

Beyond Liberty Alone

*A Progressive Vision of Freedom
and Capitalism in America*

Howard I. Schwartz, PhD

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

Preface

Over the last forty years, a deeply disturbing and pernicious understanding of liberty has become popular among many Americans, one that has reshaped how many Americans understand our government and its politics and our place in the world. At the core of this understanding is the contention that our liberty primarily means protection of our individual rights and properties, which are themselves thought to be self-evident and natural and to exist prior to government. Through the frame of this understanding, those who hold this view protest the size of our government and the interference of government in our lives, and they dismiss the moral claims that they and their government have duties to others, including the less fortunate both within and beyond the confines of their own United States.

This understanding of liberty is not really new at all, but it is one that has gained in popularity and achieved a kind of mythological status and religious dogma among its adherents in the last part of the twentieth century and the beginning of the twenty-first, though not all those who espouse this view have thought deeply about its history, its philosophical foundations, or its moral consequences. The view of liberty I am talking about has come to dominate the politics of the Right and libertarians in the post-Vietnam period, as America has found itself in a more complex world in which globalization and economic changes have undermined the certainty of America's dominance and moral leadership and challenged some of the basic assumptions by which Americans frame their self-understanding. I call the view of liberty that they espouse the

“liberty-first” position, since it puts the weight on liberty before all other competing human values.

This book critiques that view of liberty and offers a progressive alternative. Liberty, defined as “life, liberty, and property” or “the pursuit of happiness” in the American idiom, is a concept that is key to both modernity and American identity. But what liberty means and who gets to define it are questions that are up for grabs in a liberal state.

This book argues that the understanding of liberty that currently dominates is wrong in many ways: in its oversimplification of liberty’s history, in its failure to understand liberty’s philosophical foundations, and ultimately, in its impoverished view of human beings and the moral responsibilities they have as members of the species and as members of society. What matters most, and what inspired me to write this book, are the destructive consequences this one-sided view of liberty has for our nation, the environment and planet, our moral self-worth, our children, and what religious or spiritually oriented people would call our souls.

I will not try to rehearse my argument in detail here; it is spelled out carefully in the many pages that follow. But the thrust of my argument is that the other human values that have been expunged from the concept of liberty must be taken into account when we consider what it means to live in liberal societies. These other values include but are not limited to responsibility, debt, sacrifice, compassion, and care, and are in my view part and parcel of what liberty was always intended to mean, even if it was not always so understood. What is put forward here amounts to a progressive or liberal account of liberty that sacrifices neither liberty nor compassion in the quest to understand our duties and responsibilities as human beings and as modern selves.

In offering a progressive theory of liberty, I am also trying to counter what seems to have been the liberal abandonment of the liberty concept to those on the political Right and to libertarians. Since the nineteen seventies, there has been an increasingly strong inclination in conservative politics to grab hold of and monopolize the concept of liberty and use that concept as a banner or flag under which to marshal many other arguments about the nature of rights and government, the correct approach to

taxes and the economy, health care, war, marriage, abortion, and a host of other topics. Liberty and protection of rights have often been the master concepts, if you will, under which the positions of the Right and libertarians were justified. In giving away the liberty concept and not fighting back, liberals have weakened their own position because they seemingly lost an anchor for their own positions in the assumptions about liberty in the American founding and in the rich modern tradition of liberty itself. Instead, they have allowed the Right to back them into a corner with the label “socialist” and to argue that the Right is the true inheritor of the American founders Jefferson, Adams, Washington, and Monroe, as well as the great English political philosopher John Locke, who likely inspired Jefferson and the other founders.

This view of liberty and history, however, is distorted, and progressives should not acquiesce to the Right’s monopoly on the concept of liberty. What follows, therefore, is both a sustained attack on the understanding of liberty among both the Right and libertarians and an articulation of an alternative progressive understanding of liberty. What emerges in the liberal view of liberty put forward here is a view of the human being who is an individual whose labor is not entirely his or her own. Instead, as individuals we stand on the shoulders of those who preceded us and thus have obligations and debts to them, our ancestors, and to our contemporaries, who are their heirs. From that debt arises obligations to others and to the societies we are born to and create. This is the centerpiece and fulcrum for the rethinking of key concepts in the liberty tradition: the idea of what liberty means and implies as well as its central concept of property. From here we reason to an alternative vision of government that sees its role as more than simply protecting our rights and property and that has responsibilities beyond its own constituents to the species as a whole.

