Beyond Liberty Alone

A Progressive Vision of Freedom and Capitalism in America

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Other Ideas Press
San Francisco, CA

ISBN: 0982832516
ISBN-13: 9780982832516

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

Contents

who has stolen property that does not belong to him or her. We call such a person a thief. We should not give a pass anymore to those who use and do not pay back. The payback is not "charity" at the whim of the person who does well. It is an obligation that arises from standing on the platform that others had built. The payback is required, just as in a bank loan or venture capital investment. Those who think they earned it all by themselves are deceived. We shall have more to say about this notion of property and debt below.

Chapter 4
Why Rights Are Not Self-Evident

Those who prioritize natural rights over other moral and philosophical considerations do so in part because they believe rights are self-evident and natural. In fact, the notion of natural rights is precarious. By precarious, I mean that the foundation and specificity of natural rights are up for debate and not at all self-evident, contrary to the position seemingly articulated by the Declaration of Independence and the natural rights philosophers who wrote earlier. Since natural rights are up for debate, what our rights are and mean is difficult to specify outside of some political process and some social community with a set of values, aspirations, hopes, and philosophical commitments. To put it more paradoxically, liberty is not a self-evident set of moral commitments that is clear up front, but a process through which we define what our rights are and should mean. Thus liberty is best understood as a particular moral and political philosophical theory about how to distribute power, goods, and resources fairly in a society in which there is no single notion of truth that is commonly accepted.

In turning to the precariousness of natural rights, I want to deepen the critique that has guided us so far. We have already seen that our opponents make several mistakes in how they think about human beings, rights, and liberty. In particular, they overemphasize the importance of rights to the exclusion of other values, and they miss the ways that sacrifice

and responsibility should inform how we think about ourselves, our lives in society, and ourselves as part of humanity. At this point, I wish to turn back to the notion of natural rights that has such a grip on our American imagination and show just how ambiguous the notion of natural rights really is and how problematic it is to rest American decision making on rights alone. If what natural rights are and mean is indecisive, then we need to revisit the assumptions about the respective roles of government and individuals, which have been based on rights.

What emerges is a picture of liberty as a process, rather than a set of substantive and clearly defined rights, that attempts to distribute power fairly among a broad range of stakeholders, precisely because there is no agreement on substantive truth commitments. It is in part the lack of agreement on truth or reason that generates the need for a process that distributes power and resources fairly in a society that embraces liberty. Where truth is agreed upon, the problem of distributing rights and resources and power is less problematic, though the interpretation of the truth itself may still be subject to debate. This understanding of liberty turns upside down the traditional relationship of liberty and rights. Instead of liberty meaning something concrete in nature, it comes to take its meaning from within a liberal and social political process that values the fair distribution of power, resources, and access to power. Liberal societies are those that produce liberty due to their vision and self-understanding and because of their desire for some notion of human equality and fairness, which is the source of liberty.[1] It is the fact that the society is liberal and values diversity that it produces rights, rather than that rights produce liberal, diverse societies. Rights emerge through a social, political process that values not only the individual but the fact that humans have many different truth commitments. In this formulation, a particular type of society gives birth to liberty, and not the other way around. Liberty does not exist before or outside of society. Liberty emerges through specific forms of social, political processes and cultural commitments. This insight has important ramifications, since it complicates the traditional understanding of government's role with respect to individual rights.

To understand why this view of liberty and rights makes sense and is compelling, it is worth contrasting it briefly with the alternative view, put forward by many liberty-first advocates and following the mistake of some, though not all, of the early modern rights thinkers. In their view, rights are in nature or God-given, and therefore they exist outside of or before social life. For this reason, rights are "inalienable," meaning people can't sell or give them away. I don't have a right to end my life or sell myself into slavery, though some early moderns thought you could give yourself into slavery under certain conditions. Since these rights precede political societies, people enter society only on the assumption and condition that their lives will be better in society than outside society. If society stripped them of all the rights that they had in nature, they would never join society nor give up their freedom in nature. For this reason, societies and governments cannot legitimately exercise power to take away or curtail individuals' rights, since those rights exist outside of or prior to society.

There are a number of difficulties with this view of the relationship of rights to societies. To begin with, it is impossible to prove that rights exist in nature. We have already seen in fact that there are different justifications of rights (e.g., God gave them to us, reason discerns them, and the social character of human beings makes them self-evident). While debate continues about whether some notion of right and wrong is universally recognized, the fact that we can't agree on the foundation of specific rights or the substance of our rights is really a problem about which few seem willing to talk.

If we cannot agree on how we know that rights exist, how could we possibly agree that we know what our rights are? This question seems so self-evident that it is startling how few people think about it. The reason we tune out this question is because the assertion "we have self-evident rights" is an American tradition that is accepted uncritically. It is accepted like a religious dogma or revelation, without scrutiny. It is evident in the Declaration of Independence, understood to be enshrined in our Constitution and Bill of Rights, and protected by our Supreme Court and the structure of our republican government. But if modernity questioned anything, it

made tradition a subject that could and should be thought about critically. The questioning of tradition was at the heart of both the Protestant Reformation as well as the modern Enlightenment's doubt that revelation alone could provide the foundation of all knowledge.[2] This questioning of tradition continued in the founding of America, where the founders prided themselves on their critical thought and engaged the key thinkers and philosophers of their day. They would have been disappointed to know that Americans today accept their ideas uncritically like religious dogmas that cannot be questioned.

Neither God nor Reason as a Foundation of Natural Rights

We have already seen that there was no common agreement among natural rights thinkers about what the foundation of natural rights is or should be. Some argued natural rights flow from reason's discernment of God, the moral Lawmaker. Others argued that rights flow from the social nature of the human being that is grounded ultimately in the desire for self-preservation. All argued that rights could be discerned by reason. This disagreement should be, and in fact became, disturbing for those who wanted to find some grounding for a universal moral law.

After the failure of European Christian communities to come to agreement on what God wanted of Christians, natural rights thinkers intended to find a foundation for rights and morality in the conclusions on which reasonable people could agree. It was a noble vision. They sought to ground human moral life on a human science that would end once and for all the religious debate about the nature of truth and the essence of human character. They ultimately failed. The expectation that the new "natural philosophy" (later to be called "human" or "social" sciences) could be as objective as the natural sciences did not materialize. Ask most people who teach humanity and social sciences today. Over the last three centuries since the Enlightenment, sociologists, anthropologists, psychologists, and even economists would all try to create a science of the human that would be as rigorous as the natural sciences and that could discover the underlying laws of human nature. But none has ever

come close to the achievements of the natural sciences.[3] The aspiration to identify laws of human behavior has been elusive in the social sciences, and some believe it is even elusive in the natural sciences itself. At least it has been elusive enough to seriously doubt whether laws of morality can ever be produced to everyone's satisfaction.[4]

Even in the seventeenth century, when the modern notion of natural rights was developed, it became increasingly obvious that reason might fail to provide a universal foundation for rights. Ironically, the problem was that reason turned out to have some of the same problems as religion and revelation. Reasonable people could and did come to different conclusions. Not all reasonable people could agree on the foundation of natural rights (e.g., there is a God versus there is a social inclination) nor on the particular boundaries of those rights. They disagreed, for example, on whether reason led to the conclusion that the sovereign should have supreme power or whether property was a natural right. They disagreed also on whether one could invade and conquer another country that was not observing the laws of nature. These debates foreshadowed the similar situation in which we find ourselves. The fact that reason cannot solve the problem of contested moral ideas is still evident today when we debate continuously whether we have rights to guns, abortion, gay marriage, euthanasia, health care, free markets, and so on. Both sides of the discussion see themselves as reasonable in their conclusions. Both sides think they are defending our natural or self-evident rights. The language of rights is in fact used to defend opposing opinions. One obvious example is abortion, where the rights of the unborn entity are opposed to the rights of the mother to choose. Rights can be used to defend both positions. The same can be said for the debate over gun control. On the one side, those who want to carry firearms argue they have a right to bear arms. Those opposed can argue that the restrictions on guns are part of a right to protect life.

Even Reasonable People Disagree

The problem with the self-evidence of natural rights is everywhere around us and always has been. If we had self-evident rights, then reasonable

people would agree. Unless we declare everyone who disagrees with us incompetent, intellectually lazy, or stupid, then we have to come to the conclusion that even reasonable people disagree on what's reasonable.[5]

Many of our contemporary debates about rights are in fact an attempt to define precisely what liberty means. We may agree with the abstraction that "we have rights." But our sense that rights are "self-evident" is typically achieved only when the idea of rights is stated so abstractly that the detail of what the right actually protects does not get in the way of agreement. As soon as we try to put specificity on a right, agreement often dissolves. This character of our rights language is analogous to us saying we all "love America," even though we have very different concepts of what America is. Or when people say "I believe in God," some think of God as a personal being, while others think of God as the nonpersonal laws of the universe. The concept of liberty has a similar feel to it. Agreement with an abstraction covers disagreement at a more fundamental level. This point is important as we think about how liberty should work in a liberal society.

Recent debates over whether one has a right to bear arms, a right to same-sex marriage, a right to die, a right to end one's life, a right to abortion, a right to polygamy, all point to the way in which the bucket of rights has quite a bit of elasticity that can expand or contract depending on how one views rights in general and the rights to life, liberty, and property in particular. Almost anything we cherish can be defined as a right. What constituted debated rights in the past was different from what constitutes the subject of rights debates today. And we can be assured that what constitutes the focus of rights will shift again in another fifty years. Those debates may be about who can have water and at what cost or whether we have the right to have as many children as we wish because we lack sufficient resources for the human population. We cannot foresee the circumstances in which people live, and therefore we cannot say precisely and with certitude what rights will matter. And even if we could agree on what the core natural rights are, what they mean in specificity would itself be a matter of debate.

Modern natural rights thinkers did attempt to draw a distinction between "natural rights," which were from nature or God, and "civil rights" (or the "law of nations"), which were created by specific sociopolitical institutions and were granted by particular societies for individuals. Natural rights were thought to be universally discernible, while civil rights were specific laws or protections offered by specific societies.

This distinction between natural and civil rights is all but forgotten today as people argue over their rights in general. In part, this is because it is very difficult to say what right falls into the bucket of "natural rights" and what falls into the bucket of "civil rights." Take the rights enumerated in the Bill of Rights, the first ten amendments to the Constitution of the United States. Are they natural or civil rights?

Is the right to a free press a natural right or a civil right? Could it be a natural right when the press doesn't exist in nature? Or is the right to a free press an extension of a natural right to speak one's mind in nature? And is that right of speech just an extension of the right to liberty itself? Who decides what a valid extension of a right in nature is? And is an extension of a right in nature a natural right or a civil right?

What about the right to bear arms? Could there be such a right in nature when arms had not yet been manufactured? Does the right to bear arms not already suppose the existence of arms that one can have a right to bear? And does not the manufacture of arms imply the existence of human communities that invented them? In what sense, then, can the right to bear arms be a natural right that precedes social life? Or rather, is the right to bear arms just an extension of the right to protect myself by any means, which is an extension of my core natural right to life? But again, what is a valid extension of my right to life, and who gets to decide? Is it clear that my right to life can be extended to guns that are invented by humans? And if guns, why not a right to own a tank or bear nuclear weapons?[6] Where and how do we draw the lines? Does nature tell us where those lines are, or are those civil lines we draw, and who gets to set them? If it is society that draws the line between natural and civil

rights, how can anyone claim they have natural rights as if those rights do not emerge from a social decision?

Do we have a right in nature to same-sex marriage? Is there even a notion of "marriage" in nature, or is the very concept of "marriage" not already a religious and cultural conception imposed on a type of relationship that also contains sexuality? In nature, is "copulation" the same as "marriage"? Is there marriage in nature at all? When animals reproduce, are they married? And since many animals do not pair with partners for life or even for more than a mating season, in what sense can marriage be natural? What implications do we draw from animal species that exhibit homoeroticism and polymorphous sexuality? Surely marriage is a concept that carries certain religious and cultural assumptions that arise from human communities and certain understandings of men, women, God, the sacred, and so forth. In what sense, then, can marriage be a natural right? And if it is instead a "civil" institution, then the specific society has in its purview the right to define it as it pleases, including the right to eliminate the institution of marriage completely if it wishes. Marriage itself is a human institution, so how can there be a natural right to it for anyone, including heterosexuals? Isn't marriage then by definition a civil right? And thus isn't the debate over gay marriage really just a debate about what we in this society want to include in the category of marriage? Do we not have instances of cultures in which polygamy seems to be accepted as the norm, including the culture of the biblical Israelites?[7] And isn't the very concept of marriage already a human construction and symbolization of a certain kind of relationship? The answer has nothing to do with nature but has everything to do with our values: our ideas about God and privacy and what love and sexuality are.

