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Thesis Consent Form
Property Rights
in
Environmental Resources

by
Murray Sheard

A thesis submitted in fulfillment of the requirements for the degree of Doctor of Philosophy, in Philosophy

The University of Auckland, 2006
Abstract

This thesis examines the nature of property rights over environmentally sensitive resources and develops a new conception of property in these resources. It has implications for the design of property law, environmental law, and the ethical responsibilities of business in the use of resources.

I pursue this project by examining arguments employed in the defence of the institution of private property. These arguments are, on one hand, the “original appropriation” arguments of John Locke (1632–1704) and modern versions of this, that appeal to ownership of one’s labour and, on the other hand, arguments that appeal to utility and economic efficiency. I show how the central intuitions of these arguments can be used to construct a theory of property in environmental resources.

I argue that property rights do not conceptually conflict with duties of preservation and that they admit of more environmentally motivated restrictions than is often thought. They do not license uses that contribute unjustifiably to environmental hazards or that lower environmental quality below certain minimums. Government interventions in the form of land use planning, monitoring, and other activities are justified in principle. The public retains a say on legal limits to property use, reflecting the interest of the community.

The conception of property that arises is a form of private ownership with an element of stewardship. I argue that this conception better captures the moral reasons that justify property than does a traditional “full liberal” conception. The account is sensitive to a plurality of justifying principles and a range of object types and gives flexibility within a property regime. It rewards labour and productivity while curbing the more destructive potential of unrestricted rights.

I conclude the thesis with an application to the issue of climate change. I show that this conception of property gives the flexibility needed if necessary restraints on emissions are not to clash severely with property rights. I develop a proposal for fairly distributing the burdens of climate change mitigation.
This thesis is dedicated to my father

Kenneth Arthur Sheard

(1912 – 1998)
Acknowledgements

This thesis was originally perfect and would have remained so if it were not for the pestered interference of three key people, to whose ‘wisdom’ I reluctantly submitted.

My main debt of gratitude is owed to my lead supervisor Gillian Brock. Her advice as to both form and content has been immeasurable. Gillian has been extremely pro-active, engaged, and helpful. She provided much guidance on the structure of my project. Her feedback on substantive work, both written and in our meetings was constructively critical and encouraging. Over this time, her insight into big-picture priorities and advice on such matters as attending conferences, preparing for publication, and career options has been invaluable. She has displayed so many of the virtues: honesty, courage, wisdom, but especially patience and perseverance.

Co-supervisor Stephen Davies provided valuable substantive comments but also a comprehensive education - long overdue - in grammatical form. This experience has completely changed my approach to my own students’ writing. I now think that a good grammatical shock treatment, delivered early, will set them up for life and prevent them from torturing their own future supervisors.

My other co-supervisor Tim Mulgan, before he left for St Andrews, provided specialist help on a number of issues. This was especially valuable for chapters 4, 6, and 7.

Other contributions have been notable: The staff at the Universities of Auckland and Edinburgh; Natasha and the friends I have lived with over this time; Many encouragers who have asked the classic question: “So, how’s the thesis going?”; Vernon and Isa Rive for the repeated loan of their holiday house in beautiful Mangawhai providing many days of concentrated writing over the last year; The various cafes in which I read and wrote (principally Occams in Grey Lynn, Jazz in Remuera, and Kahve in St Heliers). Following the decision to award the PhD (YAY !!), I am permitted to know the identities of - and to thank - my thesis examiners for their work and complimentary comments: Lawrence Becker and Clark Wolf.

E te matou Matua,
Whakapaingia tenei mahi.

Murray Sheard.
Tamaki Makaurau / Auckland
Aotearoa / New Zealand
December 2006
Table of Contents

CHAPTER 1 INTRODUCTION: PROPERTY and the ENVIRONMENT 1

1.1 Motivation .................................................................................................................. 1
  1.1.1 Ecology and crisis 1
  1.1.2 Property and the environment: The connections 2
  1.1.3 Contribution to property theory 4
1.2 Overview of the Thesis .......................................................................................... 5
1.3 What is Property? ..................................................................................................... 8
  1.3.1 What is a right? 8
  1.3.2 What are rights of property? 9
  1.3.3 Private and other forms of property 11
  1.3.4 Types of private property 12
  1.3.5 Property rights in society 14
1.4 Justifying Property .................................................................................................. 14
  1.4.1 Justification and argument type 14
  1.4.2 Rights-based arguments 15
  1.4.3 Goal-based arguments 16
  1.4.4 Complete theories of property 17
  1.4.5 Environmental resources 17
1.5 Approaches to Related Topics and Applications .................................................. 18
  1.5.1 Mutual dependencies 18
  1.5.2 Future generations 19
  1.5.3 Alternative property traditions 20
  1.5.4 Applications 21
1.6 The Concept of Property and the Right to Destroy .............................................. 21
  1.6.1 Destruction in the core rights 21
  1.6.2 The right of transfer 22
  1.6.3 The right of use 22
  1.6.4 The right of exclusion 23
  1.6.5 An emergent right to destroy? 24
1.7 Contributions to Political Philosophy ................................................................... 24
  1.7.1 Lockean scholarship 24
  1.7.2 Land, labourer, and natural capital 25
  1.7.3 Protection from within the concept of property 25

CHAPTER 2 LOCKE: COMMON RIGHTS and PRIVATE APPROPRIATION 26

2.1 Introduction .............................................................................................................. 26
2.2 What is Original Appropriation? ........................................................................... 27
2.3 Locke in Summary .................................................................................................. 28
  2.3.1 “Of Property” in the Two Treatises 28
  2.3.2 The state of nature and the first labourer 29
  2.3.3 Labour’s power to circumvent consent 31
2.4 Rights and Liberties in the State of Nature .......................................................... 32
2.5 The Ownership Problem: Locke and Labour ......................................................... 36
  2.5.1 Approaching the ownership problem 36
  2.5.2 Premise 5: Self-ownership 38
  2.5.3 Premise 6: Ownership of one’s labour 42
  2.5.4 Premises 4 and 7: Mixing labour and objects 42
CHAPTER 5  The LIBERTARIAN CHALLENGE 104

5.1 Introduction........................................................................................................... 104
5.2 Nozick on Property............................................................................................... 106
5.3 Original Acquisition and the Duties of Others....................................................... 108
  5.3.1 Acquisition and duty creation 108
  5.3.2 Unilaterally imposed, onerous duties 109
5.4 Self-Ownership..................................................................................................... 112
  5.4.1 Property as conceptually necessary for liberty 113
  5.4.2 Property as instrumentally necessary for liberty 114
  5.4.3 ‘Makers’ right’ and the ownership problem 116
5.5 Does Nozick’s Theory Give Environmental Protection?....................................... 117
  5.5.1 Nozick on the proviso 117
  5.5.2 The Baseline and border crossing 119
  5.5.3 Conservation policy and the baseline 122
5.6 Is Nozick’s Theory Applicable to Environmental Cases?...................................... 124
  5.6.1 Pollution as a negative externality 124
  5.6.2 The problem of the ubiquity of rights violations 125
  5.6.3 The problem of shaping specific rights 126
5.7 Conclusion............................................................................................................ 128

CHAPTER 6  UTILITY and EFFICIENCY ARGUMENTS for PROPERTY 129

6.1 Introduction........................................................................................................... 129
6.2 Property and Utility............................................................................................... 130
  6.2.1 The use of utility in arguing for property 130
  6.2.2 The scope of utility arguments 131
  6.2.3 Property through utilitarian eyes 132
  6.2.4 What will count as utility? 132
6.3 The Personal Utility Argument.............................................................................. 133
  6.3.1 The argument 133
  6.3.2 Assessment of the premises 135
  6.3.3 Non-property goods needed for happiness 136
  6.3.4 Conclusions from the personal utility argument 139
6.4 The Economic Efficiency Argument..................................................................... 140
  6.4.1 The general argument 142
  6.4.2 Prospects for a specific argument for full liberal rights 147
  6.4.3 Weaknesses of efficiency arguments for full liberal rights 147
  6.4.4 Full liberal rights and future people 151
  6.4.5 Efficiency of full liberal rights over specific environmental goods 154
6.5 Conclusions.......................................................................................................... 158

CHAPTER 7  TOWARD a THEORY of ENVIRONMENTAL PROPERTY 159

7.1 Introduction........................................................................................................... 159
7.2 Strands of Argument for a Limited Property Conception.................................... 159
  7.2.1 Locke’s failure to generate strong rights from self-ownership 160
  7.2.2 Labour value, earth value 160
  7.2.3 Enough and as good: implications 161
  7.2.4 Nozick’s Theory 161
  7.2.5 Limits from utility arguments 162
7.3 The Effect of Residual Interests........................................................................... 163
  7.3.1 The nature of residual interests 163
Chapter One

Introduction: Property and the Environment

1.1 Motivation

1.1.1 Ecology and Crisis

The ancient fear of what Mother Nature will do to us has recently given way to a concern about what we may be doing to her. Only a dwindling minority of scientists now deny that overuse of resources, persistent pollution, and the destruction of natural landscapes are accelerating threats to life on planet earth. The Washington-based Worldwatch Institute, in its 2003 State of the World report, gives the human race only one or two generations to rescue itself.\(^1\) Without immediate remedial action, there is an increasing likelihood of severe biological impoverishment in the near future.\(^2\)

Among the worst trends is that 420 million people now live in countries without adequate crop land to grow their food. About one-quarter of the developing world’s crop land is being degraded and this rate is accelerating. Almost one-third of the world’s rural residents lack access to safe drinking water. More than 500 million people live in regions prone to chronic drought and by 2025 that number is likely to have increased at least four-fold. A probable world population increase of 27% over the same period will create social and ecological instability. While 99% of that growth will be in the developing world, those in the more affluent world use five times more energy per capita.\(^3\)

Meanwhile, toxic chemicals are being released in ever-increasing quantities and global production of hazardous waste has reached more than 300 million tonnes a year. Carbon dioxide in the atmosphere has reached 371 parts per million, the highest level for at least 400,000 years and probably for 20 million years. In 1995 the Intergovernmental Panel on Climate Change (IPCC) claimed that anthropogenic emissions from greenhouse gases will cause flooding, hurricanes, disruption in rain patterns, depletion of fresh-water sources near coast-lines, and a reduction in arable land. Less directly it could cause the spread of pathogens to new areas and adversely affect agricultural yields.\(^4\) The impact will be far from geographically uniform with one-fifth of Bangladesh expected to be inundated within 20 years.

Since then the news has worsened further. On land, Siberian ice is thawing for the first time since its formation 11,000 years ago. The area contains billions of tonnes of methane. “This will ramp up

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\(^1\) See http://www.worldwatch.org/pubs/sow/2003/Accessed 1\(^{st}\) Dec 2005

\(^2\) I acknowledge that predictions concerning planetary trends and especially irreversible environmental damage are notoriously unreliable and we must take seriously the limits to human predictive powers.


temperatures even more than our emissions are doing, causing global warming to snowball”, says Sergei Kirpotin of Tomsk State University.\(^5\) Meanwhile, over the oceans a dramatic Arctic melt began around 2001 and scientists fear accelerated loss of the polar sea ice that has kept the climate stable for thousands of years. Sea ice reflects up to 80 per cent of incident sunlight but this is mostly lost when the sea is uncovered. Professor Peter Wadhams, an Arctic ice specialist at Cambridge University observes that “if anything, we may be underestimating the dangers”.\(^6\) IPCC projections have so far omitted these gas emissions.

The state of the world's natural life support system is perhaps the most worrying indicator. On land, about 30% of the world's surviving forests are seriously fragmented or degraded and we lose over 120,000sq km a year. Wetlands have been reduced by 50% over the last century. In the seas, a quarter of the world's mammal species are in danger of extinction and coral reefs, the world's most diverse aquatic systems, are suffering the effects of over-fishing, pollution, epidemic diseases, and rising temperatures. In the air, bird extinctions run at 50 times natural rates, with 12% endangered.

In my country, Aotearoa/New Zealand, within 800 years humans and their introduced pests have made extinct 30% of indigenous birds, three out of seven species of frog, and at least twelve major invertebrates. About 1000 of our known animal plant and fungi species are considered threatened.\(^7\)

Renewable energy technologies could significantly reduce the threat from both resource overuse and pollution. While these could now supply most of the world's energy needs, there is a lack of political will to introduce them with sufficient speed. One industry that causes widespread destruction, mining, could largely be replaced by re-use and recycling. Mining consumes 10% of the world's energy, spews out a vast range of toxic emissions, and threatens 40% of the world's undeveloped forests. These effects could be drastically reduced.

With respect to pollution, some measures, such as banning toxins at the point of origin, have proven successful. Lead, PCBs and strontium 90 have decreased by 80% in the air, body tissue, and milk respectively. But efforts to control other pollutants have simply failed. In north-east China, Benxi, a city of over 1 million, has completely disappeared from satellite photos under an umbrella of smog.