In developing this progressive position, I go back to and engage with the classic expositors of liberty and rights in the modern period, as well as those philosophers who arguably created the very language that our American founders Jefferson, Adams, James Wilson, and others inherited in thinking about liberty. My interlocutor is the philosophical thinking that emerged in a different time and place. It was a century that began in

the English-speaking world with an absolute monarch in place but ended with a revolution that redefined the relationship of government and the people. In between, this same century produced civil war and regicide, followed by a failed commonwealth and then a restored monarchy. It was the same century that early on produced the thinking of Thomas Hobbes and at the end provided fertile ground for the thinking of John Locke.

The century I am speaking about is the seventeenth century, one that for Americans seems impossibly far away, both in time and in relevance, though it was the one that produced the language and historical frame of reference by which America's founders came to understand themselves. There is a deep irony in all this. Americans today think of themselves through the defining events of the American Revolution and our own Civil War. But for the definition of liberty among the American founders, the key defining references were in fact the historical events and philosophical reflections produced in the seventeenth century. Americans learn little about these events in understanding themselves, but these events were key in defining the thinking that emerged from the period and ultimately that entered into America's founding.

Among the key English thinkers in this century were English philosopher Thomas Hobbes, who witnessed the English Civil War, and John Locke, whose work justified and explained the Revolution of 1688, which ousted King James II of England, led to the Bill of Rights of 1689, and marked the end of absolute rule of the monarch in England. The great English philosophers who witnessed these events and reflected on them were influenced as well by continental philosophers Hugo Grotius in the Netherlands, who set the terms of the discussion about rights for the seventeenth century, and Samuel von Pufendorf in Germany, who synthesized the work of his Dutch and English predecessors, and whose work both Locke and Jefferson read.

The ideas of these thinkers transformed how moderns thought about liberty, government, and property, though these ideas also had their roots in classical Greek philosophy and the Renaissance. The idiom and language they developed for thinking about liberty, rights, and government still frames how we speak about these topics today. These ideas, moreover,

were at the core of the American Revolution and the conceptions of government that were being developed in the American founding. The American founders were engaged with the thinking and writing of these seventeenth-century political philosophers, and the American colonies not only lived through and witnessed the English Civil Wars and Revolution, but understood those events as part of their own history, for they saw themselves for the most part as British colonists until shortly before they declared their own independence. George Washington had a copy of Grotius's book in his library, as one example.¹ And Jefferson read Locke, Pufendorf, and Hume, among many others. The list could go on. These seventeenth-century English events were mythic events through which the American founders filtered their own experiences and came to their own conclusions about what America should be.

There are many ways that one can approach the rethinking of liberty that is at the heart of this book. My approach is only one possible way. There are others. I was and am troubled by the superficial platitudes that one often finds under the banner of liberty in the popular discourse that continues to dominate American political language. I am trying to chart a difficult course between the popular discussion of liberty and the deep and rich academic tradition in political philosophy. As an academic by training, I find the academic research in history and political philosophy to be important and insightful. And though I am fascinated by academic discussions and some of the complicated academic debates on critical philosophical and historical problems, I am also aware of how arcane those discussions can become to the average person, with the result that deep insights from both history and political philosophy often get lost in academic discourse and never find a way to touch more popular opinion.

My goal has been to chart a course between these extremes and to try to bring some of the rich academic insight into engagement with more popular discourses. Whether I succeeded in doing so my readers can themselves judge. This, then, has been my method: Where I have found fascinating and important discussions in the academic secondary literature, I have tried to allude to these in notes but not burden the reader with all the ins and outs of academic discussions. At the same

time, the discussions of liberty in popular political discussions often seem to gloss over and ignore incredibly important questions and perspectives in both history and political philosophy. This popular discourse at times is so devoid of any interesting insights that it has become sheer platitude and dogma. With such important questions about how we should run our lives, what obligations we have to one another, and what we should expect from our government, it seems incumbent upon us, as individuals, as a country, and simply as human beings, to reflect more deeply on these critical questions that may ultimately determine our fate as a nation and perhaps also as a species.