The point that I am making is that there is little clarity about which rights are natural and which rights are derived from society. This is because all rights are in fact civil rights, for they are the rights that society picks out to affirm as most important. It is society that arrives at a notion of what's natural based on a set of convictions and propositions about what it means to be human and what it means to be a member of that society. Each society has convictions that it develops about how what

it sees as core rights should be implemented and extended for its particular social setting and moral commitments. Of course, these decisions may represent compromises between competing views if the society does not impose one set of convictions on everyone.

What about the very right to life itself and the inclination to self-preservation, which is what many early moderns defined as the primary natural right? It is arguable that this right is the very foundation of all the other rights, since even the rights to liberty and to property are interpreted as extensions of the right to life itself. Isn't the right to life a clear and self-evident natural right? Natural right advocates say yes, though they arrive at that conclusion through various routes. Some see the instinct to self-preservation as inherent in nature and in human beings.[8] Others have argued that life is sacred since it is given by God. In the classic formulation by Locke, we have a right to life because we are God's workmanship. Since we are each God's property, no one has a right to hurt us. Perhaps the different ways of arriving at the right to life do not matter, and the conviction that there is a right to life is more basic than its justification. But even with the right to life, we see varying interpretations of what it means and how it should be implemented.

For example, is the right to life unqualified? If so, then there should be no capital punishment. The fact that some societies practice capital punishment shows that there is a view that certain human behaviors justify the extinguishment of an individual's right of life. Even the classic natural rights thinkers argued that one could take life under certain conditions, such as the life of a murderer—or even when a thief enters one's house at night.[9] They argued that anything that borders on a threat to one's own life can be met with the right to take the life of another. But what borders on a threat to my life and what kind of crime might be so egregious that the criminal's life should be taken are both difficult questions that depend on other values and assumptions.

A similar issue arises in discussions of war. Pacifists argue that there is no condition under which it is right to take a life. By contrast, the "just war" tradition assumes that there are conditions in which it is justified to go to war and take a life. Those who embrace this tradition argue

that states and nations are in a state of nature with respect to each other and can go to war under certain just conditions.[10] However, as we might expect there are disagreements over what constitutes "just causes" too. Some viewed the violation of Christianity as a cause of just war; others the violation of the laws of nature.[11]

The debate over abortion is also at least in part a debate over the definition of life and when life begins. Since the beginning of life is itself dependent on religious conceptions of what life is and when it starts, the debate over abortion is a debate about what life itself means. And the argument over whether people should have a right to end their lives or to practice euthanasia is a debate about whether the right to life belongs to a person him- or herself or is sacred and belongs to God. Who is going to adjudicate whether life is our own or belongs to God in a society where not everyone believes in God? And who is going to be the authoritative interpreter of God's wishes anyway in a society with various religions that understand God differently? Who decides when my God says something different to me than your God says to you? If one looks beyond our own modern culture, there are societies that seem to have very different convictions about life. In some, there is evidence that cannibalism or human sacrifice may at times have been practiced. And so the conviction that life is sacred and what that means seems to a certain extent to be culturally dependent. Whether these practices or positions are morally justifiable or defensible is complicated. Each side can tell its own reasonable story about the positions it holds. And even the most seemingly savage practices of other cultures look reasonable to those societies, and a lot more reasonable to us, when ethnologists, anthropologists, and scholars of religion understand other cultures from the inside out. Indeed, the whole history of modern anthropology and ethnography since the late nineteenth century has been to debunk the sharp dichotomies we in the West have had between "savage" and "advanced" cultures.[12]

What we realize, when we dig beneath the high-level claim that "we must protect our rights," is that it is indeed murky what the source of those rights is, what is included in them, and what they specifically mean. Even if some of us are sure we know what our rights are and what they mean, not all of us agree. And therefore any attempt to say what our rights are and mean is to impose a perspective on a group who may have different conceptions. One could try to argue that it doesn't matter what people think, because a particular notion of natural rights is either authorized by God or inscribed by the founders in the Declaration of Independence or the US Constitution. But none of those arguments suffices to quell the ambiguity inherent in natural rights, for at issue is precisely the question of who gets to say what God or the founders meant. The attempt to discern a clear intention in scripture for understanding God's intent or in the Declaration of Independence and the US Constitution raises the same problem. Not everyone reads these documents the same way. The original intent in scripture or among the American founders is debated by different groups, be they religious authorities, historians, or Supreme Court justices. Even historians cannot come to a consensus on a single account of what happened or what a particular document means.[13] If that is so, then an account of liberty must take account of the divergent views not just about religion and God, but about what truth and morals are and, by extension, even what rights are.

All of this is to say that those who appeal to natural rights oversimplify an immense problem when they try to settle the question of government's limits and our rights. The matter is not so simple or clear-cut, because as human beings we have divergent views of morals. So how do we constitute a society when people differ not only in religion, but in their moral convictions and their conceptions of rights?

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The early modern natural rights philosophers did not quite see the full implications of reason's failure to provide a self-evident foundation for morality, though glimmers of the problem had started to appear. They were already fully aware of a diverse range of religious and moral views and practices among the world's peoples. Most acknowledged a difference between inconsequential cultural variations, which some called "positive

law," "the law of nations," or "civil law," and a universal moral law that they called the "law of nature."[14] It was recognized that each nation had its own tastes and ideas and that cultures differed from one another. What one group liked to eat or the accepted rules of behavior could vary across societies, and many of those differences were perceived to be insignificant cultural variations or matters of taste. But natural rights thinkers argued that the moral law was not a matter of taste, and some expected that reason would and should have led everyone to the same moral conclusions. The fact that there were variations even in what appeared to be core moral principles was a problem that had to be explained. As Locke posed the problem, "If indeed natural law were discernible by the light of reason, why is it that not all people who possess reason have knowledge of it?"[15] There was in fact no easy or compelling answer to this question, because the question itself had a flawed assumption: that all people using reason always arrive at the same conclusions.

The answer the natural rights thinkers gave was ultimately unsatisfactory. They concluded that human diversity on moral matters, religious beliefs, and practices was due to the fact that some individuals and even whole nations had not yet opened themselves up to the light of reason and thus had not embraced the laws of nature.[16] If only people could be shown reason through education (or in some cases forced to see reason), they too would come to the same conclusions about morality, God, religion, and natural rights. The encounter with native peoples with wildly different lifestyles, moralities, and religions posed a devastating and ultimately unanswerable challenge to this natural rights perspective. The divergence about what people thought was reasonable was as problematic as the earlier debates about what God wanted.

One important early modern natural rights thinker, Thomas Hobbes, concluded that reason could not be relied upon to bring people to agreement on all moral and religious matters, with the consequence that human beings are always in danger of dropping back into a state of war. To address the insecurity of reason, this thinker proposed that there must be an all-powerful body or sovereign in society that could resolve disputes and determine the religious beliefs of society.[17] Since reason could

not bring people to agreement on fractious issues, there must be a single power in society that imposed an answer. One of the great ironies of the modern period is that one of the most important early modern natural rights thinkers who shaped our language and ideas about natural rights endorsed the need for some social body or person to have absolute power in society to dictate laws, values, and even religion.[18] He concluded that only by giving a sovereign power absolute control was it possible to solve the problem that *neither religion nor reason* could lead people to agreement.[19] This absolutist notion of government was ultimately rejected in the natural rights tradition of the seventeenth century. Yet the fact that such a position was held by one prominent natural rights thinker shows that the very notion of natural rights does not lead to just one particular conception of government. *The very meaning of natural rights itself is part of what we debate as part of a liberal society.*

Even John Locke, the recognized father of the liberal modern natural rights conceptions, may have harbored his own doubts about the ability of reason to lead us to a common moral law. Locke's doubts would not matter were his writings not such a strong foundation for the American view of rights. Some political philosophers today see such a strong link between Locke and the American founders that they even want to use Locke's positions as the framework by which we eliminate debate about the meaning of our own constitution.[20] For those interested in the history of ideas and the possible roots of American philosophy, stay with me in the paragraphs that follow as we take a more detailed look at possible doubts about reason that may even be visible in Locke's writings.

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In Locke's famous *Second Treatise on Government*, in which he is credited with setting out his core philosophy of government and rights, and one to which liberty-first advocates often appeal, Locke assumes that the idea of natural law is universal and evident from reason's ability to discern a Creator God. As a younger man some years before, Locke had written a

series of essays explaining the foundation of natural law.[21] But in his *Second Treatise*, Locke never defends the existence of natural law or God, the moral Lawmaker, which sits as a foundation for his argument for natural rights. Though Locke relies extensively on the concept of natural law in this treatise on government to derive rights and conclusions about proper political arrangements, he notes that "it would be besides my present purpose, to enter here into the particulars of the Law of Nature."[22] The existence of a natural law was an assumption seemingly taken for granted in this influential work of political philosophy but never explicitly defended. The lack of any justification of natural law in the *Second Treatise* raises an interesting question that hovers in the background for anyone attempting to understand Locke or to build a political philosophy of right that rests on both Lockean ideas and those of the American founders. Why did Locke not elaborate his ideas about natural law in his treatises on government or come back to develop them later in his life? Did Locke realize that his early arguments for natural law were problematic in some way, or did he think natural law had already been proven?

A similar question arises from the missing justification of natural law in Locke's *An Essay Concerning Human Understanding*, Locke's majestic and influential work, which is ultimately a search for the very foundation of knowledge and led both contemporaneous friends and critics of Locke to press him for an updated justification of natural law.[23] The missing argument about natural law raises an interesting and interpretive problem in understanding Locke but also for any theory of rights that tries to depend on a Lockean approach. Some interpreters assume Locke simply took for granted the views of his earlier essays on natural law, written as a younger man, and felt no need in the later discussion of government to repeat arguments about natural law and God's existence that he had made earlier and that had been developed by other writers who had published since his essays.[24]

Yet this answer may be too simple. The ambiguity in Locke's position is compounded when Locke examines the foundation of human knowledge. Locke tells the story that he wrote the *Essay* in response to a discussion with friends about the foundation for morality and possibly natural

law. While Locke's *Essay* was a revolutionary perspective on the way the mind and reason construct knowledge from the senses, it is clear Locke himself felt he fell short of the goal of finding the foundation for morality. In the *Essay*, reason's capabilities appear much more tentative than they do in his earlier essays on natural law when he was a younger man, even though the later work starts with assumptions and language from the former. In the later, more mature context, Locke is more skeptical, describing the mind as an active agent that uses reason to construct the very notions of time, space, duration, weight, identity, mass, and infinity with which it engages the world. These are not innate ideas but frameworks through which the mind engages the world. The mind is thus active in producing the framework of knowledge that we humans have, down to the very bedrock of our foundational conceptions of time, space, weight, solidity, etc.

After spending six hundred pages showing how limited human knowledge is and how active the mind is in interpreting input from the senses, Locke reaffirms his claims that reason can also arrive at a notion of a God whose existence is presupposed repeatedly throughout the work. Locke demonstrates knowledge of God, however, in what is a strikingly short and unsatisfying chapter for a thinker who has thought so deeply about how we come to know what we know.[25] Perhaps Locke was simply assuming the proofs of God's existence were already demonstrated and the foundation of those conclusions didn't need to be reexamined. Whether intentionally or not, Locke's work on the constructed nature of human knowledge ultimately throws doubt on his own conclusion that God and morality could be discerned by reason.[26]

Indeed, a reader of Locke's *Essay* can't help but wonder whether Locke himself had doubts about whether God was as "unreal" or as "constructed" as space, time, and duration, other concepts needed and produced by the human mind. Even the idea of infinity, which is really required to come to the idea of God, is acknowledged by Locke to be itself constructed by the mind as an extrapolation from concepts of space and duration. Locke's reassurances to the contrary seem hollow, as when he writes the following about the impossibility of having certainty about spiritual beings

such as angels: "Angels of all sorts are naturally beyond our discovery;… the knowledge of his own mind cannot suffer a man that considers to be ignorant that there is a God. But that there are degrees of spiritual beings between us and the great God, who is there, that, by his own search and ability, can come to know?"[27] It is understandable that some of his earliest critics and religious contemporaries (such as the Bishop of Worcester) thought Locke's understanding of reason and knowledge undermined traditional Christian faith and had led to a slippery slope to atheism.[28]

In any case, Locke reasserts his claim that the mind has enough knowledge to discern God. He writes that "How short soever their knowledge may come of a universal or perfect comprehension of whatsoever is, it yet secures their great concernments that they have light enough to lead them to the knowledge of their Maker, and the sight of their duties."[29] Toward the very end of his extremely long treatise, he repeats in a very short and, by the standards of the rest of his book, an unsatisfyingly shallow argument that the mind can discern a Creator God.[30]