\subsection{1.1.2 Property and the Environment: The Connections}

Important though such data is many will find it both wearisome and disputable. Perhaps rightly so, for the argument over just how advanced is the planet’s ailment is something of a red herring. We do not need a coronary occlusion to know there are principles of sound nutrition. The real issue is whether or not we have an obligation to live in certain ways, independent of diagnostic assessment over just how far earth's illness may have progressed.

\(^6\) Independent, London, 16\(^{th}\) September 2005  
\(^7\) New Zealand Bio-diversity Strategy, part 1, p 4 (Wellington: Ministry for the Environment, 2000)
Social institutions provide the skeleton structure of societies and the opportunities and protections available to members, both now and in the future. Environmental problems are also social. They arise from socially organised practices that are allowed because decision makers (public and private) deem them an acceptable sacrifice. If the deleterious effects of environmental degradation are to stop affecting those who do not cause and sometimes do not benefit from them, they must be controlled by a legal system. Property is part of that legal system.

Property rights allow owners a cluster of rights over resources; principally, rights to use, possess, transfer and gain income from goods. Many of the potential uses conflict with interests that both current and future people have. Millions of individual actors making small insular decisions can, by cumulative affect, threaten our survival. This is especially true when the object of property in question is a natural resource, has a high resource component, or affects the integrity of natural ecosystems.

In fact, the privileges of private property won in recent centuries have in significant measure created the problem. Yet they should not be surrendered unnecessarily, as they have also been instruments for enhancing quality of life for many. Yet the quest to protect these privileges against all intruders is an unholy one. The survival of the human and biotic community must be the paramount interest. There is potential for developing legal and market instruments around property to ameliorate and arrest environmental damage, while respecting the interests and efficiencies that motivate a private property system. This I explore in the pages to follow.

The Western concept of “full liberal ownership” over land and natural resources was developed before there was clear evidence that a world population growing in both size and affluence poses a threat to the capacity of these resources to sustain us. Many scholars we shall meet in these pages argue that property rights grant near complete sovereignty in decision-making over resources. The standard element of a property right, the “right to use”, is sometimes referred to as the “right to use and abuse”. The second half of this formulation suggests that “use” amounts to “use as you see fit”. Under this view, attempts to regulate use and impose pollution standards are unjustified violations of that right.8 In many countries, saliently the USA, economic and political libertarians have endeavoured to roll back legal protections of the environment.9 A central element in their case has been a near-absolute conception of property rights.

Avoiding the potentially catastrophic costs of escalating future environmental problems, involves the imposition of costs on present individuals. Many conflicts have arisen between regulating bodies

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and land owners over just what the latter are entitled to do on their ecologically sensitive or significant land. If property rights are at odds with preservationist duties, conservationists and others who argue for environmentally motivated restrictions face an uphill battle, since they must pit the value they defend against the carefully guarded right to property. This problem is not insurmountable as liberal political theory deals with pluralist problems all the time. Property rights, far from being sacrosanct, address one social value among many. Yet must the environmentalist be on the back foot here? Perhaps we are too hasty to concede that rights of property and duties of preservation are at odds. If they are not then sometimes property rights will not count against preservationist duties. Those wanting to resist preservationist claims must find other grounds than property rights on which to rest their case.

1.1.3 Contribution to Property Theory

I develop a conception of private property that addresses these issues. Much concern to halt both resource depletion and over-production of emissions manifests in a popular tendency for environmentalists and those concerned with global inequalities to dismiss *private* property in favour of common or collective property. Attempts to do so continually show a lack of understanding around both motivational issues (the ‘tragedy of the commons’ and incentives to production) and moral issues (such as, protecting the interest a worker has in the fruits of her labour). They simply fail to account for the strengths of private property.

My account of property over environmental goods captures the value of the private conception while retaining a sense of common access, participation and connection. To be convincing to those resistant to all but minimal restrictions on property (for example, libertarians) any conception of property rights must protect an owner’s autonomy and financial interest. I show how property rights in these environmentally sensitive resources must also protect other values such as sustainability, biodiversity, and fairness to future generations. In consequence, both rights over resources with a high natural resource component and rights over other resources that significantly affect environmental quality must be less strong than full liberal rights. I show how these can be determined. Under such a conception, we are not without defence against those who may abuse such goods. I argue that those who claim that property rights are violated when environmental restrictions are imposed misunderstand both the concept of and the arguments for property rights. Rights over some environmental resources are more like stewardship rights than full-blown liberal rights.

In particular, I show that:

- Property rights do not conceptually conflict with duties of preservation.
- Property rights do not license uses of property that result in needed goods depleting before substitutes can be found.
• Property rights do not license uses that contribute unjustifiably to environmental hazards and lower environmental quality beneath an acceptable standard.

• Government interventions in the form of land use planning, monitoring, and other activities are justified in principle. The public retains a say on legal limits to property use, reflecting the community’s interest.

Without these results, some environmental regulation may be justified all-things-considered, but would still violate property rights (albeit in an excusable way). Yet if I am right, some government imposition of such limits will not violate those rights in the first place.

Much, maybe too much, ink has been spilt on arguments for and against property, the most recent flurry occurring in the late 1980s and 1990s. However, specific applications to environmental resources are rare at the level of journal article and to my knowledge have not previously been attempted in a book-length treatment by a philosopher.

1.2 Overview of the Thesis

This thesis examines the nature of property rights over natural resources, especially those which are environmentally critical and develops a new conception of property in these resources. It is thus a work in political philosophy and environmental ethics with implications for the design of property law, environmental law, and the ethical responsibilities of business in the use of resources.

I pursue this project by examining arguments employed in the defence of the institution of private property. These arguments are principally the “original appropriation” arguments of John Locke (1632–1704) and Robert Nozick (1938-2002) who appeal, three centuries apart, to ownership of one’s labour.10 I also employ a sub-theme of arguments that appeal to utility. I will determine the limits to property rights inherent in these arguments and examine the role each plays in broader defences of property. Because so much of Western (especially American, and now international) property law is based on Locke’s thought, one can provide powerful reasons for environmentally motivated restrictions if one can find a defensible Lockean alternative to Locke’s theory of property that justifies those restrictions.

In this chapter, having motivated the thesis, I examine the concept of property and the conceptual variety of arguments employed in its defence. I then discuss the relationship between this thesis and other feisty philosophical issues that intersect with it. Some of these, for example the question of obligations to future generations, would require theses in themselves, so I merely explain what

10 I will abbreviate my (many) references to Locke’s Two Treatises with Treatise and Section. So, for example, “II 27” will designate Section 27 of the Second Treatise. The full reference is John Locke, Two Treatises on Government, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1960). Unless otherwise stated, all quoted italics are Locke’s not mine.
assumptions I rely on. I finish by clearing from the ground some challenges that may otherwise threaten the project.

In chapter 2, I begin an assessment of the most discussed argument for property, that of Locke. I consider the nature of the original appropriation of land and show that, while a version of Locke’s argument yields a case for private property, it simultaneously attaches limitations. The exact makeup of the set of limitations I argue for is novel but contains elements that reflect commonly discussed issues within Lockean scholarship.

Chapter 3 considers the nature and implications of the “enough and as good” proviso that Locke employs. The exact restriction this generates determines the rights Lockean property will support. Appropriations should not be unfair to others who are yet to appropriate. I address theorists who argue for a range of positions: those who claim that a proviso of this sort must be rejected, those who try to rescue the proviso, and those who view Locke’s aim as preserving a right to access rather than appropriation and ownership. The last yields a more plausible type of proviso.

In chapter 4 I begin the positive contribution to property theory. I harness the Lockean material to show what rights are granted and how their justification serves to circumscribe them. I posit the view that Locke ignored the loss of an important set of rights and interests that are of such importance that their omission would at best require revision of and at worst invalidate his solution to the consent problem.

I show how the central and valid intuitions Locke appealed to can be used to construct a theory of property in environmental resources. Rather than appealing to self-ownership as Locke does, I argue that we are better served if we see ownership as an artefact dependent on the summation of (possibly) competing considerations. Factors such as need, liberty, the interests in products of our making, and features of the relationship of people to land all take their place as components of this. This account gives a more constrained set of property rights.

Both environmental protection law and my conception of property in environmental resources are potentially vulnerable to attack from libertarians. In chapter 5 I defuse this while bringing out some surprising conclusions about libertarian thought with respect to the environment. My focus is on Robert Nozick. I argue that Nozick’s theory either justifies large environmentally motivated limits on the use of property or it is inapplicable to a certain class of objects of property, of which, environmental goods are typically members. This novel combination of results removes the most important barrier to developing my view that property rights in environmental resources are sensitive to patterns of their distribution.
The main non-Lockean arguments for property come from the utilitarian school. In chapter 6, I discuss an argument from individual utility and an intersecting set of arguments from economic efficiency. In the former, the argument gives no support for rights to pollute or to destroy significant ecosystems. In the latter, an efficiency argument for property works well at the general level, yet strong rights will not always be the appropriate form. I suggest criteria under which less strong incidents, including preservationist duties, are more likely to protect long-term utility.

Chapters 7, 8, and 9 contain the bulk of the positive contribution and original theorising. I complete the neo-Lockean account to show how labour grounds claims to property and how these claims are affected by the labouring context that includes need, the proviso, the ability of others to perform desert-garnering actions, the natural component of any final product, and an important set of interests I developed in chapter 4. Exploiting the fact that the owners’ interests from labour could be met without removing all the interests of others in property, I outline and argue for a conception of property that has the following features.

- An appropriator’s interest is fulfilled by granting rights of use, possession, transfer, some forms of trespass, and a large share in the income.
- Land use planning, inspection, monitoring, and other activities characteristic of maintaining patterns of use that ensures no harm are morally justified.
- Some share in the income derived from labouring on unowned goods should be redistributed to those less able to undertake that desert-garnering action.
- The public retain a voice on legal limits to property use, reflecting the community’s interest. Prohibitions on certain uses in some geographical areas or taxes on income from harmful uses could embody this.
- Property rights must be limited to prohibit use patterns that threaten the viability of environmental services.
- The public possesses collective rights to certain values - environmental rights.
- Restrictions are defined in a way that does not diminish incentives below levels indicated by utility arguments.

Some objects of property, though owned by one person, are such that some interests of others must be respected in the design of the owner’s property rights. Under certain conditions, rights over environmental resources are more like stewardship rights than full liberal rights.

In chapter 8, I define the features of this form of property, spell out consequences and advantages, and draw precedents that lend it weight. While I cannot be specific at this level, enough is said to establish some important restrictions on what particular regimes can allow. The conception of property that arises is a form of private ownership, with market transfer along with an element of stewardship. The last feature is implemented by legal restrictions on property use. I argue that this conception better captures both the reasons given to justify property and the impact of the variety in
the objects of property than does a full liberal conception. The account is sensitive to a plurality of justifying principles and a range of object types and gives flexibility within a property regime. It rewards labour and productivity while curbing the more destructive potential of unrestricted rights.

Destruction and harmful uses, in some cases, would be excluded from the incidents of property. This includes those uses where harm is caused by multiple agents subtly contributing to an accumulating harm. In these cases, producers and risk-takers should not be at full liberty with respect to appropriation, transfer, and use.

Chapter 9 concludes the thesis with an application to the issue of climate change. I show how my account justifies the set of restrictions on property necessary to implement an effective climate-protecting strategy. It shows that the restrictions entailed by stewarding rights are justified when a crucial resource becomes scarce or is threatened. Property limits are crafted to track the minimum restriction necessary to protect the atmosphere and these curbs may be severe if this is required to preserve environmental quality. This is clearly more restrictive than restrictions contained in the Kyoto Protocol. I develop an approach to dividing responsibilities for emissions controls among nations that combines fairness and sensitivity to the historical cause. This approach is in line with my conception of property.

1.3 What is Property?

1.3.1 What is a Right?

An account of rights operates on three levels. At the highest is a conceptual theory of rights. This explores the relation of “right” to concepts such as “duty” and “entitlement”. At the next level down we find a formal theory. Here the structural features are expounded, such as, trade-offs between rights, whether they function as trumps, and whether they are side constraints. Finally, we come to the substantive level of a theory, where we are concerned mainly with the content and justifications of rights. In this thesis, I operate principally at the substantive level with occasional sorties into the formal.

At the conceptual level, I will be couching my arguments in terms of the “interest” theory of rights developed by N. MacCormick¹¹ and J. Raz¹²

A Right to X is held by person P when P has an interest in X that is of sufficient moral significance to justify holding a set of others to be under a duty with respect to X.

One must enquire of a candidate interest whether it is sufficiently important to qualify as a right or if, instead, these interests should be aggregated with other concerns in a more utilitarian way. The function of a rights theory is to pick out certain key elements of a holder’s well-being as being worthy of special protection.\textsuperscript{13}

This is currently the most widely accepted account of rights. Previously dominant theories include the “benefit” theory\textsuperscript{14} (whereby an individual has a right when it is intended that she benefit from another’s performance of a duty) and the “will” or “choice” theory\textsuperscript{15} (whereby a person has a right if she can morally claim or waive the performance of a duty from another). The core arguments concerning rights that I use throughout this thesis can be recast in the terms of these other theories, with only scarcely perceptible changes.