Like many writers and artists, I felt called to write this book. My journey to its creation began over ten years ago when personal circumstances led me to leave an academic career as a professor of religious studies at Stanford University and begin afresh working in a software company in Silicon Valley during the beginning of the Internet transformation. The two contexts were worlds apart, and moving from one to the other had a profound effect on me. Though I ultimately thrived in many ways in the high-tech Internet boom that has redefined all our lives, the nagging concerns with morality and justice led me to wonder whether business and the economy had to be the way they were. My own experiences in leading marketing and sales, and in helping to run the business of a public company, coupled with a much broader political debate going on in our society over the proper and respective roles of government and business, crystalized this question for me and ultimately set me off on a decade-long journey that culminated in two books and a number of essays.²

I believe and hope I have said something important in the chapters that follow. In putting forward a progressive view of liberty, I am going against the grain of contemporary trends in several ways. First, I am doing so by arguing that progressives do have an intelligible view of liberty that fits meaningfully into a legitimate understanding of modernity and of America's founding. Progressives don't have to be embarrassed in speaking about liberty anymore. Second, my writing attempts to chart a course between the banalities of popular discourse and the interesting but obscure minutiae and language that often define academic discourse.

Third, I believe that my way of putting together some of these discussions is unique, though I have leaned on and read hundreds of other philosophical and historical works on my way to my own perspective.³ I acknowledge a debt to others before me but hope and believe that I have added to and enriched what has been said before.

Whether what I say is unique or not, however, is not ultimately what is important for me. I was reminded in writing this book that even Thomas Jefferson thought he had said nothing new in writing the Declaration of Independence.⁴ And he was correct, for the ideas there contained nothing new that had not been said before a hundred times, as some of his most articulate interpreters and critics have said. But sometimes the same ideas have to be said multiple times for their meaning to be heard. I think of books and literature as being a lot like music in this regard, in the sense that multiple different approaches to the same theme can be interesting, illuminating, and moving, even if the ideas are not totally unique. There is no single musical rendition or work of art that exhausts the truth. Many artists and musicians contribute to our insight. So too with knowledge. It is my hope that this book says something useful to those who are concerned about the dominant language of liberty and the way our nation has taken a stance on what are our responsibilities toward our own citizens and human beings in general.

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Introduction

Once upon a time, America was a great country with a moral vision that could have been, and perhaps at one time was, a light to other nations. But times have changed. America in the first decades of the twenty-first century is off course and adrift. Those of us who were born in America in the twentieth century were taught that our nation is an inspiring country, one with a moral vision that could and should be emulated by the nations of the world. We brought to the world a new nation, one founded on liberty, and showed the world how a great country and great democratic institutions could be made. This was a land of opportunity. We welcomed immigrants and provided means for people who worked hard to make a meaningful, successful life for themselves. We believed that there was always enough to go around, and those who would make an effort could make a good life for themselves. We prided ourselves on being the leading economy and offering what seemed like limitless opportunities to people. We believed implicitly that our economic leadership was tied to our moral leadership. What made America great was its vision of liberty at its founding and the democratic institutions by which that vision was implemented.

But in the last half of the twentieth century, we collectively lost our way. The world's economic situation has been seriously troubling off and on for over a decade. Our optimism that America could produce endless wealth and opportunity is faltering. We see jobs moving overseas to emerging economies. We know that there are other great nations afoot, particularly China and India, whose resources and talents are threatening to compete with those of America. We are worried too by the resources

on the planet and by the ability of the world to support the population, which has just reached seven billion people.