In the context of this lengthy treatise on what the human mind can and cannot know for certain, a treatise that demolishes the notions of innate ideas, including the innate idea of God, and that reveals an active mind that constitutes what it experiences as much as it receives from the outside world, one wonders how genuine Locke is when he makes the traditional argument for the discernment of the Creator. Is it really possible that the same thinker who spends upward of six hundred printed pages discussing how the mind comes up with the ideas of space, mass, time, substance, duration, and even infinity, would feel content with only nine pages on how the mind arrives at the idea of God, the timeless and boundless Creator? Perhaps. Perhaps Locke had not taken the final step and turned his own critical thinking toward the foundational religious assumptions on which he grounded morality. And that is an understanding of Locke that many of his interpreters assume.[31] Yet Locke's reticence on the question of God and the origin of the natural law looks suspicious, and one can give many historical reasons why Locke would have been reluctant to draw out the more radical implications of his own thinking on the idea of God and be subject to the charge of "Hobbism," which

was how atheism was described in his day. In fact, Locke's *Essay* never delivers on its purported purpose of finding the ground of the moral law and of ethical conduct. Locke thus fails to achieve what he set out to do. He leaves no solid foundation for the natural law, which itself provides the foundation for his view of individual rights, which are, according to Locke, the basis of government. It seems that subsequently Locke may have written his work *The Reasonableness of Christianity* in part as an attempt to sort out some of these problems left unresolved by his theory of knowledge in the *Essay*.[32]

We may never know whether Locke came to doubt his argument that reason could lead us to a moral law, though some interpreters, myself included, believe he was aware of this failure.[33] In the end, it doesn't matter. Within thirty years, others had come to have such doubts. Indeed, within his lifetime, deists such as John Toland, Anthony Collins, Matthew Tindal, among others, were already picking up on the tensions between reason and revelation and leveraging reason to call into question whether major sections of revelation were really not from God at all.[34] Whether or not Locke reached that point on his own, his work certainly accelerated the tensions between revelation and reason. Furthermore, the realization that reason alone could not solve the ambiguities about morality came to be defined as one of the failures of the Enlightenment itself. In this way, the problems that the century started with, namely, how to arrive at a moral law when revelation's meaning is disputed and when there is such human variability in thinking and practice, had been shifted in the century that followed to reason itself. Reason would crumble as an identified source of common agreement.

By the middle of the eighteenth century, the very notion of natural rights could be dismissed by philosophical thinkers as the fiction of a political party. The great philosopher David Hume, for example, argued that the notion of natural rights and "social contract" is as much a fabric of speculative principles to justify a political party as the view that God authorized divine rule and monarchy.[35] Doubts about natural rights made their way into the founding of America, caused the American founders to hesitate to initially rely on natural rights arguments in the period

leading up to the Revolution, and may have influenced Jefferson himself, though these misgivings were forgotten once they were enshrined in the Declaration of Independence.[36] By the middle of the nineteenth century, the very notion of natural rights had appeared to the utilitarian philosopher Jeremy Bentham as "simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts," and philosophic doubts about the validity of the concept have persisted among philosophers since that time, leading many to prefer a utilitarian approach to morality and ethics.[37]

When Reasonable People Disagree

To step back for a moment, the larger problem before us is this: How do we create a society if both reasonable and religious people cannot achieve agreements on even basic principles? Perhaps religious people are right that there is a Creator God and that God has certain expectations of us as human beings. If there is a God who actively cares about the world, then it would seem reasonable to assume that such a God had ideas about how we should live. Christians, Jews, and Muslims, among other religions, certainly think so. But the problem is that not everyone agrees with them, either on the fact that there is a God or what that God wants of us. Even those in the same religion do not agree among themselves, as was already apparent in the seventeenth century. Catholics, Protestants, Lutherans, Evangelicals, and Mormons cannot agree on what God expects of society, not to mention the disagreements among Jews, Muslims, Buddhists, and other non-Western religions. The same problem of diversity in religious beliefs and in what counts as reasonable has not gone away by the appeal to natural rights. The toleration for religious differences that began to emerge in the seventeenth century and was ultimately embraced by the American founders through the work of Adams, Jefferson, and Madison, among others, recognized that political institutions should not try to resolve the disagreements about religious truth. That should be left to the afterlife for God to resolve.

What the early modern natural rights philosophers did not see quite as clearly is that the very same problem is present in trying to found both moral law and natural rights on reason. Not all reasonable people come to the same reasonable conclusions. And while some reasonable people might be right and others wrong, who gets to define what is reasonable in the first place?[38] People who think they are right feel they should be the ones to decide. This ambiguity in what is reasonable itself turns out to be a core issue that any theory of liberty must solve. Hence, the question before us is, what are we to do when there are conflicting views of what is reasonable? Should we have a separation not only of church and state, but a "separation of reason and state" as well? If we separate reason and state, then how do we come to any decisions about what our founding principles are or imply? Are we left with mere consensus or rule by a supermajority and no other foundation? From where should we derive the moral limits on the acts of the majority if there is no law of nature to which we can appeal?

The problem for the advocate of liberty is not, then, the problem of relativism (i.e., "there is no truth"), but the problem of diversity ("people have different views of truth"). If we all agree that reasonable people can disagree, the question becomes: How can we live together given that we do not agree on whether there is a God, what that God wants, or what counts as reasonable? Human beings will not come to agreement on the nature of the human being, God, or the absolute, nor the correct moral law. Ironically, the believer in God, the advocate of reason, and the relativist all end up with the same problem on their hands when it comes to living together. They can either impose their standards on others through the use of power or persuasion or seek some other mechanism for resolving differences of opinion about what the founding principles are or should be. We could, as one natural rights thinker urged, opt for an all-powerful sovereign body in society to end the debate, or we could revert to a monarch who simply dictates what is right and wrong. Sometimes, in our current messy and broken political processes, those options look good. But we tried those approaches in the past, and the sacrifices they entailed seem too big.

practice of liberty that is and ought to be totally dissolved; and that as a free and independent people, we have the power and duty to limit war, conclude peace, contract alliances, establish moral commerce, protect common resources, repay debts to the past and the people who preceded us, and do all other acts and things that independent moral states may and should of right do. And for the support of this declaration, with a firm reliance on the protection of the ultimate commitments and values to which we aspire, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

Notes

Preface

1. Tuck, "Introduction" to *The Rights of War and Peace*, 6. For a deeper discussion of the influences on Jefferson, see my own Schwartz, *Liberty in America's Founding.*
2. The other book I wrote on this topic is *Liberty in America's Founding*. I have also published a number of essays on my website: www.freedomandcapitalism.com.
3. One can peruse the bibliography to see the hundreds of other voices who have influenced and shaped my own views.
4. See, for example, Boyd, *Declaration*, 16; Becker, *Declaration*, 25; Ford, *Works*, vol. 10:343; Malone, *Jefferson*, 220; Schwartz, *Liberty in America's Founding*, 18–21.

Introduction

1. Friedman, *Freedom and Capitalism*, 15, 8.
2. See Hayek, *Road to Serfdom*, xxxv, and his essay called "Why I am not a Conservative" in *Constitution of Liberty*, 397–411. Contrast this with my essay, Schwartz, "Why "Market Liberals' Are Not "the True Liberals.'"
3. I take this impulse as also behind the writing of others in the progressive or justice tradition, including but not limited to John Rawls, Amartya Sen, Ronald Dworkin, Cass Sunstein, Paul Hawken, Robert Kuttner, and many others who inspired me and whose names appear in the endnotes and bibliography.
4. Libertarians tend to be more consistent in their use of liberty than Republicans or Tea Party advocates. They tend to invoke the notion of individual rights more consistently regardless of the issue. Republicans and Tea Party advocates tend to use the concept when it suits their purposes. For the discussion of the Pledge of Allegiance, see, for example, Hannity, *Let Freedom Ring*, 113–142. On the abortion issue, see, for example, Ron Paul, *Liberty Defined*, 1–9; he argues against the right to abortion, but otherwise holds a fairly strict adherence to a proliberty position. Of course, he gives reasons for holding this view. But that is precisely the point, that when there are reasons to limit liberty, he will choose other values over liberty itself.

5. For a further discussion, see also my discussion, Schwartz, "Why Can't My Daughter Drive a Tank?"

6. I am not alone in my concern with this broad range of issues and instead wish to see myself building on and synthesizing discontent expressed by a number of people with various parts of the "liberty-first" platform. I see my own work as attacking one key root of the liberty-first position often ignored by others. Among those who are asking similar questions but from different perspectives are the following: Hawken, *Ecology of Commerce*, and Hawken et al., *Natural Capitalism;* Sunstein, *Free Markets and Social Justice* and *Second Bill of Rights*; Breyer, *Active Liberty;* Stiglitz, *Price of Inequality*; Dworkin, *Taking Rights Seriously*; Rawls, *Theory of Justice*; Sen, *Ethics and Economics* and *Development as Freedom*; Kuttner, *Economic Illusion* and *Everything for Sale*; Glendon, *Rights Talk*.

7. See my thinking in Schwartz, *Liberty in America's Founding*

Chapter 1

1. The early modern natural right philosophers drew attention to this paradoxical side of liberty. In *Leviathan* (14:5, 87), for example, Hobbes says the second law of nature implies "*that a man be willing, when others are so too, as far-forth, as for peace, and defense of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.* For as long as every man holdeth this right, of doing any thing he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he; then there is no reason or any one, to divest himself of his: for that were to expose himself to prey, (which no man is bound to) rather than to dipose himself to peace. This is that law of the Gospel; *whatsoever you require that others should do to you, that do ye to them.*" [italics in original]

Locke has a similar perspective contrasting natural liberty with liberty in society. "The *Natural Liberty* of Man is to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule. The *Liberty of Man, in Society*, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it." Disagreeing with one of the popular royalists at the time, Locke writes, "*Freedom* then is not what Sir *Robert Filmer* tells us.…*A Liberty for everyone to do what he lists, to live as he pleases*, *and not to be tyed by any laws*." On the contrary, "*Freedom of Men under Government*, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man. As *Freedom of Nature* is to be under no other restraint but the Law of Nature" (II § 22, Laslett, 283–284) [italics in original]. For Locke, liberty in society meant not freedom, but the right to have a standing law to live by. Liberty means the right to follow my will where the rule is silent.

Again Locke: "For in all the states of created beings capable of laws, w*here there is no Law, there is no Freedom*. For *Liberty* is, to be free from restraint and violence from others which cannot be, where there is no Law: but Freedom is not, as we are told, *A Liberty for every man to do what he lists*: (For who could be free, when every other Man's humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the allowance of those Laws under which he is; and therein not to be subject to the arbitrary will of another, but freely follow his own" (Locke II § 58; Laslett, 306). [italics in original]

2. For discussions of the varying definition of rights and liberty and their histories, see, for example, Tierney, *Idea of Natural Rights*, 43–89; Munzer, *A Theory of Property*, 15–56; Tuck, *Natural Rights Theories*.

3. See note 1 on the foundation of this view in modern natural rights thinkers. We shall see below that some modern thinkers see rights, and thus liberty, as the opposite of law (law meaning restriction), whereas others think of rights, and thus liberty, as including restrictions of the law.

4. See, for example, Locke, II § 62–71.

5. In some sense this was Thomas Hobbes's question in *Leviathan*, which arguably is about why people can't live with unlimited desires in the state of nature.

6. On this definition of economics, see, for example, Flynn, *Economics for Dummies*, which states that "Economics is all about how people deal with scarcity." Or Okun, *Equality and Efficiency*, which says that "Tradeoffs are the central study of the economist."

7. In particular, the focus on natural rights has all but eclipsed the great moral insight that individuals have responsibilities to each other as members of the human species, in addition to each other as neighbors or members of the same communities, nations, or religious communities.

8. One of the interesting questions is whether our responsibilities devolve to those with whom we share a commonwealth or political society or whether we have broader obligations to the human species itself and, if so, what is the ground of that obligation. The natural rights philosophers do not all agree on this point. Hobbes, for example, sees rights and obligations emerging only with society, and thus the core of one's obligations are to fellow citizens. Locke, by contrast, sees right emerging as creatures of God and thus being implicit in nature even before the existence of a commonwealth. Thus Locke is also willing to speak about an obligation to "mankind" and not just to the citizen. As we shall see, I derive this obligation to the species in a different way, without needing to resort to the concept of God, which may be a stumbling block for some people who do not believe in God or who conceive of God in other ways.

9. See, for example, Epstein, *Principles*, 133–157, which argues that charity and altruism are private matters.

10. We shall see below that the "social contract" assumed by the natural rights tradition has also a "natural responsibility" dimension. By entering into society, one takes on more responsibilities than one had in nature.