The analysis of a right includes specifying the following: the right holders and right regarders, the nature of the relation between the parties, the act or forbearance owed the holder, the conditions under which a right claim is sound, the conditions under which a right has been violated, and when the violation is excusable.\textsuperscript{16}

\section*{1.3.2 What are Rights of Property?}

To assess the nature and strength of arguments for property we must have in mind some understanding of what property consists in. The specific rights over an object of property are familiar enough. They include the right to exclusive control, the right to use, the right to derive income, and the right to alienate, and the immunity from expropriation.\textsuperscript{17} Property seems to be a cluster of rights definable in terms of the contents of the cluster.

Yet this is not as straightforward as it may seem. Each part of the bundle is separate and can be lost. There are smaller bundles (for example, leasing, mortgages, and rights of way) and yet a person who has entered into these arrangements, which limit her rights in the object, is still the designated owner. Further, laws of alienation - notably inheritance - vary wildly across property systems. Finally, objects of property differ markedly; these include such diverse items as automobiles, land, ice creams, and ideas. There seems little common content.

\textsuperscript{13} One concern I have with the formulation of MacCormick and Raz is that utilitarians can argue for rights without mentioning interests at all. I have a right because holding others under a duty to me maximises utility. But this story doesn’t mention my interests, except in aggregation with those of other people. I could lack that interest, yet still end up with rights if it maximises utility. I locate the source of this problem in the simultaneous attempt to define what it is for someone to have a right and to comment on why the person should have that right. The second task should not be the task of a definition. I will not pursue this here.


\textsuperscript{16} In this paragraph, I have briefly summarised a useful discussion by Becker. See Lawrence Becker, Property Rights: Philosphic Foundations (London: Routledge and Kegan Paul, 1977), pp 8-11

\textsuperscript{17} I assume familiarity with Hohfeld’s distinctions between claim rights, liberties, powers, and immunities.

So is defining property impossible? Such scepticism is unwarranted for three reasons. First, as H.L.A. Hart\(^\text{18}\) points out, it is wrong to think that particulars can be classified under general terms only on the basis of common features. Second, we can usefully adapt for property the concept/conception distinction that Rawls uses with respect to justice. Property is a concept of which many conceptions are possible. Finally, legal scholars, who have driven the unbundling of property into its multitudinous rights, risk too readily obscuring the centrality of some powers of property. We would do well to recognise an analytic core for specific rights, namely, of use, exclusion, and transfer.

A definition that ties up all the loose ends is probably impossible. Waldron attempts this, but the complexity of the result and the sheer number of issues he deliberately leaves open testifies to this.\(^\text{19}\) However, crucial points can be posited and progress made to yield an adequate definition. Beyond this, further intricacies fail to shed much light worth the effort expended.

The concept of property can be defined most clearly in the case of material resources. We can say that the concept of property is the concept of a system of rules governing access to and control of material and other resources. Ownership is understood as a right-constituted relationship between persons with respect to things. Over 150 years ago, Jeremy Bentham pointed out that property is what we have in things, not the things themselves. Some of this is just the equivocation caused by an abbreviation. When using “property” to refer to the rights and duties between people with respect to things we really mean “property rights”. Thus, while things can be our property, property rights are not things but legally (because socially) approved constellations of power relationships with respect to socially valued assets. Bentham’s point is pushed too hard, as it has been by some legal scholars, when the object of ownership becomes rights over things.\(^\text{20}\) This introduces a useless redundancy, since owning rights will then mean having a bundle of rights to rights in relation to some thing.

Nozick’s definition is among the most clear and succinct:

A property right in X is the right to determine what shall be done with X; the right to choose which of a constrained set of options concerning X shall be realised or attempted.\(^\text{21}\)

A regime of property rights is a coercive scheme of constraints on usage. It thus has an allocative function, although it is an open question whether property derives whatever moral force it holds from

this allocative feature.\textsuperscript{22} In effect, property draws a circle around certain objects and activities associated with those objects within which an individual or organisation has a greater degree of control and freedom than she does without.

At the formal level, an understanding of rights that allows them to be easily overridden could yield relatively simple and sweeping specific incidents. All the difficult moral work would occur when deciding when it is to be overridden, and what factors, including other rights, enter into this decision. But my approach is to accept that rights cannot be overridden, except in extreme circumstances. In this case the exact set of rights, liberties, powers, and immunities will need to be more complex. As we will see, in many cases, the resulting rights will be multiply constrained and have numerous qualifications and exception clauses.

\textbf{1.3.3 Private and Other Forms of Property}

The distinction between private property systems and varieties of socialism is not that the former has a system of rules governing access; in fact, both have this. It is the nature of the rules that tells us whether a private, collective, or common conception of property dominates in a particular society.

In private property the rules of access are organised around the idea that resources are assigned (and therefore belong) to some individual. A rule obtains that, in the case of each object, an individual decides how the object shall be used and by whom.\textsuperscript{23} We take the aforementioned Nozickian definition and add the individualist quantifier.

\begin{quote}
A private property right in X is the right of an individual (or individual firm) to determine what shall be done with X; the right to choose which of a constrained set of options concerning X shall be realised or attempted.
\end{quote}

Private property \textit{regimes} will be those where property is primarily held by private individuals or firms.\textsuperscript{24}

We can now distinguish private property from two other forms of property. The first is collective property where resources are assigned under a rule saying allocation and use follows the collective interests of society as a whole. In purer versions of socialism this form dominates. The second is common property. While similar to collective property in that there is no individual privilege, in common property the collective interest has no special status either. Waldron contends that no

\begin{footnotesize}
\textsuperscript{22} The scarcity of goods is regarded by most writers as the central controlling fact of the context in which property rights arise. Yet if Hegel is right that private property is essential for personality development, it will be important even in the absence of scarcity.
\textsuperscript{23} Waldron, \textit{The Right to Private Property}, p 39
\textsuperscript{24} This definition of private property is less stringent than some. See, for example, James Grunebaum, \textit{Private Ownership} (London: Routledge and Kegan Paul, 1987), p 9
\end{footnotesize}
society works dominantly in this way, but specific instances exist that are, in Locke’s terms “common by compact”, for example, parks.  

Private, collective and common forms of property are ideal types. Real systems only approximate them. Some systems mix them and some also use pragmatic allocations in specific cases on top of the organising ideas. Some types of property are more amenable to certain property rules, regardless of society; sunlight is amenable to common ownership, while toothbrushes are amenable to private ownership. I note also that my focus is chiefly upon private productive property.

1.3.4 Types of Private Property

Having distinguished “property” from “private property”, we can now distinguish the concept of private property from conceptions of private property. One strength of Nozick’s formulation is that it highlights the indeterminacy of the concept. The “constrained set of options” is unspecified at this level. Without establishing what the constraints are, it is not possible to state precisely what a property right in X entitles the rights holder to do with X. To move to the level of specific conceptions of private property rights that become the basis for law, we must bridge the gap between the abstract concept and the specific entitlements real property owners possess. To this end, property rights are interrogated to show what “incidents” – specific rights, liberties, powers, and immunities – they admit.

Are the incidents of property themselves specific enough to render these entitlements determinate? Any one incident will be embodied by a nation through a set of much more specific laws. For example, the right to transfer allows various legal schemas. So the task of specifying the “constrained set of options” is not completed merely by listing the incidents. I see this job as a two-step process. First, we state the particular incidents in use in a regime; the set of incidents that a society decides its laws will embody. Second, we define legally what the boundary conditions or limits of each incident will be.

As Gopal Sreenivasan points out, in principle “there are any number of … options that could be employed to provide the notion of a property right with determinate content. In practice however, … the actual variation in the content of a property right across different societies has been limited”. I outline the most commonly discussed and operative type, full liberal rights, and contrast it with key alternatives that I choose because I employ them in later chapters.

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**Full Liberal Rights.**

This is the term for the fullest set of property rights, liberties, powers and immunities as developed by Honore. Honore sought to identify the stable common bundle among the specific rights held by property holders. He described eleven “standard incidents” of property:

1. The right to possess exclusively.
2. The right to use at one’s discretion.
3. The right to manage, including deciding how and by whom it is used.
4. The right to income.
5. The right to the capital value. This may imply the right to alienate or consume.
6. The right to security; immunity from expropriation.
7. The incident of transmissibility, for example, heritability.
8. The incident of absence of term.
9. The duty to prevent harm; not to use or allow others to use harmfully.
10. The liability to execution; forfeiture for a judgement of debt or insolvency.
11. The residuary character; a right to reversion of the rights of lesser interests upon extinction of those interests (for example, expiration of leaseholder rights).

These are a cluster of Hohfeldian modalities. Possession, management and receipt of income are claim rights. Use is principally a liberty with a claim right element excluding others’ interference. Transfer is a power, while immunities, duties, and liabilities are specifically mentioned.

I note that these incidents can detach from each other and collect in smaller bundles. This would no longer be full liberal ownership, but may still be within the ambit of private property. Further, each incident can admit of differing strength by restricting what can be owned and how it can be owned. For example, one may hold the right to use, but be barred from certain uses. This opens the door for other conceptions, including the one I will develop.

Crucially, in full liberal ownership these rights are maximal; they allow only restrictions necessary for the protection of the life, liberty, and property of others. Inconsistent with full liberal ownership is any legally enforced social policy that tailors its rights and powers in order to implement an overall social goal; for example and in particular, redistributive goals. This has been the dominant conception in the Western world in the last 200 years and has since spread globally.

**Usufructuary Rights.**

This Jeffersonian term refers to rights in property held by one person while real ownership is vested in another. The Oxford English Dictionary defines it as the right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to this. While the first may use the objects for her own benefit, she

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27 Honore, pp 166-79
holds the property in trust for the second whose benefit must be paramount. Locke’s antagonist, Robert Filmer argued that all property “belonging” to the subjects of a king is merely held as usufruct. Other writers argue the reverse. Theorists differ over whether this should be considered a form of private ownership at all.

**Stewardship Rights**

The rights conception I have in mind is one where ownership is still invested in the owner/user himself; including the right to use and profit from that use. But use restrictions obtain, generated by the interests of others that cannot be excluded. There is an equitable “ownership” vested in the non-owners. This may manifest, for example, as restrictions on the owner to develop property in certain ways when critical environmental capacity is approached.

### 1.3.5 Property Rights in Society

I conclude this section with a brief word about the effects of property regimes in society. On a macro level, property greatly influences how well or efficiently resources can be used to produce wealth and how justly wealth is distributed. This is obvious once ownership is understood as a right-constituted relationship between persons with respect to the things that contribute strongly to wealth.

At the individual level, property rules affect a person’s disposition to achieve, work, compete, and cooperate. To a large degree they influence how economically independent, interdependent, and socially mobile we are. They enhance or undermine the various virtues of character, such as, industriousness, individuality, community-spiritedness, generosity, and empathy. The same is true for the vices of sloth, envy, and greed.

While capitalist and socialist apologists - and all those in between - tend to overestimate the benefits of their favoured system, significant potential for society formation rests with property. It demarcates the moral space around a person where what one has is immune from predation. Property, perhaps more than any other right, is the arena for playing out how the balance between private and public interests will be struck.

### 1.4 Justifying Property

#### 1.4.1 Justification and Argument Type

To marshal a full argument for a determinate set of private property laws would, I think, require a three-step process. The first step is to argue for private property as against non-private regimes. The second is to argue for a particular conception of private property; a set of specific rights or

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standard incidents. I suggested, in 1.3.4, that to make property rights determinate necessitates a further step - arguing for the limits and scope of these particular rights.

It may turn out that in completing the first task we find reasons for preferring a particular conception as well, and so go some way along the second step. In fact, we may find that a justification of private property imposes limitations on the scope of the standard incidents, helping us with the third task. (As we shall see in later chapters, this is so in both Locke’s arguments and those from utility.) All justifications of property rights will, by definition, yield rights on the surface, but not all these are sourced from rights-based arguments at the level of justification. Only those that do are rights-based justifications, even if others yield derivative rights.\(^{29}\) In *Taking Rights Seriously*, Ronald Dworkin distinguishes between rights-based and goal-based political theories.\(^ {30}\) This can be employed to demarcate ways of arguing for private property.\(^ {31}\)

### 1.4.2 Rights-Based Arguments

These arguments defend a social arrangement on the basis of how it expresses or promotes respect for the rights people have. It is a separate question what rights people have and we should define a “rights-based argument” in a way that is neutral, as far as possible, between competing theories of the rights of people.

In 1.3.1, we saw that to say someone has a right is to say that an interest of hers is sufficient reason for holding another to be subject to a duty. So an argument for private property is rights-based just in case it takes some individual's interest as a sufficient justification for holding others to be under a duty to create, secure, maintain or respect an institution of private property.