In this new era, with a new set of difficult and troubling challenges in front of us, we need a new vision of America's purpose. The one that has been guiding us at the end of the second millennium and beginning of the third will continue to lead us and those who follow us deeper into the problems that currently face us. Indeed, it is partly responsible for the deepening mess we have around us. America has lost its moral compass and our collective purpose. And we threaten to lead the world to the brink of disaster as well.

How did we lose our way and what can we do about it? This book suggests an answer. In the last part of the twentieth century and at the start of the third millennium, America has been increasingly dominated by a particular ideology that is destroying our moral center and ultimately leading the United States and the world toward calamity. The irony is that this ideology portrays itself as patriotic and having "our" best interests at heart. And it does so using America's favorite language of "liberty and rights." Like all ideologies, this one tells us that it is true (not simply one world view or ideology) and that it has the best perspective on the way we should run our lives and our society. To back up these claims, this ideology grounds itself in moral argument, history, economics, philosophy, and sometimes God and religion. It claims to be true by giving us all the reasons why we should believe and embrace it and why doing so will make our lives and the lives of countless others better. But each one of the reasons offered by this ideology is flawed. Its moral arguments are fallacious, its history is distorted and one-sided, its economics is too narrow, its philosophy is mistaken, and its interpretation of religion idolatrous.

What is this ideology that has sent us off course? It is one that I shall label the "liberty-first" philosophy or the "liberty-first" platform. Those who espouse this ideology, whom I call the "liberty-first advocates" or the "liberty-first coalition" (or, when I'm not trying to be nice, the "liberty-first extremists"), are present in large numbers in the Republican and Libertarian parties and in the new Tea Party.

Those in the "liberty-first" camp are by no means all the same. They come in different varieties and flavors, making it confusing sometimes, because they do not always agree among themselves on a number of key matters. But what unites them is a key philosophical contention and assumption: that by maximizing the liberty of individuals, we maximize everything that is good in life. In the view of those in this camp, liberty leads to more productive people, to progress that brings social and economic well-being, and ultimately to a better world for everyone. Liberty is the engine that drives this growth in well-being. The output of liberty lifts everyone higher on the rising tide of social well-being. This rising tide is like a broad ocean that reaches from those of us in the developed world even to those in the Third World. Even though those in poorer countries do not have as much material well-being as do we, the engine of liberty lifts all boats, no matter where they are. We should not feel badly about the discrepancy of wealth and material well-being inside our society or between our society and others. That disparity is necessary and part of what makes the engine hum. Individuals motivated to better themselves, and surplus capital that can be invested in new innovations, are all key components of this liberty engine. If we try to "level" the material wealth and make everyone the same, we shall experience less overall growth in well-being, and fewer people will benefit. We all benefit the most by limiting individuals the least.

I call this the "liberty-first" philosophy or "liberty-first" platform because the ideology makes individual rights and liberty the primary value that matters most and that should guide us. When push comes to shove, and public policy decisions need to be made, liberty trumps other values. In other words, "liberty-first" advocates want to give the value of liberty a prerogative in public decision making when it comes into conflict with other values, such as responsibility, common good, obligation, care, compassion, and equality, among others. They think that moral concerns and justice should be matters handled by every individual in his or her own conscience, not a matter of public policy. I shall spend a good deal of time on this question of liberty's relative importance to other values later, because it is a core part of my argument about how

we have gotten off course and adrift. In giving this view of liberty such a prominent place in America's consciousness, we have perverted what were otherwise quite positive impulses of the modern period. The near-obsessive focus on liberty to the exclusion of other important values and concepts is part of what is causing the world's problems and undermining America's leadership and respect. This of course is ironic, since America earned its reputation precisely because it expanded the notion of liberty in important and key ways. But America has lost much of that respect, precisely because it has taken liberty to extremes. Bringing liberty back into balance with other values is a core goal of my writing and one that ultimately dovetails with what I believe is right and just.

• • •

Before we talk about what is wrong with this liberty-first philosophy or platform, let us listen to how liberty-first advocates tend to speak: "Do not touch what is mine. It is my property and my money. I earned it. I worked hard for it. How dare government take away what is rightfully mine. How dare government use my money for someone who did not work as hard as I. Government has become too big. By becoming too large, government oversteps its bounds and infringes on my rights. When government becomes too big and too bureaucratic, it curtails my freedom, and takes my hard-earned money.