11. See, for example, Epstein, *Principles*, for a liberty-first position that rejects the concepts of rights. If rights are neither "self-evident" nor "natural," then how we go about constructing the focus of government is an entirely different matter and requires an entirely different set of arguments. In that case, we can't rely on "self-evident" truths and must devise other ways of determining what our political entities focus on. I shall turn to the question of rights' self-evidence in the following discussion.

Chapter 2

1. The idea had its predecessors in the natural law tradition and the Greek philosophical traditions from antiquity. The relationship of modern natural rights thinking to those of late antiquity and premodern Christianity and the Renaissance is complex. See, for example, discussions by Tuck, *Natural Rights Theories* and *Philosophy and Government;* Tierney, *The Idea of Natural Rights*; Strauss, *Natural Right and History*; Skinner, *Foundations of Modern Political Thought*, 2 vols., and Skinner, *Liberty Before Liberalism*. See also Zuckert, *Natural Rights*, for a contrasting view of Locke and Locke's relationship to Jefferson.

2. Many have written on this topic of Jefferson's intellectual influence. For a review, see my discussion of the influences on Jefferson in Schwartz, *Liberty in America's Founding*, 18–50, 273–306.

3. Both Jewish and Christian thinkers synthesized Greek philosophical ideas about God, nature, and reason with the biblical traditions. In the Jewish tradition, Philo, the first-century Jewish thinker in Egypt, and Maimonides, the twelfth-century Spanish Jewish philosopher, were among the most famous synthesizers of the two traditions. In the Christian tradition, thirteenth-century philosopher Thomas Aquinas is the most well-respected premodern synthesizer of both traditions.

4. See, for example, Hobbes, *Leviathan*, 14.3, where he distinguishes law from right and defines right as the ability to choose to do or not to do whereas law is the duty not to do something. See the early Locke, *Essays*, 111, where he makes a similar distinction in very Hobbesian language.

5. In his *Two Treatises*, Locke tends to see natural law as providing the foundation for natural rights which are implied by natural law. Natural law exists in nature and is discernible when reason perceives the existence of a moral creator. That recognition that we are all God's property and creation leads to the corollary that we cannot harm the life, liberty, or health of another and that we have the right to punish an offender and get reparations for injury. See Locke II § 6; Laslett, *Two Treatises*, 271.

6. See Grotius, *Rights of War and Peace*, *Preliminary Discourse*, 10:1, 54, where he defines right as a dictate of right reason and sections III to X, where he discusses multiple meanings of the term "right."

7. In the synthesis between Greek philosophy and both Christian and Jewish views of revelation, illustrated by Philo, Maimonides, and Aquinas, among others, reason was thought to align perfectly with insights from revelation. One of the ways in which the modern view differed was in seeing that insights from reason and revelation were not necessarily identical. This emerging tension between reason and revelation would occupy the deists who come after Locke and in fact set the stage for the modern discussion that continues today. For discussions of this topic, see Manuel, *The Eighteenth Century Confronts the Gods* and *Changing of the Gods*; and my discussion, Eilberg-Schwartz, *Savage in Judaism*, 31–48.

8. In Christian thought, Jews had been examples of peoples who rejected God's revelation. With the Reformation, Protestants and Catholics argued that each had misinterpreted God's word and the will of Christ. For a similar perspective, see, for example, Wolterstorff, "Locke's philosophy."

9. Grotius, *Rights of War and Peace*, *Preliminary Discourse*, 24:42.

10. The diversity of human belief and practice would be one of key problems that European intellectuals would ponder in the sixteenth and seventeenth centuries. From the beginning of Columbus's discovery in the late fifteenth century throughout much of the sixteenth and seventeenth centuries, Europeans were fascinated and horrified by the description of cultures and practices in the Americas. The bewildering diversity of human beliefs and practices among the native peoples discovered by Europeans further amplified the problem caused by the breakdown of a single view of truth among European Christians themselves. The turn to reason and the law of nature in the seventeenth century was in part an attempt to find a common foundation for truth across human populations in the common consent of nations, a position held, for example, by Grotius. At the same time, however, this diversity of belief and practice among peoples of the world posed a difficult challenge for the new emerging intellectual view that reason could discern a universal law among nations. For example, John Locke, in his early *Essays* on the natural law, would name diversity as one of the key challenges to the view that reason could be the universal basis for morality. "The only thing, perhaps, about which all mortals think alike is that men's opinions about the law of nature and the ground of their duty are diverse and manifold—a fact which, even if tongues were silent, moral behavior, which differs so widely, would show pretty well. Men are everywhere met with, not only a select few and those in a private stations, but whole nations, in whom no sense of law, no moral rectitude, can be observed. There are also other nations, and they are many, which with no guilty feeling disregard some at least of the precepts of natural law and consider it to be not only customary but also praiseworthy to commit, and to approve of, such crimes as are utterly loathsome to those who think rightly and live according to nature" (Locke, *Essays*, 7:191).

11. On Galileo's physics influencing Descartes and both influencing Hobbes, see Tuck, *Hobbes*, 19, 20–25. See also Manuel, *Eighteenth Century Confronts the Gods*. All of the writers in the natural rights tradition were seeking to explore and find a foundation of human morality, which seemed shaky. We shall come back to this point later for the quest to find the source of morality in reason and in a natural sciences methodology that ultimately failed and posed a problem that continues to occupy us.

12. Grotius, *Rights of War and Peace*, *The Preliminary Discourse*, 11, 38.

13. The rationalist conception of God as a clockmaker was influenced by the growing prestige of science in the wake of Descartes. But it also had roots in the rationalist philosophy of Thomas Aquinas, which had already achieved a synthesis of classical Greek and Christian thought.
14. I associate this stream of thought with both Grotius and Hobbes. By contrast, see Locke, *Essays*, I, 119 where he lists the instinct to preservation as the fourth type of argument for natural law, though it is not the foundation of his own position. He also notes that "all [thinkers] direct perhaps more attention to this point than is necessary" (*Essays*, 4, 159).
15. See, for example, Grotius, *Rights of War and Peace*, Preliminary Discourse, VI and VIII, 36, "this Sociability, we have described in general, or this Care of maintaining Society, in a Manner conformable to the Light of human Understanding, is the Foundation of Right." Locke at times also recognizes this social impulse as well (*Essays*, 4, 157–59).
16. Hobbes, for example, does not see humans as social by nature but as at war and in competition by nature. He instead sees humans becoming social as a means to peace, and thus sociability is achieved through human development rather than inherently part of human nature.
17. This is the position of Hobbes, *Leviathan*, chaps. 13–14.
18. This is how I understand Hobbes's position that in the state of nature a human being has unlimited rights, even to one another's body and life, because there is no moral law in nature. Hobbes calls these "rights" because they are natural and because there is not yet a moral law that declares them "wrongs."
19. Grotius, Hobbes, and Locke all share this view to some extent.
20. From this social nature of the human creature, different thinkers inferred a broader or narrower set of laws. At the very least, social life depended on a set of standards and rules that protect a person's life, liberty, and property. For others, the rules that were inferred by reason were broader than simply life, liberty, and property. As we shall also see, some thought these rights were already evident by reason in nature prior to the existence of social life.
21. For a detailed exposition of this distinction, see Pufendorf, *Law of Nature and Nations*, book 2, chap. 1:4, 98.
22. Locke and Hobbes would both say that humans were animals who curtained their natural liberties or inclinations, though Locke envisioned laws and restrictions in nature and Hobbes did not.
23. Hobbes, *Leviathan*, 14:4, 87.
24. Mt. 7:12 and Lk. 6:31.
25. Hobbes, *Leviathan*, 15:1, 95. See also Grotius, *Rights of War and Peace*, *Preliminary Discourse*, 16, 38.
26. To convert promises into contracts, societies must have a coercive power that makes them enforceable. Thus the very foundation of social life is the contract, which requires a power to enforce it and hence the need for government. See, for example, Hobbes, *Leviathan*, 11:3, 95. Contrast Locke, II § 14, and Laslett, *Two Treatises*, 276, which sees promises as binding on people even in a state of nature "for the truth and keeping of faith belongs to men, as men, and not as members of society."
27. Locke, II § 77; Laslett, *Two Treatises*, 318–319.
28. For an example, see James Otis, "Rights," 423.
29. As Grotius, *Rights of War and Peace*, Preliminary Discourse, 11, 38, puts it, "what without the greatest wickedness cannot be granted."
30. Hobbes, *Leviathan*, 15:41, 106, by which Hobbes means that natural law is not really law but "dictates of reason." In his Essays 4, 151, Locke says something similar when he writes that "in order that anyone may understand that he is bound by a law, he must know beforehand there is a law-maker, i.e. some superior power to which he is rightly subject." Thus both agree that you need a Lawgiver to have natural law, but Hobbes therefore concludes natural law is not a law in fact, but only a mistaken idiom, whereas Locke concludes it is law and a lawmaker is discernible. Hobbes thus seems to imply that God, the Lawgiver, either does not exist or that the natural law is not enforced by God. For subtle implications such as this, the accusation of "Hobbism" in the seventeenth century was often associated with "atheism."
31. Grotius, Hobbes, and Locke all had to flee their countries at some point in their careers for political safety. Thus the question of how open these thinkers were with their deeply held convictions is a matter of debate in the academic literature and was most forcefully articulated as an interpretive question by Leo Strauss in *Persecution and the Art of Writing* and taken up by his students.
32. See Locke's rejection of tradition and innate knowledge as sources of moral knowledge in his early *Essays* (2, 131). He carries these themes forward in his magisterial *Essay Concerning Human Understanding*, which develops and further demolishes the idea of innate ideas already articulated in his earlier *Essays*. On the challenge this presented to more traditional religious understandings and understandings of the mind, see Wolterstorff, "Locke's Philosophy of Religion," Jolley, "Locke on Faith and Reason," and Rickless, "Locke's Polemic against Nativism."
33. In his *Essays*, 4, 153, Locke builds on but diverges from Descartes's proof of God in his *Meditation 3*. See the comment of von Leyden, "Introduction," notes, 153. Locke revisits the assumption of a creator in numerous places in passing in his *Two Treatises* and repeatedly in various places in his *Essay Concerning Human Understanding*. As discussed below, it is surprising that Locke did not scrutinize or question the proof of God in more detail given his skeptical theory of knowledge that he ultimately articulates. Below, I suggest that Locke may have had a more skeptical position on God's existence than many interpreters think.
34. Having inferred a creator from the evidence of the senses, Locke argues (*Essays*, IV, 153–155) that "reason lays down that there must be some superior power to which we are rightly subject, namely God who has a just and inevitable command over us and at his pleasure can raise us up or throw us down, and make us by the same commanding power happy or miserable." See also Pufendorf, *Law of Nature and Nations,* 3:10, 56 ff.

35. Locke, *Essays*, 4, 157.
36. Ibid., 159.
37. Ibid., 7, 195.
38. See Locke, II § 6 and 7, and Laslett, *Two Treatises*, 270–271.
39. See Hobbes, *Leviathan*, 15, 35, 104.
40. Locke's words "free, equal, and independent" (II § 95) are similar to the words used by Jefferson in the first draft of the Declaration of Independence and in the Virginia Declaration of Rights, authored by George Mason and a document that may have influenced Jefferson in writing the Declaration. I return to this point in a subsequent discussion. For discussions of these and related points see, for example, Schwartz, *Liberty in America's Founding*, 72–82; Boyd, *Declaration;* Boyd, *Papers*, 345; Ganter, "Pursuit of Happiness"; Maier, *American Scripture*, 134; Becker, *Declaration;* Dershowitz, *America Declares Independence*, 75; Jayne, *Jefferson's Declaration*; Zuckert, *Natural Rights;* Gerber, *To Secure These Rights*; Carey, "Natural Rights, Equality and the Declaration of Independence."
41. Locke, II § 6, and Laslett, *Two Treatises*, 270–71. [italics in original]
42. I am referring here to Locke's view of property, discussed in more detail below, where we shall have occasion to look at alternative perspectives.
43. There is a seeming tension or contradiction in Locke. On the one hand, he says that humans are God's workmanship or the property of God. On the other hand, he says they own their labor. This has led to an interesting discussion in the secondary literature on what Locke intended and whether it makes sense. Contrast Zuckert, *Natural Rights*, 220ff and 239ff, with Schwartz, *Liberty in America's Founding*, 378, notes 66 and 67, and "Liberty Is Not Freedom"; Tully, *A Discourse on Property*, 105–106; and Waldron, *Right To Private Property*, 177–184, who see no contradiction between these positions, understanding that the human life can belong to God but the will is the possession of the individual.
44. Locke, II § 9, 11; Laslett, *Two Treatises*, 272–273.
45. See, for example, Pufendorf's *Law of Nature and Nations*, book 2, chaps. 1:2, and 2:5–6, discussion of why God did not see fit to give humans "wild liberty."
46. I am anticipated in part by Glendon's wonderful work, *Rights Talk: The Impoverishment of Political Discourse*; she is moving along similar lines although she comes at it from another direction.