These arguments can be based on special rights or general rights. A special right is a right generated contingently when someone gains the aforementioned sufficiently strong interest in some object due to something that they did or was done to them. A special rights-based argument takes an interest to have this importance not in itself but on account of the occurrence of some contingent event.\(^ {32}\) A general right is a right where the importance of the interest that justifies the right is attributed to the interest itself in virtue of its qualitative character. Thus, in a game of rugby, general rights arise from what it is to be a player in the game; liberties to pass the ball backwards and rights not to be tackled without the ball are examples. On the other hand, the right to kick a penalty or to take a free kick from a mark are rights arising from occurrences in the game in progress, and so are

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\(^{29}\) For an account of what it is for a theory to be “X-based” (eg “rights-based”) see John Mackie, “Can There Be a Rights-Based Moral Theory?”, in Waldron, *Theories of Rights*, p 238


\(^{31}\) Stephen Munzer (in *A Theory of Property* (New York: Cambridge University Press, 1990)), for example, develops his theory of property on the basis of three kinds of reasons for having private property: efficiency/utility, justice/equality, and labour/desert. The first pairing is goal-based and the last two are rights-based.

\(^{32}\) In this discussion, I draw on Waldron, *The Right to Private Property*, pp 68-79
examples of special rights. General rights-based arguments for private property are arguments that rest the importance of the interest that justifies private property on that interest. In the history of modern political philosophy, Locke and Hegel are the salient special and general rights theorists, respectively. Lockean arguments - my major focus - are special rights-based, while appealing to a more basic general right to the means of subsistence.

1.4.3 Goal-Based Arguments

The distinction between rights-based and goal-based arguments can now be made. There is a long history of goal-based justification in utilitarian theory, where it is argued that treating a right as a complete justification in particular cases without reference to the more basic goal will in fact advance the goal in the long run.\(^{33}\)

The goal is taken to count in favour of (weakly) or justify (more strongly) the right. Yet a rights-based argument also takes a goal, namely, the protection of a right as the justifier. A problem arises in that we want utilitarianism to turn out to be goal-based, not rights-based so we need to pick out what type of goal demarcates a rights-based argument. The most salient distinguishing feature is the level of individuation of the political aim. Yet this does not by itself solve the problem since a goal-based system like utilitarianism also holds individual interests as morally and politically important (be it in an aggregative way).

Rights-based theories can be distinguished from goal-based theories by the way each deals with conflicts between claims and conflicts between rights. For utilitarians, preferences and pleasures are substitutable without regard to content. The quantity not the nature of an interest gives it its weighting alongside other interests. Large interests may be traded off against a multitude of smaller interests. It is this kind of trade-off, rather than trade-offs as such, that a rights-theorist is opposed to. As Waldron says, “a theory of rights accords special importance to individual interests of certain types, and may express this importance in terms of the lexical priority of those interests over human interests generally”.\(^{34}\) The main distinction between rights-based and goal-based arguments is that rights-based arguments take single individuated aims as the basis for generating genuine and full-blooded moral constraints and utilitarian theories do not.

I consider one type of goal-based argument for private property; namely, utility arguments. These state that the general welfare of society will be better served if productive property is owned privately. This is supported by pointing to flaws in common and collective property systems that, it is claimed, encourage freeloading and resource overuse and discourage investment and the efficiency of markets.

\(^{33}\) Dworkin, pp 170-1

\(^{34}\) Waldron, *The Right to Private Property*, p 78
1.4.4 Complete Theories of Property

A satisfactory theory of property must not be wholly abstract; it must attend to psychological, social and economic contexts, such as, the connection between property and human agency, character, stability and the expectations it sets up; it should offer balanced solutions to problems of distribution and production; it should limit undue influence of property rights on other areas of society, such as political representation and political power.

Historically, too many theorists attempt to reduce all to a single perspective. The strained credibility in their resultant theories illuminates the fallacy of doing so. Some argue that property is established unilaterally from the state of nature. Under this view, the type of rights gained are usually held to be full liberal rights and, provided some provisos are met by the appropriator, no public interest or interest of other individuals need be considered. In this thesis I reject that idea.

A theory of property must make room for all considerations for and against the assignment of property rights and must co-ordinate conflicts between them. Each element enters with finite weight into the justification of property regimes and the specific rights that embody them. This is a pluralist account of the justification of property. Factors worthy of consideration include: the moral import of actions that affect people's happiness, welfare, and preference satisfaction; the prior rights and equal moral worth of people; human agency and responsibility and how these function as bases of desert.

Property rights do not exhaust all morally significant factors necessary to govern human relationships. It is the task of political philosophy to adjudicate or balance the morally significant claims that compete for attention. This may result in a society imposing duties of care and preservation over objects when they conflict with property rights over those same objects.

Further, it is not certain that those other moral considerations automatically conflict with property rights. Perhaps property rights themselves give no rights to violate those moral considerations (specifically, the care and preservation standards that environmentalists seek). This is why it is important to understand the justifications used and exactly what it is they justify. Individual property rights, to be rights at all, must trump most claims most of the time and even the claims of government some of the time. But they are not good against the considerations that warrant establishing them in the first place.

1.4.5 Environmental Resources

In the course of my work I have engaged with arguments for property in general, yet my focus has been on rights the exercise of which has the most potential for deleterious environmental effects. This class of goods I call "environmentally sensitive resources". It most obviously includes natural resources, which I define as those resources not brought into existence by human action. National
parks are cited as great successes of the environmental movement, yet not all natural objects worthy of our concern are of such public salience.

A taxonomy of such goods can be made in the following way:

- Non-renewable resources, such as oil. These deplete with any use.
- Regenerating renewable resources, such as trees and soil. These are depleted if expended at rates higher than their regeneration threshold.
- Recyclable goods such as water. These are exhaustible by misuse.
- Self-renewing resources such as sunlight.\(^{35}\)

Environmental resources may not be alone in having the features to which my conception of property applies, but their distinctive elements make them the clearest example. Some natural resources are non-renewable so their depletion and exhaustion is irreversible. Often, their value cannot be captured in monetary terms. Further, many environmental benefits and burdens are essentially public, where contiguous groups of people are all exposed and the effects are not isolable.

Identifying resources over which limited rights are needed requires broader work than simply identifying the especially valued resources. Beyond this, the conception I develop applies to the use of goods that may not be of concern themselves, but have a high potential to negatively affect such environmental resources. In the case of polluting emissions, the resources that must be preserved (such as, atmospheric balance, including levels of carbon dioxide, methane, and ozone) are degraded, not by any use they are put to by their owners (indeed, largely they are not owned), but by spill-over effects from the use of other property. For example, the use of vehicles and production processes that have large emissions of climate affecting chemicals.\(^{36}\) The requirement that important resources be preserved kicks back to justify limitations on the use of other property.

When I speak of property limitations that are motivated by concern for environmentally sensitive resources, it will be to either or both of these that I refer.

### 1.5 Approach to Related Topics and Applications

#### 1.5.1 Mutual Dependencies

In this section I set out philosophical questions that are relevant to this thesis, but that I have deemed to be outside its scope. Many philosophical claims in one field depend on contentious claims in others. I must be content to assume the truth of some account or other and in most of my

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\(^{35}\) One could add “indestructible resources” of two types: non-exclusive (e.g. laws of nature) and exclusive (e.g. radio frequency waves), yet these natural resources are not at issue here.

\(^{36}\) Of course almost any object of property could be used in harmful ways. We must restrict attention to uses that were it not for the threat of environmental disaster, would normally be regarded as innocent.
assumptions I have chosen to rely on positions that are philosophically respectable even if not universally accepted. I am also aware that I work within one philosophical tradition, namely, the Western tradition of political liberalism, more broadly situated within the Anglo-American analytical tradition of philosophy. A different canon and set of understandings would be present if I worked in Continental philosophy.

Discourses that affect what one finds acceptable as a discussion of property include debates about the nature of justice, the nature of human flourishing, the ranking of interests that enter into the assignment of rights, and the question of future generations. Sometimes the relationship is a one-way implication where what we say about property rests on the other issue. Sometimes it is the other way around. More often each affects the other. Where necessary in this thesis, I comment and take a stand on these cases.

1.5.2 Future Generations

Property theory is situated within political philosophy, which aims at defining and prioritising rights and interests. One set of considerations that bears on the legitimacy of any set of property rights is the effect on future people. Whether this will cause a property theorist pause depends on the status of future generations as moral patients. The moral status of the yet to be conceived and its implications for the acceptability of traditional moral theories is hotly debated. While I accept minimally that it would be wrong for this generation to act in ways that would deprive future people of the means to productively work for their survival, to justify my taking a stand in favour of their moral considerability would require a thesis in itself.

Fortunately, two sources of help are at hand. First, the aforementioned stance is a respected position, in fact the majority view, in recent work on this question. Where my overall argument rests on that view (for example, in my chapter on utilitarian arguments for property), I assume the positive moral status of future people on the basis of this.

Second, I argue that the central traditions with which I engage assume this same view. Utilitarianism, for example, is future focussed. While this does not in itself show that the not yet conceived are included, even a quick read of the debate shows that the futurity problem has caused much trouble for utilitarians, especially concerning the “repugnant conclusion”. This they could avoid simply by denying that we should be concerned with the interests of future generations, yet largely they do not.

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37 See, for example and references, Bryan Norton, Toward Unity Among Environmentalists (Oxford: Oxford University Press, 1991)
38 See, Derek Parfit, Reasons and Persons (Oxford: Clarendon Press, 1982). The conclusion that is so repugnant concerns choices between possible futures we could create. A future population of very happy people would be judged to have less overall utility than a future society where everyone has only marginal surplus of happiness but where sheer population numbers force the overall utility up. (While this is a theoretical problem for utilitarians even without reference to the future, its practical importance bites hardest in discussions of choices that affect future people).
In the case of Locke, most interpreters accept that future generations matter.\(^{39}\) I argue that those in the Lockean tradition, including libertarians, are inconsistent if they deny this. Locke’s “enough and as good” proviso attaches to current appropriation on the basis of what is left for others in future. Locke had the preservation of humankind in mind. He also held that land quantity was sufficiently vast that it would take many generations to appropriate it exhaustively. Nozick’s argument around monopolising essential natural resources has the same structure. Temporal proximity is irrelevant in violation of the provisos. In view of all these factors, I do not spend time in this thesis arguing for why future people are morally considerable.

1.5.3 Alternative Property Traditions

A word is needed on arguments for property I choose not to consider. Alongside the utilitarian, libertarian and Lockean schools, less well-known bodies of literature feature in philosophical history. These include arguments from political liberty and those of Kant and Hegel. The first takes political liberty as the goal and indicates how private property promotes it. Evidence for this could be both theoretical (arguing that private property laws encourage respect for individual control) and empirical (plotting actual regimes of property against the corresponding level of political liberty). Hegel’s is notable for the place given to labour. In counter-distinction to the English tradition (Locke and the utilitarians) where labour is seen as a burden, Hegel holds a self-developmental image of work (that he shares with other Germans such as Kant and Marx).

Other theorists attempt to secure moral weight to the institution of property by employing a wide range of principles. Thus, Hobbes appeals to the authority of the sovereign; Grotius and Pufendorf rest their cases on fidelity to emphasise the sanctity of the compact that allowed the division of the earth. Principled condemnations of property - in general and of typical Western systems in particular - are not unfamiliar to readers of the Levellers, Rousseau, and most famously, Marx. These discourses I have omitted because they are less major influences on property law and because a respectful treatment of them would expand the thesis well beyond its word limit.

I am aware that in non-Western cultures both legal and customary assignations of property function in ways foreign to Western law. A more environmentally protective set of practices can and often has emerged from these other traditions (though this is not consistently the case). I believe that the Western tradition has much to gain from listening to societies unaffected by a scientific culture that has tended to let the pendulum swing too far in the direction of scientific reductionism and over-confidence in our ability to manage the world. Most acutely, I am aware that I have not been able to extend my scope to include the property allocation – and broader spiritual relationship to land – of the first people of my own land, namely, the Maori of Aotearoa/New Zealand.\(^{40}\)


\(^{40}\) For an account of Maori practices with respect to property, see John Patterson, *Exploring Maori Values* (Palmerston North: Dunmore Press, 1992)
In this knowledge, I have steadfastly adhered to my intention to work within the Western tradition. There are a number of reasons for this. One is to demarcate the scope of what is already a large project. The Western literature on property is sufficiently bulky as a research base. Another is familiarity: I am trained in the tools and the content of this tradition and discipline. A third reason is my belief that, given the dominance of Western thought in property law, operating within it to design a new theory will give the thesis more practical import. This is a major motivation.

Fourth, typically, arguments for property are embedded within particular moral theories that limit their power for those who hold other theories. In consequence I seek to work from as parsimonious a set of principles as possible. Sometimes I will see how far I can take the most sceptical of opponents, especially libertarians whose list of political values rarely extends beyond its first member, the appeal to liberty. At other times I will be content to leave them behind and appeal to the majority who take a pluralist value theory within the Western tradition. In view of this, one can see why it is even more important not to insist on acceptance of principles sourced from well outside this tradition that those within it would be less likely to accept.