"This country was founded with a vision of liberty, and we have abandoned that vision. Those who favor bigger government or more government spending have socialist leanings or are socialists. There is a slippery slope to socialism that begins with letting government curtail individual rights. Those who do so are denying the vision of America's founders and the spirit of liberty. They are also denying what God wants. God created individuals free and equal and with 'natural rights.' 'Natural rights' are those that are God-given or 'self-evident' to reason. These rights include life, liberty, property, and the pursuit of happiness, values that are enshrined in the Declaration of Independence and protected by the

Constitution of the United States. By infringing these rights, we deny God's purposes, go against nature, and undermine the founding vision of America.

"By protecting what is yours and mine, we create a just society and a better world for everyone. Liberty is the foundation of the free market system. Economists since the time of Adam Smith, the father of modern economics, have realized that markets work best when left to themselves and when governments do not intervene. Free markets help motivate people to labor and invent. The incentives in the market encourage people to dream, to innovate, and to work hard. The market makes human character better and makes the world a better place. Through the invisible hand that is created by the thousands of transactions in the market, the market mechanisms determine how much of a product should be produced and what the price should be. Supply and demand and the mechanisms of the market are finely tuned to send signals to farmers and factories about how much of a product should be produced. When governments intervene in markets with taxes or subsidies or government-run programs, the mechanisms of the market are distorted. People suffer through that intervention, because products are not produced as cheaply as they could be. Government intervention in markets is not only harmful, it is wrong. As Milton Friedman once put it, 'Underlying most arguments against the free market is a lack of belief in freedom itself,' and 'freedom in economic arrangements is itself a component of freedom broadly understood, so economic freedom is an end in itself.'"¹

The preceding several paragraphs provide a nice, concise summary of the key position of liberty-first proponents. We see a mixture of different types of arguments, all of which are used at one time or another by people who espouse the liberty-first position. The arguments are economic, historical, moral, philosophical, and religious. Not all of these arguments are necessarily used by the same individual, and some of the arguments are actually incompatible with each other. Not all individuals who broadly fall under this liberty-first umbrella in fact agree with each other. Those who believe the economic arguments that "free markets make for a better world" may not believe that "natural rights are God-given," and

they may not even believe in God. Those who think that “our rights are self-evident” may not think God gave them to us in any traditional sense. But many of these ideas can be woven together: God gave us liberty; the founders had liberty at the heart of their vision of America; liberty is at the foundation of free markets; and free markets are best for the world in general. What unites all of these variations, despite their sometimes profound differences, is a core conviction that liberty of individuals is the key value that must be protected, no matter what. The “no matter what” is important, as it underscores the priority that the value of liberty has in public policy decision making. And it is that value that unites individuals who otherwise think very differently on some matters.

In this introduction, I shall tease these arguments apart and set the groundwork so that later I can challenge them, each in turn, one at a time. The ultimate goal is to show the power of an alternative vision for America that questions this broad, sweeping ideology that places such a narrow understanding of liberty above everything else that matters.

• • •

What I am calling the “liberty-first” philosophy or stream of thought has grown its number of adherents and captured imaginations in the last several decades of the twentieth century and continues to be a prominent voice in the early twenty-first century. The philosophy has been articulated in both academic and popular writing by political leaders, radio talk show hosts, and news organizations. In academic writing, among its most articulate spokespersons have been Frederick Hayek, Ludwig von Mises, Ayn Rand, Milton Friedman, Richard Epstein, among others. Politically, the ideas have been articulated by Republican presidents, most notably Ronald Reagan and, to some extent, both presidents Bush, though critics believe the second George Bush failed to live up to his own rhetoric. In England, the ideas were at the center of Margaret Thatcher’s political program. Institutionally, the philosophy of “liberty-first” is supported by think tanks such as the Cato Institute, the Heritage Foundation, and

FreedomWorks, among dozens of others that have supported research and publications on the subject. On the American Supreme Court, the philosophy is reflected in varying degrees in opinions of conservative justices such as Chief Justice William Rehnquist, Chief Justice John Roberts, Justices Clarence Thomas and Antonin Scalia, among others. In the popular media, the liberty-first ideology is promoted fiercely by the radio talk shows of Rush Limbaugh, Glenn Beck, and Sean Hannity and the writings of libertarian political figures such as Ron Paul and is implicitly endorsed by media outlets such as Fox News.