Chapter 3

1. See Strauss, *Natural Right*, 182, for example; Strauss partly characterizes one difference between modern and ancient notions of natural rights around the shift from "duties" to "rights."
2. The lengthy discussion by Locke (II § 52–76; Laslett, *Two Treatises*, 303–317) on paternal power and the relationship between parents and children has to do in part with his rejection of Filmer's patriarchalism and Filmer's claim that fathers own their children and wives as property. That patriarchal assumption was key in Filmer's argument that Adam was the owner of the whole world and that all property and people that followed were Adam's property and that of his heirs. This was the basis for Filmer's justification of monarchy. The kings were seen as the descendants of Adam and thus inherited his rights to absolute ownership over their children and their people. In addition, there are other impulses at work as well in the discussion of parent/children relationships in the natural rights theorists. The very question of authority over persons, which is at the heart of the discussion of political power, led Locke and others to discuss the relationship of power and rights over all peoples and to the assumptions of the patriarchal family. Grotius, *Rights of War and Peace*, book 2, chap. 5:1–8, 49–51, at the start of the century discusses parents' authority over children and articulates the patriarchal position asserting the father's right to "pawn" his children and the husband's status as head of the household. By contrast, Hobbes, *Leviathan*, 22, 4–9, 133–134, sees the father and mother more equally and also sees the parent's dominion as based on a child's consent. For discussion on the patriarchal family as a context for Locke's thinking, see Schochet, "Family and Origins of State."
3. This analogy is key to the argument of King James in his *Trew Law of Free Monarchies*, published in 1598, on absolute royal authority. See Zuckert, *New Republicanism*, 30ff.

Chapter 4

1. Hobbes, in *Leviathan*, 13:13, 44, had argued something similar when he argued that right and wrong emerge with the beginning of society. "The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice…They are Qualities, that relate to men in Society, not in Solitude."
2. Locke in particular questioned "tradition" as a source of knowledge in his *Essays* and his *Essay Concerning Human Understanding*. He argued that tradition was not a sufficient basis for knowing God or morality and that reason instead must be the way to discern the source of truth.
3. Writers in the seventeenth and eighteenth centuries aspired to emulate the methods of the natural sciences in the study of human beings. Max Weber in the modern period is often credited with developing the "antipositivism" position within sociology, as an example, which denied that the methods of science could be applied to the study of the human phenomenon. The debate in the modern period has been over whether the social or human sciences (anthropology, sociology, psychology, economics, and political science) are sciences in the same way as natural sciences and can use the same methodologies. In all of these disciplines there are those who see the discipline and methodologies as interpretive and humanistic (nonscientific) and those who lean more toward positive, scientific methodologies and ways of characterizing what they do. Each discipline has fought out this battle in its own discipline.

4. This goal of the seventeenth-century thinkers, such as Hobbes, Pufendorf, and Locke, among many others, was to produce a science of morality. Emulating the natural sciences, Locke, for example, thought that ethics was and could be a demonstrative science like mathematics (von Leyden, "Introduction," 54–55). Here is Locke in his own words, *Essays* 7, 201: "it seems to me to follow just as necessarily from the nature of man that, if he is a man, he is bound to love and worship God and also to fulfill other things appropriate to the rational nature, i.e. to observe the law of nature, as it follows from the nature of a triangle that, if it is a triangle, its three angles are equal to two right angles, although perhaps very many men are so lazy and so thoughtless that for want of attention they are ignorant of both these rules."

Though Locke would ultimately in his more mature work reshape how we understood the mind and human knowledge, he ultimately failed, and he may have realized he had failed, in his quest to found morality on the basis of reason. I take up this point again below.

5. Locke, like others in the natural law tradition, had a problem explaining why, if reason can lead to the correct foundations of knowledge, all people don't come to the same conclusions about morality and about how to live. As mentioned in the previous note, Locke at one point in his early essay blames lack of agreement on tradition, people's laziness, or thoughtlessness. Sometimes (*Essays* 1, 113) Locke compares those who do not discern the results of reason to a blind person (113) who cannot read a legal notice. And though everyone is endowed with reason, not everyone cultivates reason.

Hobbes (*Leviathan*, 11, 69–70) has a much more pessimistic view of knowledge and argues that the reason people don't dispute "the doctrine of lines, and figures" (i.e., mathematical truths) is because "men care not, in that subject what be truth, as a thing that crosses no man's ambition, profit or lust. For I doubt not, but if it had been a thing contrary to any man's right of dominion, or to the interest of men that have dominion, *That the three angles of a triangle, should be equal to two angles of a square; that doctrine should have been, if not disputed, yet by the burning of all books of geometry, suppressed, as far as he* whom *it concerned was able."* While Hobbes still relies on reason to arrive at his laws of nature, he is more likely to see that what counts as truth depends on a human being's interests.

6. See my essay on this topic in Schwartz, "Why Can't My Daughter Drive a Tank?"

7. Seventeenth- and eighteenth-century thinkers grappled with the presence of polygamy in other cultures and as an accepted practice in the Hebrew scriptures, among other instances of cultural variations. See Grotius, *Rights of War and Peace*, book 2, chap. 5:9.2 and 9.4, 51–52. The discussion continued into the eighteenth century. See Hume's tongue-in-cheek essay "Of Polygamy and Divorce," discussing whether marriage practices are universal.

8. Grotius, Hobbes, Locke, and Pufendorf all start with the right to life or instinct to self-preservation and derive the other rights from this more basic right. They disagree, however, on where this primary right comes from. As discussed previously, for Locke, this primary right comes from the discernment of God the Creator. Grotius, *Rights of War*, book 1, chap. 2:1.1, 62, refers to it as "instinct of every animal" and as "first duty." Hobbes never says where this "right of self-preservation" comes from and thereby suggests it is something like an instinct. Indeed, the word "right" for Hobbes can be understood as what derives from human nature, and thus is "natural."

9. See, for example, Locke, II § 11 and I § 18, 19. Grotius, *Rights of War and Peace*, book 1, chap. 2:2, 88, also reflects on the thief who may be killed but notes the scriptural passage (Ex. 32:2) that distinguishes a thief killed during the night from a thief killed during daylight. No punishment applies to the first, but it does to the second.

10. See Hobbes, *Leviathan*, 17:2 and 17:4, 111–112, and Locke, II § 145.

11. Compare Pufendorf, *Law of Nature and Nations*, book 8, chap. 6:9, 837, with Grotius, *Rights of War and Peace*, book 2, chap. 22:9, 269–70. See Grotius and Pufendorf's disagreement with Francis Bacon about whether violation of the laws of nature constitute grounds for just war. Locke dodges the whole issue and doesn't define the just war at all.

12. One way to read the rich history of anthropological thought from the twentieth century to the present is about contesting the sharp dichotomies between civilized and savage peoples that were bequeathed by nineteenth-century evolutionary anthropologists such as Edward Burnett Tylor, James George Frazer, Lucien Lévy-Bruhl, and others. Twentieth-century cultural anthropology questioned the dichotomies between savage and civilized cultures, led by the pioneering work of the British anthropologists such as E. E. Evans-Pritchard, and providing the foundation for the work of American cultural anthropologists such as Clifford Geertz and French structural anthropologist Claude Lévi-Strauss. For discussions, see Harris, *Rise of Anthropological Theory*; Wilson, *Rationality*; Eilberg-Schwartz, *The Savage in Judaism*, 1–28.

13. In every humanistic discipline and social science, there is a fundamental and unresolvable divide over whether unambiguous interpretation of human behavior or writings is possible. Whether in history, literature, anthropology, religious studies, sociology, or the political sciences, there are those who believe it is possible to arrive at a set of unequivocal conclusions or interpretations of history, texts, or human behavior and those who believe you can't, and that interpretation is always ambiguous and open ended. The literature on the subject is vast in each discipline, and the founding assumption fundamentally divides methodology and conclusions.

Among the many important discussions on the subject are those flowing in philosophy from Rorty, *Objectivity, Relativism, and Truth;* in hermeneutics from Gadamer, *Truth and Method*; and in science from Thomas Kuhn, *Structure of Scientific Revolutions*. For a discussion in literature, contrast the position defending authorial intent, by Hirsch, *Aims of Interpretation*, with the positions arguing for the death of the author, by Barthes and Derrida, among others.

For a debate related to the interpretation of the Constitution, contrast, for example, Levy, *Original Intent*, and the view of Scalia, *A Matter of Interpretation*; related to history, contrast, for example, Skinner, *Natural Right and History*, with my own Schwartz, *Liberty in America's Founding*, 309–322.

14. There were several different ways of approaching the question of whether the law of nature and law of nations are the same concept. Some thinkers distinguished the two concepts and others did not. Grotius (*Rights of War and Peace*, *Preliminary Discourse* 41, 45) distinguishes the law of nature from the law of nations, though he acknowledges that others define the terms differently (see also book 1, chap. 1, 9:1, 55). In his view, the rules that are consented to by "many" people historically and across nations, he calls the "law of nature" and distinguishes it from "laws of nations," which are not generally or widely accepted. (See also book 2, chap. 8:1.2, 93 on this distinction.) But Grotius also distinguishes the law of nations from the civil law, though that distinction is less clear (*Rights of War and Peace*, book 1, chap. 1:14, 57). Indeed, at times Grotius seems to forget his own distinction and calls the laws consented to by most nations the law of nations.

Locke does not use the term law of nations at all in the *Two Treatises* and refers instead only to the law of nature. This is consistent with his rejection of consent among nations as evidence for the law of nature (Locke, *Essays,* 5, 161–179, and Von Leyden, "Introduction," 100). Instead, Locke believes the law of nature is evident through reason even before political society comes into existence and thus available before there is any nation that can consent to it. Hobbes says the law of nations and the law of nature are the same thing (Hobbes, *Leviathan*, 30:30, 235). Pufendorf, for his part, has a whole chapter devoted to the subject and tends to agree with Hobbes (*Law of Nature and Nations*, book 2, chap. 3:23, 149ff).

15. Locke, *Essays* 1, 113.

16. See, for example, Locke (*Essays* I, 113–115). Locke (*Essays* 7, 191) also writes, "There are also other nations, and they are many, which with no guilty feeling disregard some at least of the precepts of natural law and consider it to be not only customary but also praiseworthy to commit, and to approve of, such crimes as are utterly loathsome to those who think rightly and live according to nature."

17. Hobbes, *Leviathan*, 18:9, 118.

18. Hobbes's ideas about natural rights were fundamental in shaping the discussion in the seventeenth century, including the ideas of Locke, whom many regard as fundamental in shaping the American founding. Both Hobbes and Locke, among others, start from the equality of human beings. But Hobbes despairs of humans ever being capable on their own of resolving matters without an all-powerful sovereign.

19. Hobbes did think reason leads people to seek peace, which is the foundation of the law of nature, and this is the foundation for the rational decision to give up control of truth to the sovereign.

20. Gerber, in *To Secure These Rights*, makes this argument most explicit by arguing that we should interpret the American Constitution based on the Declaration and therefore limit our understanding of rights to what John Locke meant. This is a position that has been implied in many accounts that show a direct line from John Locke's *Second Treatise on Government* to Jefferson's Declaration of Independence. For positions holding this view, see, for example, the now classic Becker, *Declaration of Independence*, as well as the more recent Zuckert, *Natural Rights*; Dworetz, *Unvarnished Doctrine*; Jayne, *Jefferson's Declaration.* Contesting this view, see my own Schwartz, *Liberty in America's Founding*, and Dunn, "The Politics of Locke."

21. The *Essays* were written in the late 1650s and completed after 1660 and before 1664 when Locke was in his late twenties and early thirties (von Leyden, "Introduction," 10–11). His more mature works, such as the *Two Treatises*, were being written in 1679–80, some sixteen years later. On the dating of the *Two Treatises*, see discussions in Laslett, *Two Treatises*, 57–66; Gough, *Political Philosophy*, 143–144; Dunn, *Political Thought*, 47–53.

22. Locke II, § 12; Laslett, *Two Treatises*, 275.

23. In 1687, James Tyrrell, a close friend of Locke and an author on natural law in his own right, wrote a number of letters to Locke encouraging him to take up again the foundation of the law of nature, especially after reading Locke's *Essay* (von Leyden, "Introduction," 9–10 and again 62–63). Tyrrell had been among the group of five or six friends Locke mentions at the start of the *Essay* (*Epistle to the Reader*, xiv) whose conversation with Locke about the basis of morality and its relation to natural and revealed law had set Locke off in the first place to write on the underlying themes that led to *An Essay Concerning Human Understanding* (see von Leyden, "Introduction," 61, and Milton, "Locke's Life," 11).

