II § 35. For discussion of this theme of taking possession of open wilderness, see Tuck, *Rights of War*, 120–126.
54. Vattel, *Law of Nations*, book 1, chap. 17 § 209, 100. Originally written in French in 1758, the book was translated into English in 1759. James Otis, for example, mentions Vattel in *The Rights of the British Colonies* (July 1764).
55. See Stannard, *American Holocaust*, for a lengthy argument on this point. But even if "holocaust" were not used, it is clear that it was a conquest.

56. Williams, *American Indian*, 44.
57. Ibid., 14.
58. Ibid., 79.
59. See Williams, *American Indian*; Stannard, *American Holocaust*.
60. Williams, ibid., 81–85.
61. Eilberg-*Schwartz*, *The Savage in Judaism*, 32–37.
62. See especially Stannard, *American Holocaust*.
63. Williams, *American Indian*, 99.
64. For discussions of discovery as the means of taking ownership, see Banner, *How the Indians*, chap. 1; Williams, *American Indian*, 78; Stannard, *American Holocaust*, 64–65; Robertson, *Conquest by Law*.
65. Robertson, *Conquest by Law*.
66. See Williams, *American India*n, 96–108, on this point.
67. Ibid., 104.
68. Hanke, *Aristotle and the American Indians*, 17.
69. Ibid., 54.
70. Ibid., 38.
71. Ibid., 74–95.
72. The question of similarities and differences between the Spanish and British conquests is an interesting and complex one and is discussed by Williams, *American Indian*, 119–225, and Elliot, *Empires*.
73. Vespucci, like Columbus, was Italian but was financed by Spain and Portugal. For a discussion of the transmission and translation of earlier Spanish ideas into English translations, see Williams, *American Indian*, 121–191.
74. On the conquest of the Irish being a model for conquest of the Indians, see Williams, *American Indian*, 140ff.
75. Ibid., 211.
76. Ibid. On the Indians' abilities with agriculture in general and the permanence of many of their settlements, see the discussion in Stannard, *American Holocaust*, 3–54, and Banner, *How the Indians*, 10–48.
77. Banner, ibid., 6–9, argues that property and sovereignty are separate concepts. At the level of "sovereignty," England and the settlers viewed the American land as unoccupied, meaning that England could justify its government of the territory, even though it was recognized that the property was owned by Indians. I find Banner's distinction of sovereignty from ownership confusing, since sovereignty of a commonwealth could only be applied to territory rightfully occupied by a people who comprised a society under that sovereign.
78. Banner, *How the Indians*, 13.
79. Ibid., 14.
80. Banner, *How the Indians*, offers a brilliant exposition of this issue.
81. Robertson, *Conquest by Law*.

82. Jefferson, *Notes on Virginia*, 497; see Banner, *How the Indians*, 50, on Jefferson's deleted note.

Chapter 8

1. Locke, II § 123.
2. Hobbes, *Leviathan*, 13:3-4, 83; Locke, II §§ 21, 94, 101, 123, 137, and see the longer summary above in chapter 7, note 4.
3. Our position on what the state or government should be and how it should act is thus tied deeply into and rests upon prior notions about our rights and property that were articulated in the early modern period. Indeed, in many ways the modern understanding of the state is really nothing more than an extension or expansion of the core ideas of individual rights and property that serve as its conceptual foundation. Since we have already questioned both the self-evidence of natural rights and the modern understanding of property that came with it, it stands to reason that the very conception of the state has to come under some serious scrutiny too.
4. In "The Original Contract," for example, David Hume calls the notion of a social contract a political myth analogous to the myth of divine right of kings.
5. The idea that states were founded on conquest, and not on consent, was a persistent theme prior to Locke, was familiar to many of the American founders, and was mentioned by some of the early American colonists. See, for example, the discussion in chapter 7.
6. See note 2.
7. I discussed this point in the previous chapter.
8. As discussed earlier, Locke actually waffles on this point, sometimes arguing that there is an actual state of nature and an actual social contract and at times suggesting it is an ideal state only. For Locke's reflections on the question whether there ever was a state of nature and a contract that created a nation, see Locke, II §§, 14–15, 100–105. See Hobbes, *Leviathan*, 13:11, where he asks the same question. Modern interpreters who still embrace something like a notion of social contract tend to portray it is as an ideal for which liberal states should strive. I take this to be part of the thrust of Rawls's work and also the way that Laslett, 93, makes Locke intelligible.
9. See doubts among the American founders about the social contract theory in my *Liberty in America's Founding*, 85–128, including summaries by James Otis, 100–101, on typical critiques of the idea of a social contract.
10. Locke, II § 59, 61, and discussion of how natural freedom and "subjection to parents" can subsist together.
11. See, for example, Locke, II §§ 75, 87, and Friedman, *Freedom and Capitalism*, 15, on the use of the umpire analogy.
12. On the view that states are like individuals in a state of nature with respect to each other, see, for example, Locke, II § 183; Hobbes, *Leviathan*, 13.12, 85, and discussion in Tuck, *Rights of War*, 8–9.