For these reasons I leave aside alternative worldviews and the premises therein in order to retain plausibility and applicability to the Western tradition.

1.5.4 Applications
The conclusions of this thesis bear practically on a range of public policy issues. While I focus squarely on environmentally sensitive resources, I am aware – sometimes painfully – that rights to other objects of property could be illuminated by a simple digression. I have consistently restrained the urge to scratch that particular itch. For space reasons I choose only one, that of climate change.

As a result, I have not developed what may be the natural next step - a theory of government takings of property. Neither have I examined the justice of any existing body of property or environmental law in the light of my conclusions. Also, I see many implications for the related and topical issue of intellectual property, especially in crops, traditional medicines, and other objects with a high natural resource component alongside the human creative input. The temptation to indulge myself here, I have similarly overcome. It is my intention to pursue some of these in future writing.

1.6 The Concept of Property and the Right to Destroy
1.6.1 Destruction in the Core Rights
Here I address one crucial impediment to my project. A standard assumption among those advocating a strong set of property rights is that such rights are at odds with preservationist duties. This can be pressed in two ways. One says that arguments for the desirability or necessity of property strongly suggest rights that conflict with such duties. The other argues that once we are
clear about the meaning of property we will see that such limits are ruled out conceptually. That is, despite the fact that no argument, used to justify property, demonstrated that limits to property in environment goods were incompatible with property, such limits are incompatible with the very concept of property.

Much of this thesis deals with the first of these, yet a reply at that level is powerless if the second objection is sustained. In order to develop a theory that allows such limits to inhere in property rights, I will first need to clear away the second objection.

To demonstrate that property is conceptually incompatible with the preservationist and stewardship duties I advocate, a critic must show that the right to destroy is implicit in the concept of at least one of the three core rights: use, exclusion, and transfer. In view of this, I will interrogate each core right. Because we are dealing with conceptual entailment (duty absence implied by the concept of property) not justificatory entailment (duty absence implied by the arguments for property) one counter-example is sufficient to show it fails.

1.6.2 The Right of Transfer
Since the right of transfer implies a right to alienate and since the right to destroy is a subset of alienation, does the right of transfer imply the right to destroy? We may note immediately that this argument form, “X implies Z, Y implies Z, therefore X implies Y” is fallacious. Transfer and destruction are both subsets of alienation, but no element of a subset is necessarily an element of another subset. The critic must show that the subsets are nested (that is, destruction is a subset of transfer which is a subset of alienation). I can think of no good reason for this claim that does not appeal to arguments for property, rather than the concept itself. One could argue that we cannot limit ways I may dispose of my goods without limiting my right of alienation over them. However, there are clear counter-examples; the right to alienate an historic building does not imply the right to burn it down. The right of transfer implies the right to alienate, but only to alienate in certain ways. We cannot infer destruction rights.

1.6.3 The Right of Use
One reason for thinking the right of use implies a right to destroy is that use rights are sometimes referred to as the “right to use and abuse”. Yet, via a helpful instance that isolates the right to use from other standard incidents, we can see that this does not conceptually include a right to destroy. Take the act of renting a property. Here the right to use the object as you see fit is limited by the obligation to return it in the same order. “Use and abuse”, unlike destruction, concerns processes,

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not end states. We do not limit the treatment to which a rented item can be subject, so long as it does not return in an undesirable end state.

Another reason why a right of use may entail a right to destroy is that property can include the right to exhaust a good. Some goods wear out or degrade through normal use. In the environmental case, land can degrade through cultivation. Yet the right to use up is a very limited form of the right to destroy. It gives no right to destroy unnecessarily, only to use up "naturally". Generally, preservationist duties can co-exist with use rights; only “strong” preservation duties (those that require leaving the good exactly as you find it) are incompatible.

In the case of irrereplaceable consumable commodities however, we must concede that use rights and preservationist duties conflict. These goods degrade with many uses and there may be no close substitutes. Works of art and especially fragile environments are instances of this. Almost any use violates preservationist duties.

Yet little follows from this concession. First, it does not show that property rights generally exclude requirements for stewardship, only that they do so in a very limited set of cases. In fact, many environmental cases escape this classification. Renewable resources admit of non-diminishing uses and so only use outside some limit of replenishment would conflict with the postulated duties. Second, even in such cases we do not have a direct argument against imposition of the proposed duties. Instead, we have a choice about whether or not to override the normal duties inhering in property. This is a value choice highlighted not settled by this incompatibility. It may be that we value such goods sufficiently highly to designate weaker rights over them than the rights of full property. In fact, if the argument in the general case is correct, use rights entail non-destruction; the preservationist duties take priority. Where there is no way to use the good without violating a condition implicitly governing the assignment of use rights in the first place, the limits from preservationist duties leave no content to the use rights.

1.6.4 The Right of Exclusion
Perhaps one could claim that the right permanently to exclude entails a right to destroy. Given the motivation behind the right of exclusion, this looks plausible. If all non-owners are excluded permanently from the use of the item it is effectively lost to them; it may as well be destroyed, as actual destruction removes nothing further. Yet we may take pleasure in the knowledge that some object exists even if we are excluded from it. Beautiful artworks and scenic sites may be of this ilk. This felt loss breaks the purported equivalence between permanent exclusion and destruction. Non-destruction has the further advantage of holding open the possibility of the renewed availability of the item through willing re-sale.

Goodin, p 408
Recall that this applies only in the absence of independent arguments for the right to destroy. See Goodin, p 412.
1.6.5 An Emergent Right to Destroy?

There remains a fourth possibility. Perhaps the right to destroy is an “emergent right”. While not entailed by particular standard incidents, perhaps the elements of the rights cluster interact and clarify each other, introducing new rights. Could the right to destroy arise in this way?

To mention this possibility is not to give an argument for it. How do the three entail this right collectively when none of them do so individually? In other fields of law, this can be achieved either by convergence or inference. In the case of convergence, a 1965 USA court decision conjured the right to privacy out of five rights in the Bill of Rights.\(^{44}\) It did this by showing how each right implies privacy over some area of life and then aggregating the spheres. We can see immediately that this cannot succeed in the case of property. The constitutive rights of transfer, use, and exclusivity do not yield ‘pieces’ of a right to destroy that we can then collate.

With the inference method, the attempt is made to infer an unstated right if that hidden right is required to make sense of other rights. Again, this hardly applies here. None of the three rights presupposes that people may destroy property. As Goodin says, we “do not have to assume that Jack may legitimately destroy a thing in order to make sense of why we would need a rule to allow him to use it, use it exclusively, or to transfer it.”\(^{45}\)

To conclude this section, I note also that a strategy that seeks to derive the putative incompatibility from the concept of property, rather than from arguments for it appears lame, even desperate. If arguments for property yield certain limits that attach to any justified conception of property then we have arrived at the maximal set of rights allowable under the label “property”. If the critic continues to assert that property does not admit of these limits she essentially pleads that all the available arguments for property must misunderstand that notion because they did not yield a particular incident that is present in her own favoured conception of property.

1.7 Contributions to Political Philosophy

1.7.1 Lockean Scholarship

One result to emerge from this thesis is that Locke’s case yields tighter limits on ownership than he acknowledged. Locke ignored the loss of certain rights and interests that are of such importance that the omission could at best require serious revision of his solution. Lockean property, especially that over objects with a high resource component, entails limits that make the case for full liberal rights hard to sustain and point toward a more limited form.

\(^{44}\) *Griswold v Connecticut*, 381 US 479 (1965)

\(^{45}\) Goodin, p 417
1.7.2 Land, Labourer, and Natural Capital

The other contributions revolve around the new theory that I develop. This conception of property honours labour as a desert-garnering act by vesting most decision-making power in the labourer. Further, it upholds the right of alienation and defines restrictions in a way least disruptive of market efficiency and the incentive to produce. It avoids the pitfalls of communal and socialist views of property, which fail to sufficiently reward labour and discourage even useful, environmentally benign development. Meanwhile, property rights must be shaped to prohibit use patterns that threaten the viability of environmental services.

One weakness in both Locke’s and Nozick’s accounts of property is that the singular principles they use are inflexible. A corresponding strength of mine is sensitivity to a range of justificatory principles and the variety of object types. While my account retains the feature that rights cannot easily be overridden, I allow for variation in the scope of specific rights granted, according to the balance of arguments in each group of cases.

An assignment of full liberal exclusive rights, (for example, a right to develop one’s land as one pleases by filling in ecologically significant marshland), ignores or distorts an obvious relationship between such activity and interests of the public. My theory is sensitive to the social and environmental context with respect to the interconnectedness of our environment and the background of human society. It rewards labour and productivity while curbing the more destructive potential of unrestricted rights.

1.7.3 Protection from Within the Concept of Property

Environmental threats often arise not from too much appropriation but from too strong a conception of the rights gained once appropriation has occurred. My conception reflects this point and provides a basis for land use restrictions from within the concept of property itself. While restrictions on property could be generated from other principles of justice, these stem from factors external to property, acting to limit it. If we are interested to see how far down the road of use restrictions the concept of property itself can take us, there is a clear advantage here over Locke’s account. Interestingly, such harnessing of Lockean intuitions to argue for environmental protection is in sharp contrast to Locke’s usual employment by those keen to show that such protection violates owners’ rights. The theory of property developed herein helps to undergird the moral force of environmental law.
Chapter Two

Locke: Common Rights and Private Appropriation

2.1 Introduction

The aims of the following two chapters are firstly, to assess the most discussed argument for property, that of John Locke (1632–1704), and secondly, to draw conclusions concerning where that argument can inform a conception of property in environmental resources which I will use later in the thesis. While a version of Locke’s argument yields a case for private property it simultaneously reveals a set of limitations on these rights. The exact makeup of the set of limitations I argue for is novel but contains elements that reflect commonly discussed issues within Lockean scholarship.

In common with the methodology needed to approach many texts in the philosophical canon, when studying Locke’s writings it is useful to separate the interpretive task from the evaluative task. I attempt to understand Locke’s intended argument and to see the argument his text actually yields. This is the interpretive task. But beyond these, I examine whether arguments for private property that have recognisably similar premises to Locke have justificatory power. This sees Locke’s own theory as a token of a theory type. Type-identical arguments to Locke may have force if Locke’s own argument fails. With this in mind I here employ a distinction between “Locke’s theory” and “Lockean theories”.

Locke’s theory
The theory contained within Locke’s own writings, including the implications Locke thinks flowed from it.

Lockean theory
Theories that are type-identical to Locke and the implications that actually follow from them, whether Locke recognises them or not.

This distinction is also helpful since Locke is neither always the best interpreter of his own argument, nor the most thorough in following its entailments. This argumentative failing causes Locke’s conclusions to misalign with the thrust of his arguments. Of the two, I am more interested in Lockean theory. My first thought is not to contribute to the extensive and painstaking Locke literature, rather it is to consider the implications - and only a specific subset of these - which flow from theories type-identical to Locke’s. I will, justifiably, leave some scholarly debates aside.

That said, we must immediately enquire as to which premises are necessary conditions for type-identity with Locke’s theory. I shall concur with Gopal Sreenivasan who maintains that a theory of

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46 I follow Sreenivasan’s useful distinction (in Sreenivasan, p 6).
property rights is Lockean if it both divorces the legitimacy of appropriation of private property from
the requirement that all others consent to this appropriation and posits that we are entitled to a
property in the products of labour on unowned resources.\(^47\)

If I am correct then the significant problems in Locke’s labour theory of acquisition provide grounds
for thinking Lockean property is more limited than Locke thinks. Defenders of extensive powers of
owner control in environmentally sensitive resources can harness Locke to their side only by joining
him in ignoring many of the implications of his argument. I further suspect that this is true of
defenders of the large inequalities in property holdings we see today, but this is beyond the scope of
this thesis.\(^48\)

### 2.2 What is Original Appropriation?

An argument for property from original appropriation seeks to derive a set of private property rights
from within the state of nature where none such existed previously. It seeks to establish, or
contribute to the defence of, property rights by offering a moral account of how legitimate property
rights could first arise. Such a justification involves defending a moral principle or principles that
underlie the establishment of this ownership. Early attempts, from Grotius, Pufendorf, Cumberland,
and Locke, each gave moral evaluations of the actions of first appropriators.

Staking a claim to property necessarily involves acting to cancel other people’s liberties. Some
theorists, notably Grotius, seek to show that property arose by consent to such cancellation.\(^49\)
Others, notably Locke, attempt to obviate the need for this. In either case appropriators are seen to
be exercising their own liberty in such a way that others are not morally entitled to interfere.

I suggest original appropriation theories proceed in four stages.\(^50\)

First, they describe the rights and liberties held by the inhabitants of a pre-political
scenario, and give an account of any material or social conditions that may motivate the
move away from this state of nature.

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\(^{47}\) The choice of premises held as necessary conditions for type-identity is annoyingly controversial and difficult to posit in
a non-circular way. What counts as “Lockean” will depend on what interpretation we give to Locke. This in turn will be
influenced by what theories we want included in the Lockean ambit.