One might be tempted to name this philosophy “conservative,” and indeed the “liberty-first” platform is embraced by a majority of Republicans and animates the new Tea Party. Naming it “conservative,” however, does not do justice to the philosophy itself, which is why many of its philosophic espousers, such as Hayek, think of themselves as “the true liberals” and why some end up calling themselves “libertarians.”² By focusing on freedom and rights, they believe they are the true inheritors of the modern liberal tradition. While all of these individuals have important differences from one another, and some articulate the philosophy more intellectually than others, they share a common core set of values that are articulated around the liberty principle. In this sense, liberty is the key concept that traverses and holds together diverse parties of what perhaps could loosely be called a movement or stream of thought. They come together for political reasons and the practical goals that they share. Even though they have different underlying assumptions, they rally together under the banner of “liberty.”

This introduction is part of a larger argument against the “liberty-first” philosophy and the development and reinvigoration of an alternative philosophy I call the “responsibility-first” philosophy. This alternative view contrasts the “philosophy of rights” that is embraced by the liberty-first party with a “philosophy of what’s right,” a philosophy that does not put all the weight on notions of individual rights. This other view contrasts “natural rights,” which many (though not all) of the liberty-first advocates emphasize, with the concept of “natural responsibility,” which shifts attention to the obligations we have naturally as a member

of the human species. It is only by shifting our obsessive focus from “liberty” as the only or primary core value to others such as responsibility, care, justice, equality, humanity, and compassion, among others, that we articulate a political position and philosophy that can provide us with a moral center, restore our prestige and meaning as a country, and provide a vision in a world that is off course and adrift.³

In arguing we need a new “philosophy” to orient us, I am using the term “philosophy” loosely as the equivalent to “world view” or “ethos,” in other words, to refer to a broad set of cultural, political, religious assumptions about what is important and why. All such world views contain and imply a tacit philosophy, though the articulation of that philosophy may be more or less explicitly intellectual.

For reasons that I will continue to explain in later chapters, I have come to the conclusion that the liberty-first philosophy is and will continue to be destructive to human flourishing. The limitations of the liberty-first orientation are many:

First, the fact that the value of liberty consistently and methodically trumps other human values is a core problem in the liberty-first agenda. Liberty is one important value, *but it is not the only important human value*. And when the relative weight of liberty in human decision making is shifted and balanced with other important human values, a more just, humane, and compassionate human flourishing is made possible. Indeed, I will argue that part of what animates the modern liberty tradition itself is precisely the question of how to balance rights and responsibilities. If we take away the right in society to adjudicate this balance, we paradoxically destroy what liberty is.

Second, many liberty-first advocates appeal to liberty when it is convenient for them, but not when it is inconvenient for them, thus demonstrating that they are not really consistent with their own overt position. If we look at their use of liberty, we can see that many (though not all) are really endorsing liberty first when it suits their purposes. They invoke liberty when they want to rail against government being too large or to promote the right to own guns, but they run from liberty when they talk about marriage between gay people, the right to abortion, the choice to

die, or even the right not to say the Pledge of Allegiance.⁴ In other words, they pick and choose when to invoke liberty, because liberty is a smoke screen or cover for a specific philosophical, religious, moral program. This inconsistent use of liberty by many liberty-first advocates shows that what is at stake is not really liberty per se. And it also shows that liberty is a concept that gets filtered by a set of values. When understood this way, the question is always how liberty should be implemented in a liberal society. By what values should it be understood and concretized?⁵ There is no absolute answer in a liberal society that must balance the values and perspectives of many different peoples who may not all agree with each other.