13. According to Alan Krueger, chairman of the Council of Economic Advisers, "Land of Hope and Dreams," "An astonishing 84 percent of total income growth from 1979 to 2011 went to the top 1 percent of families, and more than 100 percent of it from 2000 to 2007 went to the top 1 percent." For additional discussions see also Stiglitz, *Price of Inequality*.
14. For inequality falling unevenly across races and genders, see Stiglitz, *Price of Inequality*.
15. This link of property, industriousness, and fairness is evident already; see Pufendorf, *Law of Nature and Nations,* book 4, chap. 4:7, 367–368, as a justification of property. The importance of property to the self was developed most intensely in the modern period by Hegel. See Waldron, *Right to Private Property*, 129, 343–389.
16. A thoughtful critique of how conceptualizing payments to the disadvantaged as "charity" impacts self-esteem and self-value of recipients is offered by Munzer, *Theory of Property*, 110–119.
17. Locke, II § 138. [italics in original]
18. Tuck, *Hobbes*, 30.
19. See Skinner, *Hobbes and Republican Liberty*, 124; Tuck, *Hobbes*, 30.
20. Hobbes, *Leviathan*, 30:17, 229.
21. Ibid.
22. Ibid., 30:18, 230.
23. On dating of Locke's *Second Treatise*, see Laslett, *Two Treatises*, 45–66, which dates the *Second Treatise* to the period of 1679–81.
24. Locke, II § 140. [italics in original]
25. Ibid., II § 97. [italics in original]
26. For a more detailed reading of Locke in this way, see Kendall, *Doctrine of Majority Rule*.
27. Locke, II § 95. [italics in original]
28. Ibid., II § 42. [italics in original]
29. Ibid., II § 51, and see also II §46 and 50.
30. Locke, I § 42 [italics in original]. See also Grotius, *Rights of War and Peace*, book 2, chap. 2:6, 4.

Chapter 9

1. Friedman, *Freedom and Capitalism*, 15, 8.
2. See, for example, Boaz and *Crane*, *Market Liberalism*.
3. Friedman, *Freedom and Capitalism*, 15, 8.
4. A notable example is Richard Epstein. See Epstein, *Simple Rules*, 30; *Principles*, 9–39, and "Utilitarian Foundations," 718, where Epstein argues that the original natural rights theorists often used utilitarian arguments and thus in their conclusions converge in many ways with utilitarian conclusions. He suggests that the loss in faith in God has led to a

modern emphasis on those utilitarian reasons but that core concepts developed by the rights tradition make sense and are consistent with a utilitarian perspective.

5. Milton Friedman, Fredrick Hayek, and Moses Mises are the most famous of those applauded by the Right and libertarians.

6. See Nelson, "Study of Choice," 31, quoting Georgescue-Roegen, *Analytical Economics*, 341. See also Debreu "Mathematization of Economic Theory."