\(^{48}\) I believe the Lockean account of property provides much support for the kind of resource use tax and transfer proposal
that Thomas Pogge calls a “global resources dividend” in “Eradicating Systemic Poverty: Brief for a Global Resources Dividend”,
*Journal of Human Development* 2(1) (2001): 59-77

\(^{49}\) In Locke’s time this view had been destroyed by Robert Filmer. Much of the first treatise was written with Filmer as the
clear target (though not on this point, which Locke concedes). For a discussion of Filmer, Grotius, and other early theorists
see James Tully, *Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press,
1980), pp 64-98

\(^{50}\) For a different analysis of what is involved in original acquisition, see Leif Wenar, “Original Acquisition of Private
Second, they circumscribe the set of actions which are taken to result in the appropriation of specific objects. This account must include reasons for asserting that this set of actions (and not others) should give rise to property rights. First occupancy, labour-mixing, and incorporation are among actions claimed by some theorists to have this power.

Third, they give a set of conditions on the limits to resources taken that ensures the above acts will yield property in a morally justifiable way. The general form of this is: “if set of conditions S obtains, then person P can appropriate resource R”. The “enough and as good” proviso of Locke and the “no worsening” proviso of Nozick are examples.\textsuperscript{51}

Fourth, they describe the content of the right to property. They must show the contours of this right as regards use, transfer, duration, and conditions where the right can be justifiably overridden. This will include the relationship to both the rights of the state and the rights of others.

In debates over first appropriation arguments, combatants have spilt a great deal of ink on both the content and prospects of the second and third stages. It will become clear in this thesis that my belief is that insufficient attention has been paid to the last, and that the last rests, to a larger extent than has been realised, on the content of the first.

2.3 Locke in Summary

2.3.1 “Of Property” in the Two Treatises

John Locke’s theory of property is the most famous early modern treatment of the subject. It was highly influential in England and the U.S.A in the eighteenth century. In the early twentieth, Hastings Rashdall was right in his judgement that Locke’s theory was now “the basis of almost all attempts of modern philosophers to base the justification of private property upon some \textit{a priori} principle and not upon the ground of general utility and convenience”.\textsuperscript{52} This influence remains strong. The most famous recent contribution, that of Nozick, is resoundingly Lockean in form.

In the second of his \textit{Two Treatises on Government} Locke forges an argument for the legitimacy of a regime of private property. He takes up the problem of how land and resources which were given to humankind in common can become owned by individuals, to the exclusion of other commoners. Expressly in the first treatise, Locke has the position offered nine years earlier by Robert Filmer\textsuperscript{51}, for an argument that this set may be empty, see Jan Narveson, “Property Rights: Original Acquisition and Lockean Provisos”, \textit{Public Affairs Quarterly} 13(3) (1999): 205-27. Even under his view, acquisition must not violate prior property rights, though this will count as a condition \textit{here} only if the acts in the previous step include acts undertaken on others’ property. They typically do not and explicitly do not for Locke.\textsuperscript{52} Hastings Rashdall, “The Philosophical Theory of Property”, in \textit{Property: Its Duties and Rights}. ed. Charles Gore, (London: MacMillian, 1913), p 40
aggressively in his sights. In chapter V of the second treatise, "of Property", Locke develops a supporting argument for the assertion (offered at the beginning of the Two Treatises) that each person has a natural right to acquire property, bounded by and springing from, the law of nature. What is characteristic of Locke’s argument is first, that he divorced the legitimacy of appropriation from the requirement that other commoners give consent to it by showing that, provided certain conditions are met, no commoner’s rights are violated. Second, Locke holds that the process of labouring on a commonly owned resource generates the claim to private property in the product of that labour.

Locke founds the permissibility of private property in the face of his sincere belief in God’s dictum of original community - where all have a common right to earth’s natural bounty. It is notable that in Locke’s demonstration all this takes place in a pre-political, non-contractual context. He shows that taking land and produce for private ownership is not necessarily harmful to others and that such an act is at least as morally significant as contracts. If successful, his argument would show that quite apart from conventional or legal arrangements private property claims can be legitimate, that some once probably were, and that some may still be. This is a significant justification, even if he has not shown the optimality of private ownership.

2.3.2 The State of Nature and the First Labourer

Locke’s account of the genesis of the right to property begins with the “state of nature”; a thought experiment set in a time before both private ownership and government. It is, for the inhabitants, “a state of perfect freedom to order their actions… within the bounds of the Law of Nature without asking leave, or depending upon the will of any other man”. It is a “state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another… But though this be a state of liberty, yet it is not a state of licence… The state of nature has a law of nature to govern it”. (II 4)

Locke notes that land is held in common (in some sense of ‘common’) and each commoner has a set of rights and liberties, including crucially, a right to preservation. “God, as King David says, Psalm cxv.16. has given the earth to the children of men; given it to mankind in common” (II 25). Locke further notes that each must minimally appropriate food, water, and clothing if they are to fulfil the right to preservation. And as universal consent is not possible, each must nourish herself from commonly owned natural produce, without the consent of all the others, for if “such a consent as was necessary, man had starved, notwithstanding the plenty God had given him” (II 28). This opens the door to appropriation, but how does it proceed to justify (and to demarcate) particular acts

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53 Filmer, Patriarcha and Other Political Works. This work was probably penned in 1637-8, but not published until 1680, well after his death in 1653.

54 By “commoner” Locke does not mean non-aristocratic. Instead he intends a technical sense, to refer to all those with common rights in the land in its natural state. Originally, this includes all humankind.

55 Although Locke also seems to regard this as historical, it is a thought experiment in that it is used to give ideal conditions, under which appropriation of property will be legitimate.
as appropriative acts? Locke argues that all acts of labour undertaken in order to preserve one’s life in the state of nature involve ‘mixing’ one’s labour with resources from the commonly owned earth. Yet each has a property in his own person and since he owns himself, no one but him has a right to his labour. Once labour is mixed with the earth or its fruits, the produce is a composite of the two forces of production that are now irrevocably linked. The produce cannot be taken from him without stealing his labour, and therefore he owns the produce. From Locke’s pen:

> Whatsoever then he removes out of the state of nature that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others. (II 27)

While the act of labouring functions to establish that some amount of private property can be created from the common, the labourer must show he has not acted to “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another” (II 6). The clause that he leave “enough and as good” for others to make similar appropriations acts to solve this problem since appropriation that satisfies it takes nothing that other commoners have a right to and hence does not stand in need of their approval.\(^56\) This clause is known variously as the “Lockean proviso” or the “sufficiency condition”.

Locke holds that the labourer comes to own not only the fruits of cultivation, but also the cultivated land itself. He believes the incidents of these new private property rights include use, excludability, and transfer. Transfer includes gifts, bequest and inheritance.

I identify three stages of property-type dominance as shown below. Locke is concerned with the transition from the first to the second.\(^57\)

| Pre-acquisition phase. All land and resources are held in common. | Acquisition phase. Some land is not yet appropriated. | Exhaustive acquisition phase. No commons remain. |

This progression is distinct from the political development that Locke believes accompanies it. Initially there is no political organisation, though eventually participants form a government. There is

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\(^{56}\) See Sreenivasan, p 48

\(^{57}\) Whether Locke conceived of the third being possible, from a 17th Century perspective is debated. Whether his theory can accommodate it, morally, depends on the interpretation we give to the ‘enough and as good’ proviso, considered in chapter 3.
no reason why Locke need hold that this occurs at or between any particular stage, though he conceived of it as occurring between the first and second.

2.3.3 Labour’s Power to Circumvent Consent

Locke’s argument addresses two main problems each of which raises questions for an interpreter. These are the “consent problem” and the “ownership problem”. The “consent problem” arises because land is held in common: How can individual appropriation occur without violating everyone’s rights in common? Locke aims to undermine any objection from the unfairness of the resulting distribution of both rights and goods. Three features of Locke’s text play important roles here. These are the state of nature and the two provisos.

First, unlike many previous theories, Locke’s theory is a theory of appropriation without the requirement of consent. One pertinent question concerns the nature of his argument for why this is not needed. Whether the consent of other commoners is required before appropriation depends crucially on what type of rights (if any) commoners have prior to private appropriation and so another crucial question is: How are we to understand the initial position?

Second, the spoliation proviso: Locke says that whatever resources are beyond the ability of the owner to use before they spoil, are not truly owned by him. How severe a restriction this is will turn on what is meant by ‘use’ (and importantly, whether exchange is an allowable instance of ‘use’). The effect of moving to a monetary economy must also be considered.

Third, the sufficiency proviso: Locke famously requires of an appropriator that she leave “enough and as good for others”. Essential tasks here include interpreting the nature of this restriction and determining its exact relationship to the validity of property.

The “ownership problem” concerns how particular resources become owned by particular individuals. In the course of answering this, Locke’s argument employs two main concepts: Ownership of oneself and one’s labour, and the metaphor of ‘labour mixing’. Locke appears to understand persons as proprietors of themselves. Those seeking to use a Lockean argument must enquire whether self-ownership is a coherent and useful concept, and whether ownership of self and labour are sufficient to generate rights in objects in the world. The peculiar description that one mixes one’s labour with natural resources is the link between self-ownership and ownership of parts of the physical world. How are we to understand the idea that an appropriator mixes his labour with an object? Is labour mixing a good reason to regard an object as owned by that person? These questions must be investigated if we are to determine the nature of Locke’s response to the ownership problem.

58 Here I follow Sreenivasan’s formulation.
Locke is concerned to show that private property is possible apart from government and positive law. Private property rights are generated within the state of nature and are among the natural rights that people bring with them into political society and for whose protection such society is founded.

2.4 Rights and Liberties in the State of Nature

Locke wants to “shew, how Men might come to have a property in several parts of that which God gave to Mankind in common, and that without any express Compact of all the Commoners” (II 25). Understanding the initial position in which commoners find themselves is crucial for interpreting and assessing Locke’s argument. Whether the consent of other commoners is required for legitimate appropriation depends on what type of rights (if any) those commoners have prior to private appropriation.

Until recently, Locke’s interpreters gave scant attention to the consent problem. One reason for this is that many assumed that universal consent is not necessary because of the ‘paradox of plenty’ which Locke describes in (II 28).59

And will anyone say, that he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.

The idea is that this paradox itself serves as a solution to the consent problem by showing that universal consent must be too stringent a requirement. But to say the requirement of consent is absurd is also to say that Locke’s description of the initial position (which, for Locke, generates the need for consent) is absurd. This was Filmer’s point. So the Paradox cannot itself be a solution to the consent problem. It is intended to highlight the problems with consent and to signal that there are solutions. It is not the need to solve the consent problem that Locke reduces to absurdity, but rather the assumption that universal consent is the unique solution to the consent problem, that is thus reduced.60

I consider a number of alternative accounts of the rights and liberties enjoyed in the state of nature. I argue (with Waldron, Tully and Sreenivasan, and against Nozick and McPherson) that they are at least as strong as those set out in (5) below.

Commentators often refer to the ‘traditional view’ and then characterise this view before proceeding to attack it. What constitutes this traditional view? Some assume a negative community of property

60 Sreenivasan, p 52
where all have no rights with respect to land. Others assume that any rights held are sufficiently weak that annexing a property right excludes or dissolves the common right. Each of these yields only a sparse set of liberties to commoners. Yet the exact set of rights, liberties, and powers that commoners had with respect to land and produce, which is a key issue for the structure and success of Locke’s argument, deserves better treatment. Each characterisation will make it more or less difficult for such rights to be gained and will place different limits on any property rights. Initial positions with strong rights should generate a smaller set of property rights for the owner since the rights of other commoners will be threatened more easily than they would under initial positions with a weaker set of common rights. I will consider 5 possibilities. All assume that each commoner has equal moral worth and that none is subordinate to any other. After this they diverge. The first is as follows:

(1) Each has inalienable claim-rights to use any resource.

This maximally strong interpretation must be rejected as an interpretation of Locke since rights and duties would conflict. Each would have a right to property in a resource and a duty to respect all others’ like right.

(2) Each has claim-rights to use any and all resources, but they are alienable.

This must also be rejected or Locke could not solve the consent problem in the way he does. Private property could only be appropriated by universal consent, where each person, bar one, voluntarily gives up claim rights to a particular resource. While it is possible this consent could be canvassed and obtained, Locke accepts Filmer’s attack on the likelihood of universal consent; it is precisely this necessity Locke employs his argument to circumvent.

(3) Each has only liberties to acquire private property.

This description is endorsed by Nozick and gives impetus to many of the accounts of property acquisition that yield weak provisos. For Nozick, all land is initially unowned. No commoner has private ownership rights, but neither does any one have common ownership rights. Each has only liberties to appropriate land.