Tyrrell was aware that Locke had already written earlier essays on the subject of natural law and was encouraging Locke to develop them, especially when critics of Locke's *Essay* challenged and questioned his position on the law of nature. Tyrrell was also suspicious that Locke was the author of the *Two Treatises*, which Locke published anonymously, and pressed Locke to acknowledge he was the author, which Locke refused to do. In any case, it is an interesting question how the Locke who wrote the *Essay*, which challenged the foundation of knowledge and the basis of knowledge in tradition or innate ideas, could also have been the Locke who wrote the *Second Treatise*, which takes for granted the law of nature (Gough, *Political Philosophy*, 12).

24. This view of Locke is held by many of his interpreters. In this line of thinking, Locke assumed reason could discern a moral lawgiver and from that assumption flowed certainty about the natural law. See, for example, Gough, *Political Philosophy*, 10, which describes this as part of Locke's unquestioned faith in a Christian God that is never subjected to the same scrutiny to which he subjects other sources of knowledge. See also Aarsleff, "The State of Nature," 99–136, for a similar theological understanding of Locke. Dunn, in *Political Thought*, 21–26, 198–199, tends to also see Locke this way and minimizes the tension between the *Two Treatises* and the *Essay*.

See von Leyden, 68ff and 72, for example, which offers several possibilities on why Locke doesn't work out the tension between the *Two Treatises* and the *Essay*. One is that Locke's theory of God as the foundation of morality was coming into conflict with his emerging theory of hedonism, a conflict that Gough (*Political Philosophy*, 14) thinks von Leyden overstates. But von Leyden also speculates (75), in a position that I find persuasive, that Locke avoided the question of natural law's foundation in God because "he

found himself at a loss to give full expression to his view of the demonstrative character of morality."

In considering this issue, we have to bear in mind Locke's refusal to acknowledge his authorship of the *Two Treatises*. This may have been due to his fear of reprisals, to the uncertainty of the political situation in which he wrote, and to his own experience in exile (Laslett, *Two Treatises*, 78). Laslett also questions whether that part of Locke's hesitation about revealing his authorship of the *Two Treatises* was because he was aware of the inconsistencies with the *Essay* and that it was no simple matter to reconcile their doctrines (Laslett, ibid., 66; Gough, *Political Philosophy*, 20). But Laslett and others also suggest that the *Second Treatise* should not be interpreted in the genre of philosophy in the same sense as the *Essay*, and that the *Second Treatise* was more of an "exclusion tract" or political work rather than a philosophical work. Since it is a nonphilosophical genre, it should not be held to the same expectations of philosophical rigor or consistency. In other words, it would be a category mistake to hold the *Second Treatise* to same expectation of philosophical rigor as the *Essay*. To complicate matters further, we know that Locke is not one of the most consistent and methodical thinkers, as Laslett notes, and thus we are at risk of overinterpreting Locke when we make too much of these inconsistencies.

25. Locke deleted a last chapter of the *Essay* called "Of Ethick in General," which was intended to be an essay on the foundation of morality and a culmination of the *Essay* (see MS Locke c 28, printed in Peter King, *The Life of John Locke*, 308–313). For discussions, see von Leyden, "Introduction," 69; Dunn, *Political Thought*, 187; Laslett, *Two Treatises*, 187. According to von Leyden, this deleted essay shows a trend toward "hedonism" (i.e., arguing that morality is based in pleasure and pain rather than reason) in Locke's thinking, which Locke may have realized was inconsistent with his argument for the foundation of morality in a concept of God and the law of nature and may be why he never published it as part of the *Essay*.

26. This is a telling irony in the story of modern natural rights thinking. One of the West's most important natural rights thinkers, John Locke, sometimes called the father of natural rights, may have doubted reason's ability to discern the moral law. The doubt appears in Locke's *An Essay Concerning Human Understanding*, one of the most important European books written to be written about the foundation of human knowledge. It is clear that here Locke is moving toward a much more skeptical understanding of what the mind can know. It is not entirely clear whether this articulated theory of knowledge fully reshaped how Locke thought about the idea of God and the natural law. For a discussion of Locke's view of God and religion in his *Essay*, see Jolley, "Locke on Faith and Reason," and the discussion that follows.

27. Locke, *Essay*, book 4, chap. 3:27, 454.

28. See discussion, for example, in Lowe, *On Human Understanding*, 7–9. Initial hostility to the *Essay* was directed at features thought to be hostile to religion, particularly its skeptical theme and its criticism of innate ideas. Critics such as Edward Stillingfleet, Bishop of Worcester, saw dangers to their Christian faith in Locke's emphasis on reason and experience. See also Jolley, "Locke on Faith and Reason."

29. Locke, *Essay*, "Introduction," 5, 3.

30. Locke, *Essay*, book 4, chap. 10, 527–536.

31. See note 24.

32. Ibid.

33. I see Laslett, "Introduction," heading in this direction. Dunn, however, draws back from this conclusion.

34. Various thinkers in the seventeenth century had already begun to question whether conclusions derived from reason were entirely consistent with revelation. This was one of the ways in which the Enlightenment thinking would break free from the medieval synthesis of reason and revelation that had been articulated in the Christian and Jewish traditions. Examples of this earlier synthesis, for example, were achieved most notably in writers such as Philo, Aquinas, and Maimonides. In that earlier tradition, reason appeared for the most part consistent with revelation.

With the Enlightenment, this nice alignment begins to break down. This was apparent, for example, already in Hobbes, and part of the reason that "Hobbism" was such a serious charge throughout the century. It was also visible in other thinkers, such as the precursor of deism, Lord Herbert of Cherbury (1583–1648), and his book *De Veritate* (1624), the first major statement of deism. In this work, Herbert begins to distinguish the key innate ideas that are reasonable and evident in Christianity and true religion from accretions and superstitions that must have infiltrated scripture and revelation. While Locke demolished Herbert's theory of innate religious ideas, he nonetheless carried forward and left unresolved the tension between "reason and revelation." Locke himself to some extent allowed reason to shape his interpretation of scripture in his *First Treatise on Government*. But Locke did not take this challenge to revelation by reason to its logical conclusion, and the deeper challenge was developed and carried forward by the deists who followed and saw the more radical implications, including Matthew Tindal, *Christianity as Old as Creation*; Anthony Collins, *Grounds and Reason of the Christian Religion*; Thomas Chubb, *Discourse Concerning Reason*, among others. For discussions of Herbert, see Hutcheson, "Introduction," Gay, *Deism,* Manuel, *Changing of the Gods*, and my Eilberg-Schwartz, *The Savage in Judaism*, 44–66.

35. Hume, "The Original Contract," 199.

36. I discuss the impact of Hume on Dickinson and Jefferson in *Liberty in America's Founding,* 134–135. See also 273ff.

37. Bentham, "Anarchical Fallacies," 914. Others who follow the utilitarian perspective include Epstein, "Principles" and "Simple Rules." For an alternative view arguing the language of rights is still defensible, see Dworkin, *Taking Rights Seriously*. Rawls, *A Theory of Justice*, is also an attempt to rehabilitate the Lockean notions of a social contract and a state of nature.

38. There is an extremely interesting debate on whether even what counts as rationality is common across cultures, in Wilson, *Rationality*. See discussions as well in Reynolds and Tracy, *Myth and Philosophy*.

39. See my discussion in Schwartz, *Liberty in America's Founding*.

Chapter 5

1. See for a similar position, Dworkin, *Taking Rights Seriously*, 192–205, and Schwartz, "Why Can't My Daughter Drive a Tank?"

2. Schwartz, *Liberty in America's Founding*, 15–82. More on the topic of land below.

3. See Maier, *Ratification*.

4. See Maier, *Ratification*, and Bowen, *Miracle*.

5. See Madison, *Notes*, on the debates during the convention. The very presence of emerging Federalist and Republican interpretations testifies that there was no consensus on either what rights meant or what the Constitution meant. For a discussion of the emerging Federalist and Republican positions, see Elkins and McKitrick, *Age of Federalism*, and Wootton, *Essential Federalist*. For a discussion questioning the notion of the original founding meaning, see Levy, *Original Intent*. For a description of the unfolding debate in the states, see Maier, *Ratification*.

6. See Levy, *Original Intent*, 284–387, which makes a similar point. On calls for a return to a lost Constitution, see Napolitano, *Constitution in Exile*, and Randy Barnett, *Restoring the Lost Constitution*.

7. See Levy, *Original Intent*.

8. See Detweiler, "The Changing Reputation"; Maier, "Strange History"; and Schwartz, *Liberty in America's Founding*.

9. Differences among branches of various religions (e.g., Protestants versus Catholics, Orthodox Jews versus Conservative and Reform Jews) often come down to arguments over the meaning of the original scriptures (God's word) and who has the rightful authority and interpretation.

Similarly, a key debate in literary theory, and one that has carried over to history and the academic discipline of religious studies as well, is whether texts have specified determinative meanings and whether those meanings can be based on authorial intent, the historical context, or the text itself, or whether the very meaning is produced through a reading. The literature on this topic is vast and spans debates across new criticism, postmodernism, deconstruction, postcolonial theory, and gender studies, just to name a few of the theoretical disciplines that have taken up the topic. Interestingly enough, debates about rights often assume that there are specified rights in nature or in the Constitution, even among jurists. In some ways this theoretical divide is more important than others.

10. See Hoekstra, "Hobbesian Equality," which argues that the idea of original equality was quite common in the Christian and Greek tradition, apart from Plato and Aristotle, and that Hobbes's use of equality should not be considered new or surprising. A more thorough examination of this question needs to be done for several reasons. First, the Aristotelian position of natural hierarchy revived in importance in the Renaissance and remained a prominent position against which natural rights theorists defined themselves. Second, interpretations of Genesis in the church saw Eve as a secondary creation after Adam and thus placed women in a secondary role with respect to men. Third, the social form of the family and society was patriarchal in the medieval period, with the father and men having the dominant positions.

11. For Aristotle's theory of slavery, see *Politics*, book 1, chaps. 3–7, and *Nicomachean Ethics*, book 7. See Hanke, *Aristotle and the American Indians* and *The Spanish Struggle for Justice*, for a discussion of how Aristotle was used to justify the enslavement of Indians in debates related to the Spanish conquest of Latin and South America. We return to this subject below.

12. The position was implicit as well in the writings of King James I and was developed fully by Sir Robert Filmer in *Patriarcha*. See the discussion in Curran, "Hobbes on Equality," and the critics of Hobbes, such as Clarendon, who argued for natural hierarchy.

13. Boyd, *Papers*, 317–18, Becker, *Declaration*, 212–13, Ellis, *Founding Brothers*, 81-119.

14. On the three-fifths rule and the compromise over slavery, see Bowen, *Miracle*, 95; 200–204. Bowen notes that in exchange for the "three-fifths" rule and the agreement to limit the import tax on slaves to ten dollars a head, Southern states agreed that importation of slaves would cease in the year 1808. For discussions in the convention on those days, see Madison, *Notes*, 103, 409–411, 503–508. The slavery question flared up regularly around the question of representation, power among the states, and taxes on imports and exports of goods, among other contentious subjects of discussion.

15. Madison, *Notes*, 411.

16. I understand Dworkin, *Taking Rights Seriously*, 179–183, to be moving in this same direction in his analysis of Rawls's work, as when he points out that a commitment to equality is assumed already by Rawls's "original position." In Dworkin's reading, Rawls's original position is not empty of all commitments. Instead "equality" is one of the key commitments already granted but never justified in Rawls's concept of the original position. Further, Dworkin, 269–275, carves out equality as the real meaning or dimension of rights, interpreting what rights mean to be identical with equality. By contrast, I see rights as a concept that pulls in different directions than equality. Ultimately this is a language issue and not necessarily a disagreement in substance.

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

18. See, for example, Springborg, "Introduction," Hobbes's *Leviathan*, 1. See also Skinner, *Hobbes*, and Tuck, *Hobbes*.

19. On the dating of *Leviathan*, see Tuck, *Hobbes*, 34; Skinner, *Hobbes*, 127.

20. Hobbes, *Leviathan*, 13:1, 82.

21. Hobbes was not the only royalist to start with human equality. John Locke, for example, notes that other royalists had started with the same assumption. For a

discussion on this surprising use of equality by Hobbes, see the contrasting discussions by Hoekstra "Hobbesian Equality," and Curran, "Hobbes on Equality."

There is an interesting debate in the secondary academic literature on whether Hobbes really endorsed and believed in equality or whether he considered it an instrumental or pragmatic concept that people should acknowledge for the creation of peace. While notions of equality had existed since antiquity, some royalists, such as Robert Filmer and Clarendon, attacked equality as a threatening doctrine and instead justified hierarchy and absolutism by identifying inequality embedded in nature.