Third, liberty-first advocates distort the meaning and history of liberty as a modern and American concept. Advocates of the liberty-first position equate one understanding of liberty with “the only” understanding of liberty. They project an overly simplistic understanding of liberty back onto the American founders and onto God and traditional religious concepts, and they tend to ignore and oversimplify the history of the modern tradition of liberty in general. We shall see that it is possible to embrace the concept of liberty without ending up in a position like that of the liberty-first advocates.

Fourth, liberty-first advocates often justify their view on liberty in terms of an overarching economic philosophy about free markets. They often argue that “liberty” and “free markets” mean the same thing and collapse the distinction between the two concepts. Milton Friedman, for example, argued that economic liberty is part and parcel of liberty. But I shall argue that liberty and free markets are very different concepts. The justification for free markets is not the same as the justification of individual rights. Indeed, the justification of free markets is usually pragmatic and economic. Economists favoring free markets say they are more efficient than other kinds of markets and will maximize human flourishing. This is the typical foundation of the free market argument, using the consequences and the outcomes to justify the position. This pragmatic argument differs from the claim that “we have natural rights to liberty that should not be infringed.” When we distinguish the two positions

(as some proponents of free markets do), we disentangle a pernicious and dangerous combination of ideas that are spontaneously combustible. By challenging each of these ideas on its own terms, it is possible to show that the two arguments cannot and should not be conflated. The protection of liberty does not necessarily mean we should have no rules governing the economy. And the value of free markets has no implications for rights. They are separate arguments. The theoretical positions of economists should not be taken as gospel any more than those of the priests of the Middle Ages. Economics is just a “social science,” and even the “natural” sciences have evolving and changing understandings of the world. Economics is no different. The quest to create a science of the human ultimately failed, and economics is no different from other human or social sciences in this regard, as we shall discuss later. What reigns as truth for our economics professors should not necessarily dictate our moral positions on social justice, responsibility, and other obligations of the human species. *It is time to stop treating economists as the priests of modernity.* I have more to say about this topic in one of the subsequent chapters.

The limitations of the liberty-first position alluded to above are academic and intellectual. Yet the consequences are broad and serious. The notion of liberty espoused by the liberty-first advocates does just the opposite of what it purports. It undermines human flourishing; it ravishes our planet; and it vitiates the notion of equality that is implied by and ultimately is the foundation of the concept of liberty. Ultimately, the liberty-first ideas must be rejected if we have any hope to bequeath to future generations a planet that allows liberty to flourish. For if we do not fight back against what is a limited and myopic view of liberty, the inequality of the present world will increase, the environmental destruction will reach a point of no return, if it hasn't already, and liberty will disappear under much stricter government regulation and, what may be far worse, a massive policy of controlled distribution. The sad irony is that the views of the liberty-first advocates are more likely to lead to socialism or totalitarianism than those of the people they criticize for being socialists.

Simply put, the question before us is this: What political philosophy should carry us forward and guide us for the next century and at the beginning of this new millennium? If we act now, we do not have to abandon the concept of liberty altogether to address the concerns in front of us. But to avoid dire consequences for the planet and ultimately for human liberty, we must return to more of a classic notion of liberty that understands freedom as one value among other important human values, and as a right to embrace and live by along with other values. By interpreting liberty in light of other important human commitments, we not only build a moral-political philosophy for the future but renew and restore some of the most important dimensions of human thinking in the past, including the best of the great religious traditions and critical insights of modernity.

I refer to this philosophy of the future as a philosophy of “natural responsibility.” It is contrasted to a philosophy of “natural rights” and balances concepts such as free markets and individual rights with a rich set of other key human concepts, such as responsibility, debt to history, public good, compassion, equality, love of one's neighbor, and a host of other rich moral and religious concepts that have slipped away from us. Such a philosophy is both a move forward and a return to what was great in the past, but without some of the past's limitations. I shall have more to say at another time about the word “natural” in the term “natural responsibility.” In contrast to those who argue for “natural rights,” a philosophy of “natural responsibility” shifts the perspective or center of gravity in our thinking beyond liberty to a broader circle of key human concepts and ideas. This philosophy takes seriously that liberty was always defined in terms of other conceptions, including human nature, science, God, morality, responsibility, equality, among others. Concepts such as justice, compassion, responsibility, obligation, care, love, equality, all have their appropriate place in the mix alongside liberty as valuable and important moral ideas. Liberty is one important concept. It gets a vote but not a veto. This is why I title this book *Beyond Liberty Alone*. One does not live by liberty alone, just as one does not live by