Whatever the merits of this view as a starting point for a modern theory of property acquisition, it cannot serve as an interpretation of Locke since Locke believes that each has a natural claim right to subsistence and to the use of resources necessary for this. This right grounds a further right to access to the means of preservation from land and the bounty of the land. To say it is unowned would mean that someone who takes it all (whether by enclosing and appropriating it, or by

61 Waldron offers and rejects the first three, Sreenivasan discusses the third and fourth. Both concur with the fifth.
gathering all the fruit of the land without enclosure) takes nothing from other commoners which they have a right to. So prior to private ownership, access to the means of preservation can only be maintained if each has guaranteed access to the bounty of the land. This amounts to a kind of non-exclusive ownership right. To say that all have a non-exclusive ownership right to X is just to say that X is commonly owned. Hence, Nozick’s account of the state of nature cannot be Locke’s (and luckily, Nozick did not claim it was).

Further, Locke introduces his arguments as a way of circumventing the problem of an appropriator needing the universal consent of common owners. No such argument would be needed had Locke conceived of the state of nature as a rights vacuum. Sreenivasan attempts to show why some commentators for example Stephen Buckle assume Locke is positing only negative community. He uses Buckle’s distinction between:

**Negative Community**
Any community of property in which universal consent is *not* a necessary condition of removing things from the common.

**Positive Community**
Any community of property in which universal consent *is* a necessary condition of removing things from the common (since it is a community where all are joint owners).

Sreenivasan says that Locke obviously does not hold to Positive Community but also points out that this does not itself answer why commoners can dispense with consent. The view that consent is not a necessary condition does not entail that it is no condition at all. While his discussion goes some way to illuminating the problem, more needs to be said. The crucial point is that candidates for characterising the state of nature that fit Buckle’s definition of negative community are not limited to cases where all have only an equal no-right. In fact (5) below is one such candidate, but it is not a liberties-only position. So Buckle’s definition of negative community above is too broad to force Locke to endorse a liberties-only view. The invalid inference is the move from this definition of negative community, to the claim that Locke must hold that commoners are not possessed of any common rights. Yet Locke holds *both* that universal consent is not a necessary condition for removing things from the common and that commoners have rights in land that appropriation may well violate.

Other possible characterisations of the state of nature turn on whether a common right can be dissolved, excluded, or superseded by an activity, such as labouring, which generates a rival claim - namely, the claim to private property. Perhaps:

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Each commoner has a set of common rights over resources but these rights are of the type that are excluded or dissolved, if someone annexes a private property right over those resources.

There is some textual support for this in II 27 and II 32 but interpreting those passages thus is too simple. If merely a conjunction of a private right to a common right were a sufficient solution why would there be any consent problem for natural rights theorists? It is the context in which this conjunction occurs, rather than the conjunction itself that acts to obviate the requirement of consent. The context is that of finding a way to protect others’ rights package by preventing appropriation from undermining the right to the means of preservation, by leaving enough and as good.

Sreenivasan attributes (4) to Waldron, I think wrongly. The text (from Waldron) where Sreenivasan finds this view, is:

> By “mixing his labour” with natural resources or pieces of land, a man can acquire such a property in them as to exclude the common right of other men. ⁶³

But it is not clear that Waldron is saying that the common right is overridden merely by an act - any act - of mixing labour. To say that it “can” happen is not to say it is automatic. Waldron’s comment is consistent with Sreenivasan’s own view that it is the conditions on how this happens which circumvent the requirement of consent, so Sreenivasan should not conclude that Waldron does not hold this more complex view. In fact, in the sentence before this, Waldron says that it “is unnecessary to restate in any detail Locke’s argument for the possibility of unilateral acquisition of property entitlements in the state of nature”. Given that Waldron deliberately omits the detail on how private rights come to be established, it is unfair to read into Waldron the claim that annexing a private property right simply overrides the common right. ⁶⁴

The next position to be considered is the one I endorse.

No one has private property but each has claim rights over resources needed for the means of their own subsistence, coupled with a duty to make any surplus resources available to others if their survival is threatened. Each has a right not to be excluded from the use of common materials.

This fits well with both Locke’s right to the means of preservation, and its post-appropriation application, the duty of charity which Locke formulates thus:

⁶⁴ Further, Sreenivasan, at p 26n, also claims that Waldron “rather curiously, discusses the issue at some length in The Right to Private Property, pp 148-54, but then neglects to explain what Locke’s solution actually is”. This itself is a “rather curious” comment as Waldron does explain, in sect 6.6 (at pp 168-71) and again in sect 6.9 (at pp 189-91) in that work.
God... has given no one... such a property... but that he has given his needy brother a right to the surplusage of his goods... As justice gives every man a title to the product of his honest industry... so charity gives every man a title to so much out of another’s plenty, as will keep him from extreme want, where he has no means to subsist otherwise. I 42

So the initial position is not an absence of rights. Recall that each position I considered started with the assumption that each commoner has equal moral worth and none is subordinate to any other. From my reading of Locke, (5) seems to be the best set of rights to conjoin to this. It is seen so too by many recent interpreters. James Tully and Jeremy Waldron rarely see eye to eye on things Lockean yet both agree that at least part of the reason Locke introduces the ‘enough and as good’ concept is to recognise and make good on the thesis that everyone had an original claim right to an adequate subsistence from the world’s resources.

2.5  The Ownership Problem: Locke and Labour

2.5.1  Approaching the Ownership Problem

As shown earlier, initial property rights held in common are rights to the means of preservation. Specifically this is the claim right not to be excluded from the subsistence use of common materials. Locke’s theory of appropriation is characterised by his solution to the consent problem, in particular, by the wedge he drives between the legitimacy of appropriation and the requirement of universal consent. If successful, Locke would show that the state of affairs in which common rights in resources are transformed to private ownership, violated no commoner’s rights. (This I examine in chapter 3.) However he would have shown neither which particular objects of property are owned by whom, nor how this occurred. This – the ownership problem – is the second problem Locke addresses. Locke seeks to understand what legitimises the appropriation of particular things by particular agents. The short answer to the question of what, for Locke, distinguishes the appropriator as owner from the other commoners as non-owners is that the appropriator laboured on the objects in question. Yet this, without embellishment, leaves unexplained how and why labour accomplishes this result. We will need to examine this, but first, a digression on other possible answers.

While the above answer is salient, Locke also appeals to need and to utility. However these two appeals will not succeed as a basis for the case he desires. Need may yield rights to consume whatever goods are necessary for survival, but will give neither the extension of ownership (‘larger possessions’) Locke envisions nor the range of rights and liberties needed for the relationship (of hungry to hungered for) to be called ‘property’. As concerns increasing utility, it is doubtful this can supply the strength of right desired. Moreover, it is an unlikely principle for a natural rights theorist to appeal to except in a supplementary manner. Utility does, however, return as a support argument to Locke’s main argument from labour.
The emphasis put on work as a justification for property, common in the twentieth century, was less salient in the seventeenth. The implications are radical; the special right generated by labouring trumps all general rights except that of basic need. Why should this be? To have an answer, Locke needs to show how such “a bare corporal act” (Pufendorf) can be the occurrence that generates a right for the appropriator. The justification proceeds in two parts: a theory of ownership of oneself and one’s labour and an account of how the force of self-ownership is transferred to resources. II 27 contains the most concise wording for the labour argument:

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joy ned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men.

Locke holds that the labourer comes to own not only the fruits of cultivation, but also the cultivated land itself. The premises of the argument Locke gives in II 27, and in II 32, can be summarised in the following way (with supporting quotes).  

1. Each commoner has the right to preservation. (“Men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence”. (II 25))
2. A person must labour on commonly owned resources to exercise this right. (“God gave the world ... to the use of the industrious and rational and labour was to be his title to it”. (II 34))
3. A person who labours on commonly owned resources and removes them from the common does not take any rights from another provided that person leaves enough and as good resources for others and does not let the produce spoil (the sufficiency and spoilage conditions). (“Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use”. (II 33))
4. A man who labours on a resource mixes his labour with that resource. The use of labour to change a thing from its natural state into something more useful, involves mixing labour with that thing. (“Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with...”. (II 27))

65 My formulation is similar to that of Waldron, who I draw on, but is an expanded account for completeness. Waldron has no premise about self-ownership. (See Waldron, The Right to Private Property, p 184). For an alternative account, see Becker, p 33
5 Each person has property in his own person; this “nobody has a right to but himself”. (II 27)

Therefore

6 The "labour of his body and the work of his hands ...are properly his". (II 27)

Therefore

7 The object being laboured on contains something which the labourer owns.\textsuperscript{66} (The object “hath by this labour something annexed to it” (II 27))

8 Given that the labourer fulfils the sufficiency and spoilage conditions, taking the object out of the labourer’s control without his consent is a way of taking his labour from him without his consent, in violation of the ownership right referred to in (6). (“For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others”. (II 27))

9 Therefore, provided he meets the spoliation and sufficiency provisos, no one may take the object from the labourer without his consent. This is to say, the object is the labourer’s property.

The argument is backed up by the claim that labour supplies the overwhelmingly greater part of the value of the product that results when labour is mixed with unowned resources. As we have seen the intended function of the Sufficiency and Spoilage conditions is to disarm objections. Premises 1 and 2 were the subjects of the previous section. Premise 3 and its implications require a chapter in themselves: chapter 3. I will examine premises 5 and 6 separately and then 4 and 7 together.\textsuperscript{67} I argue first, that as a case for property from the ownership of oneself and one’s labour, it fails. To rescue it requires much alteration yielding little case for the full and exclusive rights Locke intends. Second, Locke’s case itself yields more limits than he envisioned. These emerge from the fact that land does not fit the model of labour-produced goods and produce and the fact that multiple forms of property are compatible with Locke’s argument.

2.5.2 Premise 5: Self-ownership

Locke’s argument is a derivation from prior property rights to one’s labour, sourced in one’s ownership of one’s person. Labour is harnessed to support the argument as a means to connect self-ownership to world ownership. Locke appears to believe he needs premise 5 (on self-ownership) for premise 6 (on labour ownership) yet it will emerge in this discussion that premise 6

\textsuperscript{66} I use ‘object’ not ‘resource’ here since what the person now holds may be the bare resource or it may be a new object formed as labour transforms the resource. In both cases the appropriator mixes his labour with a resource to produce something useful, and in both cases I will refer to this as an ‘object’.

\textsuperscript{67} A full treatment would require discussion of additional problems that, for reasons of space and importance, I have chosen to omit. These include the question of when, exactly, the object becomes his and of the relationship between labour and first occupancy.
can be better supported on other, less controversial grounds. There are three problems that concern the self-ownership premise directly.

First, Locke believes our body, as God’s handiwork, is God’s property. Does this pose a problem of consistency if Locke now argues we are self-owned? God’s ownership and self-ownership are consistent if what is owned in each case is not identical. Waldron uses a technical account of “person” from Locke’s *Essays on the Law of Nature* to drive a wedge between “person” and “body”. We create our person in that we freely create our actions. We then have creator’s rights over our actions but not over our body. Waldron concludes it is thus a mistake to attribute to Locke the claim we own our bodies. This, I argue, will not do, since Locke seems committed to a stronger sense of ‘body rights’. Locke, in common with many natural rights theorists, drew an intimate link between a person’s rights and what ‘belongs’ to that person. These ‘belongings’ - or *suum* - concern a set of essential possessions of life, limb, and liberty that one cannot be stripped of without injustice. Because *suum* includes one’s body, Locke is committed to holding that each person’s limbs (etc) are indeed owned by that person. We have claim rights against others protecting our bodies. So while he talks of owning our persons, it is no mistake to interpret him as claiming we have ownership rights in our bodies. The inconsistency remains intact.

I offer an alternative lifeline to Locke. He could concede that our rights over our bodies, persons, (and even labour if necessary) are leasehold *with respect to God*, but argue that all the important body rights that this lease vests in the person, amount to self-ownership *with respect to other people* in that one holds rights in oneself and one’s body that no other mortal does. This is consistent with Locke’s repeated emphasis that, over a man’s person, “no Body has any Right to but himself.” Reserving rights to control and benefit from one’s own activities for oneself against other *humans*, would be all that is needed for the rest of the argument to proceed.

Yet a second problem emerges even if there were to be no inconsistency here. Locke’s statement that “every Man has a Property in his own Person” says clearly that the relationship one has to one’s person (whether or not this is construed as including the body, about which now, for arguments’ sake we remain agnostic) is a property relation. He is not alone in this; libertarian property theorists often use the same claim to argue for strong property rights in the world. Jan Narveson, for example, argues that each person possesses the standard incidents of ownership with respect to her person. In fact without Locke’s theological premises, Narveson is not inconsistent by, and so has no hesitation in, extending these rights to include rights over the body. From this, Narveson concludes that liberty itself is a form of property right: to be free to act is just to exercise the right to use what is yours.

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69 Waldron, *The Right to Private Property*, p 177 and p 361n
We can see why Narveson (and perhaps Locke) would be attracted to a construal of the relationship to self as a property right in the full liberal sense. If one takes this line, one can make the intuitive leap from rights to one’s person to rights to one’s labour. If one can then extend this to world–ownership, the most natural rights-type suggested also would be full liberal ones as that would preserve the rights-type running through the progression.