Some interpreters argue that Hobbes was beginning with the assumption of his adversaries, such as the Levellers, and showing that even from those starting assumptions one ends in a view of absolutism. Hoekstra offers a similar instrumental view. He argues that Hobbes treated equality as a pragmatic idea that was necessary to achieve peace but did not really think of humans as equal and that his philosophy in fact presupposed that they were not equal either in nature or after they left nature. Curran questions this assumption, arguing that Hobbes really did embrace the idea of equality and was not just using the concept for instrumental purposes.

Understanding exactly what Hobbes meant by equality is not simple. In my view, Hobbes is not saying that humans are equal in nature in general, though he does note that experience and training tend to level differences in nature. Instead, Hobbes is saying that mortality is the great equalizer of human beings and that from the equal vulnerability to death, humans eventually discover through their reason the first law of nature, which is to seek peace, and thus to join a commonwealth. This realization that they are all equally vulnerable before death drives them to seek protection, to overcome their sense that they are better than one another, and to relinquish their rights in nature, which is the foundation of human society and ultimately morality. As Hobbes notes, in reality individuals think of themselves as superior to each other in many ways. But because they are mortal, they are led to understand that they must overlook their confidence in their own superiority and be willing to treat each other as equals to achieve peace.

In other words, it is *fear of death* that makes us the same and trivializes the other differences between us, such as strength, wit, and so forth. I thus understand Hobbes to be saying that it is our mortality that leads us to live in fear (i.e., we know we can die at the hands of anyone). From this fear of death, reason leads us to realize that we have to leave the state of nature. We trade our rights to everything in nature for more limited rights in political society to reduce or escape this fear of death. On that reading, I do not see Hobbes as using equality as simply a pragmatic concept (we need to acknowledge each other for peace), but as saying that it is our actual equality in mortality and our resulting fear of death that lead us to follow reason into a society in which we lose some of our freedoms and rights held in nature. Humans come to understand that they have a better chance of life and protection with loss of liberty (under the commonwealth) than fear of death, unlimited rights, and total liberty in the condition of mere nature.

22. Hobbes, *Leviathan*, 8:1, 45.
23. This kind of statement by Hobbes is interpreted by some as proving that Hobbes thought equality was a pragmatic or instrumental concept critical for peace, even though he recognized that people were not equal in all sorts of ways. See Hoekstra, "Hobbesian Equality."
24. Interpreting Hobbes as saying that death is an equalizer, I think, comes closer than the way that Hoekstra, "Hobbesian Equality," 76, which characterizes it as "they are equal because of their natural ability to kill one another."
25. Hobbes, *Leviathan*, 13:1, 82–83.
26. Hobbes treats the concept of "prudence" as "experience" and thus like skills that are developed. Elsewhere he says that animals have prudence, by which he means the kind of knowledge developed through experience and contrasted with knowledge developed by reasoning. He also sees no difference between the "prudence" of husband and wife that should justify the man having dominion over the children.
27. Hobbes does make an interesting exception in the case of science (i.e., philosophy), for which few have the capacity, in his view. Thus when he says there is a basic equality in faculties of mind, Hobbes seems to be referring to general adult capabilities, not those of the scientist or philosopher. But, unlike Aristotle, Hobbes does not make this difference a basis for one's role or status in society. The scientist deserves no special consideration for their differences in cognitive abilities.
28. Hobbes, *Leviathan*, 15:21, 102, in his comments on the ninth law of nature. [italics in original]
29. Ibid.
30. Ibid., 15:24, 103. [italics in original]
31. Ibid., 15:25, 103. [italics in original]
32. Ibid., 15:26, 103.
33. Hobbes, *Leviathan*, chap. 13:3, 83.
34. Locke, II § 2; Laslett, *Two Treatises*, 269. [italics in original]
35. Filmer, *Patriarcha*, 53; Laslett, *Filmer*, 11–20. Filmer's book was published during the Exclusion Crisis in the reign of King Charles II, in which the party led by Locke's patron, Lord Ashley, 1st Earl of Shaftesbury, tried to exclude King Charles's son from taking the throne. On the publication of *Patriarcha* in the midst of the Exclusion Crisis, see Laslett, *Filmer,* 33–35, and discussions also in Laslett*, Locke,* 46–66, and Dunn, *Political Thought,* 58–76.
36. Filmer, *Patriarcha*, 54.
37. Ibid.
38. As a contrast, see the view of Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:4, 320, which said it is in vain to argue about the original ownership of Adam.
39. Gen. 1:28.
40. There is some evidence that Locke wrote his *First Treatise on Government*, which is a refutation of Filmer, after he had already written most of his *Second Treatise on Government*. For a discussion on the relationship of Locke's *Two Treatises* to the publication of

Filmer's *Patriarcha*, and to the argument of Filmer, see Laslett, *Locke*, 46–66 and 67–78, and Dunn, *Political Thought*, 58–76.

41. As discussed previously in chapter 4, there is a fascinating debate in the secondary scholarly literature on Locke, trying to understand why he does not provide a philosophical foundation for his idea of natural law and, of course, the idea of liberty and equal rights that comes with it. For discussion of this point, see chap. 4, note 23.

42. Locke's *Second Treatise* was written during what became known as the Exclusion Crisis, when there was fear that King Charles II would be succeeded by his Catholic brother, James Duke of York, who was also an advocate of the divine right of kings. Whigs led by Lord Shaftesbury, the patron of Locke, feared that a Catholic "popish" monarch would impose absolute rule, including control of religious freedom.

43. See Locke, I § 4, § 67 ; and Laslett, *Two Treatises*, 150–190 [italics in original]. Locke is quoting Filmer, who mentions the same three individuals as vindicators of the divine right of kings but starting from the assumption of natural liberty and equality (Filmer, *Patriarcha*, 54). It is possible to read Locke's *First Treatise* as focused in large part on proving that revelation accepts the natural liberty and equality of humankind in opposition to Filmer's reading, whereas the *Second Treatise* assumes the equality is self-evident from reason.

44. There is a complicated academic debate on why Locke does not refer to Hobbes and whether Hobbes is everywhere, always hovering in the background but unmentioned, or whether Locke simply had not read his work. The issue is complicated by the fact that Filmer and Pufendorf, both of whom Locke read and engaged with, both were reflecting on Hobbes. For discussions, contrast Laslett, *Two Treatises*, 67–79; Dunn, *Political Thought*, 77–83; Zuckert, *Natural Rights*, 218–220; Gough, *Political Philosophy*, 119–120. See Strauss, *Natural Right*, 221–251; Strauss sees Locke as more consistent with a position of Hobbes than do others.

45. Locke, II § 6.

46. See Zuckert, *Natural Rights*, 188, drawing the contrast between Locke and Grotius.

47. Locke, II § 54. [italics in original]

48. For versions and discussion, see Becker, *Declaration*, 198, and Maier, *American Scripture*, 132. See also Schwartz, *Liberty in America's Founding*, 66–82.

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

50. As noted earlier (this chapter, note 16), Dworkin, *Taking Rights Seriously*, argues that equality is assumed in the "original position" of Rawls's theory of justice. On that reading, Rawls's theory of justice is both assuming and trying to create equality as a foundation for the moral life by moving people into the original position where they do not know their future quality of life. In this way, Rawls attempts to rule out biases that arise from knowing who an individual will be or his or her own personal life histories.

51. For discussion of what the state of nature meant to these writers, see, for example, Tuck, *Rights of War and Peace*, and Laslett, 98. See Locke II §§ 14–15, 100–105, where he explicitly takes up the objection whether there ever was a natural state of humankind. Locke hedges his bets in all sorts of ways. On the one hand, he argues there is historical evidence of people starting new societies from the state of nature and also leaving societies and starting new ones (II §§ 102–103). He argues too that the origins of government in early societies are often buried in history and not always discoverable, and thus many political commonwealths may have started in a social contract out of the state of nature, though that history is lost (II § 101). While Locke thus wants to anchor his state of nature in real historical examples, Locke also dismisses those who argue from history (i.e., Filmer) and claims that "though at best an argument from what has been, to what should of right be, has no great force" (II § 103). Here Locke seems to be saying that the argument of natural rights does not need to rest on an actual historical account of how societies did come together but instead on how they should come together. Other modern thinkers such as Laslett, 93, and Rawls, *Theory of Liberty*, have followed this impulse and interpreted the social contract as a kind of ideal thought experiment rather than as a historical reality. Rawls's concept of an "original position," in fact, is an attempt to put people into a thought experiment where they imagine themselves in a kind of state of nature. Similarly, Hobbes, *Leviathan*, 13:11–12, 85, anticipates Locke, arguing that while there was never a time when everyone was in a state of nature, there are still "savage people in many places of America…[who] have no government at all; and live at this day in that brutish manner." He also notes that sovereign governments are in a state of nature or posture of "gladiators" toward one another, since they have no power to enforce a set of standards across more than their own national boundaries.

52. My thinking here aligns with the insights of Dworkin and Rawls. As noted earlier, the concept of the "original position" in Rawls's *Theory of Justice* is analogous to an idealized state of nature. As noted earlier, Dworkin argues that Rawls's "original position" is not empty of all content and is already presupposing a commitment to the idea of equality through this thought experiment.

53. Among the many ironies of history is the fact that early arguments that the monarch's power derived from the people, rather than from God, came from the representatives of the Catholic Church seeking to undermine the power of the secular authority and restore the prestige and power of the Church (McIlwain, "Introduction" to *Political Works of James I*, xvii–xix).

54. I take this to be one of the central conclusions of Williams, "Idea of Equality."

55. These assumptions are implicit in the work of Ayn Rand, Hayek, Friedman, Epstein, and others.

56. See, for example, the essays in Ferber and Nelson, *Feminist Economics,* as well as the various theoretical challenges to this core economic assumption.

Chapter 6

1. For example, see, Hobbes, *Leviathan*, 15:3, 96: "And therefore where there is no *own* [i.e., "mine"], that is, no propriety, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth, there is no propriety;

all men having right to all things [italics in original]." Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:4.3, 364, for example, writes that "From what has been offer'd, "tis evident that as well positive Communion, as Propritey, does imply the Exclusion of others from the Thing thus said to be either common, or proper, and consequently doth presuppose more persons in the World than one." See, for example, Locke II § 36, "I dare boldly affirm, that the same *Rule of Propriety*, (*viz.*) that every man should have as much as he could make use of, would hold still in the World without straitning any body; since there is Land enough in the world to suffice double the inhabitants [italics in original]." Similarly Locke, I § 41, writes "that by this donation of God, *Adam* was made sole proprietor of the whole Earth, what will this be to his sovereignty? and how will it appear, that *propriety* in land gives a man power over the life of another [italics in original]?" I am quoting the Hollis edition here; the Laslett edition has "property" instead of "propriety."

2. Richard Epstein, for example, a legal and political philosopher who embraces the "liberty-first" position, abandoned the notion of rights in favor of a utilitarian approach. A utilitarian or consequentialist position argues on the basis not of individual rights, but on the basis of the general impact and consequences of a policy or decision on the general welfare.

3. Locke, II § 49. On the history of humankind in Locke's political philosophy, see Schochet, "Family and the Origins of State," 81–136. See also Strauss, *Natural Right*, 215ff. For a similar quote by Hobbes, see his comments on the state of nature and the brutish manner in which the savages of American live (Hobbes, *Leviathan*, 13:11–12, 85).

4. Pufendorf, *Law of Nature and Nations*, book 4, chap. 3:2, 356. "It is therefore beyond Dispute, that Almighty God, inasmuch as he is the Maker and Preserver of all Things, doth likewise hold, as it were, an Originary and super-eminent Property over all, and they belong so strictly to Him, as that no one can pretend to the least Right in them, without his permission and consent."

5. There are many important books making this argument including, among others, Hawken et al., *Natural Capitalism*, and Hawken, *Ecology of Commerce*.

6. See, for example, Locke, I § 86 and II § 25 and more below.

7. Throughout my book, I generally follow the translation of the King James Version (KJV), but in this case it has a wording that is difficult to understand or is a mistake. The KJV reads: "And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." And God said, Behold, I have given you every herb bearing seed, which *is* upon the face of all the earth, and every tree, in the which *is* [sic] the fruit of a tree yielding seed; to you it shall be for meat. (Gen. 1:.28–29). See http://www.kingjamesbibleonline.org/Genesis-Chapter-1/. Most seventeenth-century philosophers such as Locke could read the original Hebrew.

8. See Strauss, *Natural Right*, 215–217, for an insightful and interesting discussion of the challenge of linking Locke's state of nature with the biblical account. Strauss notes that Locke assumes people can eat meat in the state of nature, but the biblical account assumes people can eat meat only after the dispensation to Noah. Therefore, Strauss argues, Locke's state of nature cannot be identical with the pre-Fall biblical state. By contrast, Waldron, *Right to Private Property*, 165, sees Locke as embracing the conception of a fall in his theory of property and the fall from a natural state.