7. There are a number of critiques of neoclassical economics for its single-minded narrowing. These come from within and outside economics. Examples of writers in this tradition include Sen, Sunstein, Kuttner, Hawken, England, Mansbridge, Nelson, Sibley, among others.

8. See the psychoanalytic and psychological traditions emanating from Freud and Jung and more recent commentators on the psyche, such as James Hillman, *Suicide and Soul*.

9. On this other side of Smith, see, for example, Sen, *On Ethics and Economics*, 22–28. See also Raphael and A. L. Macfie, "Introduction" to *Moral Sentiments*, 29.

10. Smith, *Moral Sentiments*, 3.

11. The fundamental disagreement arises from the positions of Keynes, *The General Theory of Employment*, and the monetary understanding was put forward by Friedman and Schwartz, *A Monetary History*. There is a vast second literature on the subject and disagreement. For useful summaries, see, for example, Smiley, "Great Depression," and White, "Boom and Crash."

12. On this critique specifically to economics, see Kuttner, *Economic Illusion*, and essays in Ferber and Nelson, *Beyond Economic Man*, and R. Nelson, *Economics as Religion.*

13. See England and Folbre, "Contracting for Care," and Nelson, "Study of Choice" on the way in which families and care pose a fundamental challenge to traditional economist models and the new economic theorizing about care. See also essays in Mansbridge, *Beyond Self-Interest*, and Leibenstein, *Beyond Economic Man*. For a counterpoint that argues that altruism doesn't exist, see Epstein, *Principles*, 133–157, and "Utilitarian Foundations."

14. Nelson, "Study of Choice," 26.

15. Hobbes, *Leviathan*, chaps. 14 and 15 are eloquent on this point. For a recent perspective, see Epstein, *Simple Rules*, 71–90.

16. See, for example, Epstein, *Simple Rules*, 43. In smaller and simpler social situations, pressure through social mechanisms of disapproval can suffice to pressure compliance, though it is doubtful that such mechanisms can work in broader, more anonymous exchanges, thus requiring "law" to enforce compliance.

17. This is basically the position of Hayek, Friedman, and Epstein, among others.

18. See, for example, the summary of analyses in Barrow, *Critical Theories of State*, for an understanding of how capitalist class interests may be developed and maintained through roles, institutions, and structures of late capitalist economies.

19. These views are influenced by many writers, including Kuttner, Sunstein, Hawken, Sen, among others.

20. Those who favor a utilitarian perspective must try to argue for the end of slavery without invoking the notion of rights. See, for example, Epstein, "Utilitarian Foundations," which tries to derive all the core values of the natural rights tradition from a utilitarian perspective. For my tongue-in-cheek critique of natural rights theory on this point, see my essay on endorsing suicide and slavery as part of a free society in Schwartz, "Liberty and the Public Good."

21. I am distilling the insights from Kuttner, Hawken, and Sens. I also see Rawls as attempting to ask a similar question but not going far enough.

22. See Waldon, *Right to Property,* who anticipates this perspective.

23. This is one of the classic challenges to the utilitarian position in general. For a discussion of objections to utilitarian approaches in general, see, for example, a useful summary and references in Velasquez, *Business Ethics*, 73–87. Rawls tries to mitigate this challenge by arguing everyone would agree with a liberal political system if they were in the original position and had a veil of ignorance about what their position would be. Since they don't know whether they will be poor or rich in the original position, they can come to agreement on how the system is most fair, and thus they can live with it, whatever the results. But as critics have noted, this strips the individuals of all the things they might want to know in the original position and thus undermines the ability of those in the original position to make rational decisions. For a critical discussion of Rawls's thinking, see Daniels, ed., *Reading Rawls*.

24. See, for example, Rosenthal, "Smuggling Europe's Waste," and NPR staff, "Electronic Waste."

25. Examples have been documented in Donaldson and Gini, *Case Studies*.

26. See Hoffman, "The Ford Pinto," 207–214.

27. Smith, et al., "Dow Corning," 39–42, and Gini and Sullivan, "The Dalkon Shield," 221.

28. See Velasquez, *Business Ethics*, 73–87.

29. http://en.wikipedia.org/wiki/List_of_motor_vehicle_deaths_in_U.S._by_year and NHTSA.dot.gov, June 2012.