bread alone. The point is not to abandon liberty but to balance it with other important values and see the meaning of liberty in light of those values. Just as a single musical instrument does not make for an orchestra, so too a single value to measure human good does not make for a good political philosophy. The difference between the philosophy of natural responsibility and the philosophy of natural rights appears on a whole range of issues: they differ on the notion of what a human being is and what truth is about, on the question of how we should think about God, religion, the meaning of modernity, history, and the purpose of America, and on the place of economics in our political life. On these and other key topics, this philosophy of natural responsibility differs from the tendencies of the liberty-first advocates. What differentiates this conception of liberty is in the entire underlying set of assumptions that make liberty intelligible.⁶

Core to the concept of natural responsibility is the conviction that we are more interdependent as a human species than we typically grant. This idea seems so self-evident that it hardly seems worth mentioning. Unfortunately, the notion of human interdependence has disappeared almost completely from the rhetoric of the liberty-first advocates. They hold positions as if human interdependence doesn't matter or as if human flourishing in general will occur by completely unfettered individuals pursuing their own self-interests. I disagree with both of those propositions. I believe that we must take seriously, both morally and philosophically, the ways in which humans are interdependent with one another across generations and across geographic, national, social, and religious boundaries. This has always been true, but in our current day, when the interconnected nature of our economies is more evident than ever and when environmental destruction is possible in our lifetime, the ways we are intertwined are more self-evident and more consequential than ever before.

In countering the liberty-first philosophy with a philosophy of natural responsibility, the goal is to shift the focus of people's thinking beyond themselves to the ways in which they are ultimately interconnected and mutually entangled. In some ways, there is nothing radically new in this

shift in perspective. It is arguable that the notion of "humanity," in counterpoint to the notion of myself, "my nation," "my people," or "my God," framed some of the great insights of the modern Enlightenment as well as particular strands at various moments of many religions. But the notion of humanity has seemingly lost much of its power in the now-current variation of the liberty-first philosophy. Humanity, or the human species, is a way of thinking about ourselves that transcends both our limits as individuals and as America, the nation. I believe that if we shift our gaze to include the unit of humanity more prominently in our thinking, we will come to understand liberty in a different way, as requiring and containing within it other values that are also important and indeed sacred in their own right. By doing so, we align with some of the insights of the great religious traditions in ways that restore other lost insights of modernity and return to a view of liberty that is more at home with how liberty has at times been understood. What is at issue is both the definition of liberty itself and the relative balance of liberty and other values. The philosophy of "responsibility first" or "natural responsibility" that I talk about here reinvigorates the importance of the concept of humanity and the idea of the human species in order to recapture the very essence of what liberty means. From that rethinking comes a broader and more nuanced understanding of liberty.

In reframing how we think about liberty and the responsibilities that spring from our freedom, I ultimately point to a new vision of America with both heart and soul. I use the metaphors of heart and soul to talk about these broader values that comprise our humanity. To some, these are matters of the heart: compassion, caring, love, solidarity, empathy, and sympathy. To others they are also matters of the soul: what people believe God wants of us and what our most spiritual natures are seeking, whether we believe in a traditional understanding of God or not. In embracing these other values, I believe we also return to lost insights about liberty that reach back to the American founders and the modern philosophers of liberty. In my estimation, when the founders wrote about liberty, they meant something deeper and more profound than do our liberty-first proponents today.⁷

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, *where 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 curtailed 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 “Hobbbism” 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 Wolt-erstorff, “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 chil-

dren 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 McKittrick, *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 Propriety, 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 America 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 allotted 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 manures 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 confining 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 Indian*, 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 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 Georgescu-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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