9. Locke, II § 25. See also Locke, I § 86, 87. [italics in original]

10. See Daly, "Absolute Monarchy," for a discussion on how the claim of divine right of kings did not always entail claims of absolutism for the kings who understood themselves to be subject to the laws of the kingdom.

11. See Locke, I §§ 86–87, where he explains his position with respect to Adam and Adam's children. Hobbes, *Leviathan*, 13:3, 83, makes a similar assumption when he claims that all people have a right to everything in the state of nature, but never justifies this position with respect to scripture.

12. See Tully, *A Discourse*, 61, quoting Macpherson, *Democratic Theory*, 123–5, who calls these "inclusive rights." Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:2, 362, originally differentiated between what he called "negative" or "positive" communion. Positive communion was his term for "tenants in common."

13. See, for example, Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:2, 362 where he calls this "negative" communion. For a discussion, see also Tully, *A Discourse on Property*, 61ff, and Waldron, *Right to Private Property*, 153ff.

14. The Hebrew "Adam" has all the same ambiguities and possible masculine biases as "Man." It is also possible in fact to read Genesis 1 as speaking about the creation of a human being who is "pregender" and that the distinction of male and female is created only when the being is split in half in Genesis 2. For a discussion, see Phyllis Trible, *God and the Rhetoric of Sexuality*, 72–143.

15. The Hebrew verbs in the "Be fruitful and multiply" passage are also conjugated in the plural and agree with the plural pronoun "them."

16. See Trible, *God and the Rhetoric of Sexuality*, 72–143. There is an extensive academic and popular literature on the meaning of Genesis 1:26–28, including what it means to be made in the image of God, whether God had a human form, or whether the passage is metaphorical. I have discussed some of this literature in *God's Phallus and Other Problems for Men and Monotheism.*

17. The injunction to be fruitful and multiply suggests that the writer assumed the differentiation of the sexes had already taken place and that Adam was understood as "humankind," inclusive of male and female.

18. Locke, II § 25; Laslett, *Two Treatises*, 286. [italics in original]

19. See Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:1, 362 which argues it ""tis an Idle Question, Whether the Property of Things arise from Nature, or from Institution? Since we have plain evidence that it proceeds from the Imposition of Men; and that the Natural Substance of Things suffers no alteration, whether Property be

added to them or taken from them." See also book 4, chap 4:4, 364. See also Grotius, *Rights of War and Peace*, book 1, chap. 2:2.2, 63, which argues that "what we call *Property* had never been introduced" in nature and that anyone could "have made use of Things that were then in common, and to have consumed them, as far as Nature required, had been the Right of the first Possessor [italics in original]." Similarly, Hobbes, *Leviathan*, Chap 15:3, 96, "And therefore where there is no *own,* that is, no propriety, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no propriety; all men having right to all things: therefore where there is no commonwealth, there nothing is unjust."

20. Grotius, *The Rights of War and Peace*, book 1, chap. 1:10.4 and 10.7, 54–55 and chap. 2:3, 63, makes this explicit, indicating that in nature people had a right to protect their "lives, limbs, and liberties" as part of the right to self-preservation but not a right to property. By contrast, for Hobbes, *Leviathan*, 14:4, 86–87, life, liberty, and property have the same status in nature. Every person has a right to everything, and there are no laws protecting life, liberty, or property in nature.

21. See, for example, Grotius, *Rights of War and Peace*, book 2, chap. 2:2 and 2:4, 19–20. See also Hobbes, *Leviathan*, 13:11, 85, "It may peradventure be thought, there was never such a time, nor condition of war as this;* and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of America, except [accept] the government of small families, the concord whereof dependeth on natural lust, have no government of all; and live at this day in that brutish manner, as I said before." [asterisk represents footnote in original]

22. See Grotius, ibid. See also Hobbes, *Leviathan*, 13:13, 85, and 15:3, 95–6.

23. See Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:5, 366, quoting from the writings of Lambert van Velthuysen, "But forasmuch as all Human Institutions and Ordinances are made with exception of extreme Necessity, therefore when so desperate a Case happens, the primitive Right to all things revives: Because, in the Common Agreement for the Divisions of Things, every one is suppos'd to have renounc'd his Right to those Things which were alloted to other with this Reserve and Restriction, Unless I am unable otherwise to compass my own Preservation. My Calamity doth not give me a Right to those things, to which I had none before; but the extremity of my Danger makes that Condition cease, under which I gave up my first Right."

24. Lambert van Velthuysen (1622–1685) quoted in Pufendorf, *Law of Nature and Nations*, book IV, chap. 4:5, 366. On the significance of Velthuysen, see discussion in Blom, *Rise of Naturalism*, 104ff.

25. Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:6, 367.

26. Hobbes, *Leviathan*, 13:3, 83, emphasizes equality as the source of fear of death, which leads to war in nature. Contrast with Grotius, *Rights of War and Peace*, book 2, chap. 2:3, 20, who emphasizes humans leaving a primitive state and weaves it closely into the biblical story of the Fall of Adam and Eve and the inclination for pleasure and vice among their descendants, thus associating this development with the development of culture and the arts. Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:6, 332, focuses on property as reducing human conflict.

27. On gradual agreement to property, Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:6, 367.

28. See, for example, Pufendorf, ibid., book 4, chap. 6, 367.

29. See, for example, Grotius, *Rights of War and Peace*, book 2, chap. 2:2.5, 21, on the tacit agreement to treat seizure or first possession as the mechanism of ownership. See Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:6, 367, for a longer discussion of "first occupancy," in which he also emphasizes enclosing and developing the land through labor as one "tills and manuers it." As we shall see later, this emphasis on ownership being associated with "improving the land" becomes one of the justifications for taking the lands of American Indians, whom Europeans mistakenly characterized as being strictly nomadic and lacking agricultural techniques and any notions of property.

30. Pufendorf, *Law of Nature and Nations*, book 4, chap. 4:4, 364.

31. Hobbes, *Leviathan*, 15:3, 96: "And therefore where there is no *own,* that is, no propriety, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth, there is no propriety; all men having right to all things."

32. See, for example, Pufendorf, *Law of Nature and Nations*, book 4, chap 4:6, 322.

33. Pufendorf, ibid., book 4, chap. 4:7, 367–368, notes that the proposition "that the settling distinct properties turn'd to the real Benefit and Advantage for men" when people had grown numerous is illustrated by the arguments of Aristotle: "But now upon the introducing of Property, all these Complaints are silenc'd; every one grows more Industrious in improving his peculiar Portion; and Matter and Occasion is supplied for the Exercise of Liberality and Beneficence towards others." Hegel would take up a similar line of thinking and develop it. See Waldman, *Right to Private Property*, 343–389, for a discussion.

34. I am in agreement with the general reading of Waldron, *Right to Private Property*, 153, that Locke's intent is to make property a natural right, and I disagree with the view of Tully, *A Discourse on Property*, 98, which sees Locke taking a conventionalist view similar to Pufendorf.

It is important to distinguish the view that property is a right self-evident in nature itself from the view that it is in accord with reason and natural law but implemented by human beings as part of creating human society itself. The view that property was part of natural law was not new with Locke. Pufendorf, *Law of Nature and Nations,* book 4, chap. 4:4, 365, for example, discusses the view of other authors who believe property rights were given in nature by God and that the prohibition of stealing in the Decalogue shows that property was already given by God, and thus a law of nature.

35. Gough, *Political Philosophy*, 92–93, sees Locke's "labor theory" of property becoming a commonplace of economic theory and being taken up and assumed by Adam Smith.

36. Locke, II § 25 and I § 86.

37. Locke, II § 26. [italics in original]

38. See Locke, I § 29, where he interprets Gen. 1:28 as meaning the natural world was given in common to all mankind, and II § 26, 287, where he calls the first humans "Tenants in common." I here agree with the reading of Waldron, *Right to Private Property*, 153. Gough, *Political Philosophy*, 80, misunderstands Locke, assuming Locke thought humans had no common ownership in the beginning (i.e., "negative rights"). Gough, ibid., writes, "not that there was any positive communism or common ownership of property, but simply that nothing belonged to anyone in particular (just as nobody today owns the air or the sea)."

But if no one had any rights in anything in nature, there would be no issue in Locke's mind in appropriating something like acorns from nature. If no one had any rights, anyone could take what he or she wanted. Yet Locke specifically says that there must be a mechanism to make acorns "mine." Locke would not see this as a problem unless everyone was "tenants in common" and each had rights in everything. It is being tenants in common that generates the Lockean puzzle of how something can become mine out of something that is ours. Since everyone has rights in everything, I have no right to take it out of nature without their approval. Gough, 86, seems to miss this point again even when he quotes Locke as saying that if a person takes more than he can use, "it is more than his share, and belongs to others" (II § 31 and 37). Here Gough sees the predominant focus of Locke on the "common right of all…to preservation," meaning that taking more than I can use undermines the welfare of the species in general. But what Locke seems to mean is that I can't take more than I need from what is common, because then it is stealing from what belongs to all, and I am violating the rights of others.

39. Grotius, *Rights of War and Peace*, book 2, chap. 3: 7–11, 33–35, was innovative early in the century in arguing that the seas belonged to no country. This partly justified the expansion of the East Indian Trading Company, to whom Grotius was an adviser. For a discussion of this idea and its development in Grotius, see Tuck, "Introduction," in *Rights of War and Peace,* 17.

40. Gough, *Political Philosophy*, 92. For a longer discussion and analysis of what Locke meant, see Waldman, *Right to Private Property*, 137–251, and Tully, *Discourse on Property*, 108ff.

41. Locke, II § 27. [italics in original]

42. Locke, II § 47.

43. Locke, II § 6. In his *Essay*, Locke spends a great deal of time arguing that the idea of God is not innate, and that we can derive a divine law from the idea of God that is discovered by reason, but he does not link natural rights to the idea that humans are God's workmanship. For examples, see Locke, *Essay*, book 2, chap. 28:8, 308. This is another of the reasons why the Locke of the *Essay* and the Locke of the *Two Treatises* seem inconsistent.

44. Locke, II § 23.

45. See Waldman, *Right to Private Property*, 158–161, for a thorough analysis of what Locke may have meant and who sees this as one possible interpretation, though he rejects it on philosophical grounds. For a contrasting interpretation, see Zuckert, *Natural Rights*, 220ff and 239ff.

46. Locke, II § 35.

47. Locke, I § 86.

48. There are some interesting discussions in the secondary literature that discuss this view of property that Locke puts forward. It may seem that the appeal to the "strong desire" or instinct here contradicts his view in his *Essay* that there are no innate ideas. But see Laslett, *Two Treatises*, 205, and notes to 19–20. As I read him, Locke in his *Two Treatises* still sees reason as the means of discovering the right of property when humans reflect on their instinct to preservation. Thus reason intervenes as the means by which humans come to understand and interpret their instinct to survive. There is also an interesting interpretive question of how Locke understood God's decision in Genesis to forbid eating animals until after the flood. The right to eat creatures as opposed to have dominion over them was a significant topic of discussion for Pufendorf that Locke passes over in a couple of sentences. It is not clear here how Locke would explain why the first humans were forbidden to eat animals and how his thinking about reason discovering the right to own animals can be meshed with the biblical account. Stauss, *Natural Right and History*, 215ff, discusses the tension between Locke's view and the biblical story.

49. Locke, II § 25, 26, 30; I § 86.

50. Hobbes and others did not see the implication of equality this way. But Filmer saw how the concept of natural liberty and equality could be used to undermine royal authority and the natural hierarchy in patriarchal traditions. The Levellers in the English Civil Wars were among those who took the idea of natural liberty and equality to its furthest conclusions. Hobbes may in fact have been using the argument of the Levellers against them in adopting equality as the foundation of his system that ended in authoritarian rule. Locke comes closest to adopting the Leveller position, though he limits the conclusions when it comes to property.

51. There are many fine deep philosophical analyses and critiques of Locke's conception of property and its limitations as well as the notion of property itself. I have benefited from Tully, *Discourse on Property*, Waldman, *Right to Private Property*, Gough, *Political Philosophy*, among others.

52. See Pufendorf, *Law of Nature and Nations,* book 4, chap. 5:2–3, 379, which in a somewhat convoluted set of paragraphs distinguishes the earth from air, light, water. Air, light, water, and wind are inexhaustible and thus should not be subdivided. Pufendorf argues that the earth is treated differently as an exemption even though it is like these other natural phenomena. "But that a thing lying in common to Mankind, and sufficient for the promiscuous Use of all, should be shared out into distinct Parts, is certainly repugnant to Reason. The Earth is of such a magnitude, as to serve the Occasions of all People in all Uses to which they can apply it; yet it would not thus serve them,

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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