30. See Pfeffer, *Human Equation*, and O'Reilly and Pfeffer, *Hidden Value*.

31. See, for example, the record of safety in the garment industry in Bangladesh, Ali Manik and Yardley, "Gross Negligence in Factory Fire," McCarthy, "Bangladesh Collapse," and Clean Clothes Campaign, "Making Bangladesh Garment Industry Safe." Another example is the treatment of workers in the fast food industry, as documented in Schlosser, *Fast Food Nation*.

32. See the International Labour Organization report on child labor "Marking Progress against Child Labour."

33. For documentation in the fast food industry, see Schlosser, *Fast Food Nation*. Recently, labor abuses have been reported in Apple manufacturing plants, Associated Press staff, "China labor watchdog accuses Apple supplier of worker abuse." http://www.nbcnews.com/business/china-labor-watchdog-accuses-apple-supplier-worker-abuse-6C10783106.

34. Bowie and Lenway, "H. B. Fuller in Honduras."

35. See case studies documented by Pfeffer.

36. Friedman, "The Social Responsibility of Business."

37. See, for example, the various critiques in Ferber and Nelson, eds., *Beyond Economic Man*, and *Feminist Economics Today*.

38. On stakeholder theory, see Freeman, "Stakeholder Theory," and Goodpaster, "Stakeholder Analysis." See, for example, Benioff, *Compassionate Capitalism*.

39. In this sense, I take Friedman's argument about the purpose of business to be for the shareholders as a description of how things in reality are, but not as a description of what they morally should be, though Friedman believes this is the way it should be as well. For the complexity of trying to see the relationship between corporate executives, board members, shareholders, and class, see the discussions in Barrow, *Critical Theories of State*.

40. It is difficult to see how one can get to all of these values from a utilitarian account.

41. See Friedman, *Freedom and Capitalism*, 108–118.

42. Grotius, *Rights of War and Peace*, book 2, chap. 3:1–16, 32–39, on the air and sea. For a discussion, see Tuck, "Introduction," *Rights of War and Peace*.

43. On use of term "externalities" by economists, see, for example, Flynn, *Economics for Dummies*, chap 14. For a sustained alternative perspective, see books by Hawken.

44. For discussions of how future generations should figure into ethical calculations, see the discussion in Velasquez, *Business Ethics*, 308–312, and references there.

45. I take this to be one of the original points of Garrett James Hardin in his original essay on "The Tragedy of the Commons," and one point I agree with. In my reading of Hardin's original essay, his point is that the commons becomes a tragedy *only if it is not regulated and that regulation is needed to protect it*. One example he gives is the national parks, which are owned in common (public property) but must be regulated to protect them. His point is that without regulation, things cannot be owned in common successfully. It is beyond the present context to discuss the extensive subsequent scholarship and popular discussion of whether the commons always ends in tragedy or not, and I do not agree with some of Hardin's subsequent moral conclusions, such as his moral conclusions about preventing immigration in his metaphor of "Living on a Lifeboat."

46. See on this point Hawken, et al., *Natural Capitalism*, and Hawken, *Ecology of Commerce*.

Chapter 10

1. See Wilson, *Rationality*. This was already noted as a problem by Locke and others as they reflected on why non-Europeans did not all come to the same reasoned assumptions about social life. This remains a key problem that is unresolved by liberal societies.

2. In other words, even if we argue there is shared rationality in modes of thinking, the substantive conclusions of rational people are not always the same. On the argument that there is a universal understanding of right and wrong, see discussion in Tierney, *Idea of Natural Rights*, 2–3, and Gewirth, *Reason and Morality*.

3. See my discussion earlier on this point, in chapter 4 and notes to that chapter.

4. Whether it is possible to discern the founders' intent and whether that should govern or dictate what we believe and do is itself an interesting question that I take up in *Liberty in America's Founding*, 309–323. See also Levy, *Original Intent*.

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