The insistence that rights to one’s person and body are full liberal property rights unfortunately leads to some implausible claims. If one owns one’s person or body in Honore’s full liberal sense, then that person or body is subject to the following three counter-intuitive incidents of property. First they are subject to “liability of execution” and can be taken away in payment of one’s debts. The second concerns “waiver of exclusion”. Giving consent to another’s treating you in ways that they can treat themselves would obliterate any wrongness of the other’s treatment. Killing another, even by consent, is an altogether worse act than suicide, yet the view under consideration would equate them morally. Consent is not usually taken to render killing an acceptable action.\(^71\) Third, the person and their body are subject to transfer. Yet this too, is not part of our usual understanding of the rights attendant to personhood and the right to bodily integrity. The full liberal ownership account of self-ownership does not draw on our central intuitions but is highly revisionary. Even if the rights one holds in virtue of being a person are sufficiently similar to a property right to be designated as one, it seems it cannot be the full liberal version of property rights that they are sufficiently similar to. There is no easy way for Locke (or Narveson) to argue from self-ownership to full liberal property rights over pieces of the world.

Further, the type of property in the world that would fall out of an argument from self-ownership is an odd form of property. Given that it excludes liability of execution, waivability of exclusion, and transfer, it lacks useful incidents we value in property over external objects and is certainly inconsistent with any form of capitalist economy.\(^72\)

What has been consistently overlooked in self-ownership arguments is a set of questions about the extent of our property in ourselves, the extent of our property in the world, and whether these are relevantly similar. This represents a third problem for the self-ownership thesis. I believe there is a problem with all arguments that employ self-ownership to ground world ownership and this seeps back to infect Locke’s too. The rights one holds in virtue of being a person are not sufficiently similar to any type of property right to be called one. I question whether self-ownership will be useful at all for grounding property.

\(^72\) I note that we could solve this by relaxing the clause requiring the preservation of rights type. However in that case, the incidents that apply would be indeterminate and little help in specifying the content of the rights. It would be better to consider, for independent reasons, the most appropriate form for each type of property object.
Modern theorists attempt to derive property rights from a robust account of self-ownership but I suspect there is no real advantage in employing the language of ‘propriety’ over merely talking about individuals’ rights of free agency. Nozick, for example, argues for self-ownership by dismissing alternative locations for ownership rights. That is, he dismisses the idea that we are partly owned by others. He fails to consider that proprietary notions are just out of place. The question “do we have self-ownership?” can only be answered if we are prepared to ask what type of ownership in ourselves we possess. And this question quickly dissolves into the questions: What rights over ourselves do we have? What are the relationships between these and the responsibilities we owe? To whom do we owe them?” The appeal to self-ownership yields no determinate position about what rights and duties we might have. Not only does this mean that to assume this set of rights and duties amount to full liberal ownership is to beg the question, but, as Alan Ryan notes, we lose nothing if we drop talk of property in oneself altogether and talk only of those rights, liberties and immunities.73 We can ensure the appropriate level of control, liberty, and ‘moral space’ without talk of self-ownership. There is no need to rest our ideas of how we distribute powers of control on notions of property alone.

The problem here stems, I think, from the tendency to assimilate rights in general to property rights. Narveson’s conclusion that liberty itself is a form of property is an instance of this and it seems the same tendency can be found in Locke. Locke’s account of “property in oneself” includes the right to pursue plans, invest labour, extend our sphere of rightful control, and to alienate our rights. But designating all these rights as ‘property’ is a conceptual confusion and a barrier to clarity in rights discourse. The rights that Locke and Narveson mention are rights to liberty, opportunity, and perhaps even occupational choice. These other rights “belong” to one, but anxiousness to designate this as “property” arises only from an equivocation on the meaning of “belong”. These rights belong to one only in the sense that they preserve an area of personal moral space by insulating some interests from interference from others. They are not property. True, property achieves this as well, but not all rights targeted at this aim are property rights. Isaiah Berlin, speaking of liberty notes that “everything is what it is: liberty is liberty, not equality or fairness or justice or culture or human happiness or a quiet conscience”.74 We would do well to rescue the concept of property in the same way.

Having said this, I do not consider the failure of self-ownership to ground property rights to be too much of a problem for the success of an argument akin to Locke’s. Whether or not one sees the human person (and/or body) as self-owned, one must still argue that the person’s labour is owned by them. Locke mistakenly believes that demonstrating that we own ourselves is an essential part of this task. Yet if self-ownership turns out not to be a useful concept, it does not follow that the alternative (non-property) kind of relationship we have to ourselves cannot ground ownership of our

own labour. Premise 6 can be defended independently of Premise 5 and in fact the former bears the weight of Locke’s argument. I turn to this now. Nevertheless, it is important to see the weaknesses in claims that the rights we hold in ourselves are property rights and that property in parts of the world proceeds straightforwardly from these rights.

2.5.3 Premise 6: Ownership of One’s Labour

It is not self-evident that one has property in one’s labour. Of the labourer, Locke says “The labour of his Body and the work of his Hands, are properly his” (II 27) but as Alan Ryan points out this is a dangerous way of talking since it equivocates between the ‘his’ of identification and the ‘his’ of ownership. The fact that labour was performed by your hands, does not straight away establish that the only person entitled to benefit from that labour is yourself. An argument is needed. Locke should acknowledge this since he believes “the turfs my servant has cut…become my property”, (II 28)

There is however as strong a consensus as it is common to get in political philosophy for the view that one has something akin to a property right over one’s actions. It is considered a violation of the Kantian respect for persons to think that the first call for control over decisions about the use of one’s productive capacities should be located in someone else or in society as a whole. This may not be spelt out in terms of ownership, but the liberties and rights it appeals to ground our treating one’s labour much as we would if it were ownership. So premise 6 is defensible and I will assume this hereafter.

2.5.4 Premises 4 and 7: Mixing Labour and Objects

Premises 4 and 7 concern the act of mixing labour. Premise 4 is a claim about the process of labouring and premise 7 a claim about the result of that process. I noted in 2.5.2 that Locke and other early modern theorists equate a person’s rights and what “belongs” to that person: what is their suum. Importantly for this section, I add that such theorists held that the suum could be extended. Of Locke, Stephen Buckle says that the “property in one’s own person thus has a dynamic quality, in that it needs to grow to survive - it requires the acquisition of certain things. The suum must be extended - ‘mixed’ - with certain things in order to be maintained”.

Locke employs the device of labour mixing as a means to connect self-ownership to world ownership. He says of a natural resource used by the appropriator that he ‘hath mixed his Labour with, and joined to it something that is his own and thereby makes it his property” (II 27). In his argument, Locke ascribes great power to purposeful effort. Labour is (almost) the sole natural source of property rights. An argument seeking to establish an entailment between labour and the

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76 Buckle, p 29
ownership of external property such that one cannot deny the labourer private property in the external goods without theft of her labour, would, if successful, produce strong claims to that property. This facet of Locke’s argument has been subjected to a host of criticisms. At best it is seen as unilateral (since performance of the required acquisitive actions by the agent is sufficient to bring about a change in the moral relation of others to objects) and in consequence, insufficiently strong to generate duties on others to respect property.\(^77\) It is also viewed as overplaying its hand as to what rights it can generate, for as Nozick puts it, why should “one’s entitlement extend to the whole object rather than just to the added value?”\(^78\) At worst the whole ‘labour mixing’ metaphor is accused of incoherence.\(^79\)

One immediate question concerns how labour is used in the argument. Two possibilities must be rejected. One option suggested by Olivecrona is identification.\(^80\) On this account, the labourer identifies with the product. This does not appear to be Locke’s view, and as Waldron notes, it is hard to see how such a subjective occurrence can be made objective and in a reliable way. A second option is desert. Lawrence Becker constructs a desert argument from Locke’s remark that to let others rather than the labourer benefit from the production would be clearly unjust.\(^81\) We can add that, in the same passage, Locke says (of the gift of the world and of the God who bestowed it) that “it cannot be supposed He meant it should always remain in common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome or contentious” (II 34). While this passage appeals to the idea that appropriators deserve holdings on the basis of their industrious labouring, this is supplementary to his main argument, which ties the produce to labour in a much more intimate way. I believe a desert theory is the most promising way to harness the intuition behind labour as a ground of original acquisition, but it is not Locke’s view.

There are two standard candidates for the mechanism Locke employs to generate a property right through labour. The first, the traditional interpretation, is to read the ‘labour mixing’ device literally. The second is to ground the right to the product in the fact that labour forms something new: the “maker’s right” doctrine. I will examine the first view, and the rest of the argument (mainly, the inference to premise 8) in this section. The second is so radical a departure that it affects how the labour argument is seen to proceed, and so I deal with it in a separate section, 2.6.

On the traditional interpretation, the property a person has in her person and labour enter Locke’s argument as unargued premises, since Locke takes ownership of yourself and your labour for granted. Premises 4 and 7 are then employed to show how ownership transfers to parts of the

\(^{77}\) See Waldron, *The Right to Private Property*, pp 266-71
\(^{78}\) Nozick, p 175
\(^{79}\) See Waldron, *The Right to Private Property*, pp 184-91
\(^{81}\) Becker, p 35
world. The labourer quite literally mixes - irretrievably - her labour with commonly owned goods. Waldron has identified several problems with this idea. One of them is that it involves a category mistake, since for something to be mixed with an object, that thing must itself be an object. Mixing is an action and it does not remain in the product in the same sense that flour remains in bread. A related problem is that labour is an action, not an object. Objects are made and can persist through time to be owned, however this is not true of past actions. One may object that we regularly make sense of owning a past action since we hold ourselves and others responsible for past actions. But this sense of “owning an action” functions only to identify who is the actor, in order to, as a separate move, attach praise or blame. This identificatory notion of owning a past action is not strong enough to do the normative work required by Locke’s argument, which is to bring an object under one’s proprietary control through labour.

2.5.5 The Inference to Premise 8: Stealing Labour

Were the above premises to work, and were the provisos to be fulfilled, would it follow that taking the object out of the labourer’s control without his consent amounts to stealing his labour? There are (at least) three problems with this. The first two I treat here and the third in a section of its own (2.5.6). First, Robert Nozick has famously suggested that this crucial inference is a non-sequitur. Does someone who mixes their tomato juice with an object, he asks, come to own that object, or have they foolishly dissipated their tomato juice? Why is labour mixing not a way of losing what I own, instead of gaining what I do not? Note that Locke cannot rely on any additional premise to the effect that labouring necessarily gives exclusive individual ownership: that you cannot lose your labour. That premise would apply equally to the second labourer, yielding at best results that Locke would reject (X labouring on Y’s property yields property rights for X), or at worst, incoherence (if X and Y labour on an object they both gain exclusive individual ownership).

Second, suppose the above problem could be answered. A question remains as to what kind of property institution is implied. Locke claims that private property is necessary for the satisfaction of basic need. A natural resource must be appropriated if it is to be made use of. Waldron criticises this argument, since, even if private control were necessary for survival in the case of food, it is not plausible for land. The need to use does not entail a necessity to own, except in special cases, such as food. Because of this, there is no argument here for private property in land over collective cultivation. Locke, in offering evidence for the superior productivity of private cultivation over the absence of cultivation, seems not to see this problem and offers no analogous argument for the superiority of private over collective cultivation. Taking the object from the labourer will not be an act of theft unless private rights to that object are justified. He could perhaps find empirical evidence to

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82 It is commonly thought that Nozick was first to this point. However, Hume says something similar about Locke’s argument. See David Hume, *Treatise on Human Nature* (London: Routledge and Kegan Paul, 1985) kk III, part II, sect II, p 209
do the job, but then the rights regime becomes a choice based on utility and not on the implications of a natural right to preservation and ownership of labour.

2.5.6 The Extent of Entitlement: Labour and Value

The third problem is to find the extent of the labourer’s entitlement over the product. Locke supports the labour argument with the claim that labour supplies the overwhelmingly greater part of the value of the appropriated product. But why, as Nozick asks, “should one’s entitlement extend to the whole object rather than just to the added value”?

Why is not the worker entitled only to some lesser interest? Why are the other commoners’ rights in the natural object defeated (beyond their rights to mere sustenance from that object that the appropriator took)?

The appropriator would appear to acquire a substantial interest in the object, proportionate to the labour, but not an interest that excludes all common rights of others. The commoner retains some right to continued access or a right to a share in the produce. This suggestion is Lockean in that it is the appropriate conclusion of Locke’s argument, but it is not Locke’s answer, since Locke himself thought full rights of exclusive ownership followed. Labour generates for the labourer a share proportionate to the amount of labour in the value of the product. How much of a limit on the labourer’s rights to the product this amounts to, will depend on the type of product. Some products derive their value mostly from the labour input. An intricate carving is physically labour intensive as are the products of intellectual labour. An article of software, for example, has little natural content. This suggests that gathered food, most building supplies, and most fossil fuels, for example, will be objects of a less robust right for the private owner (and subject to a stronger common right of others), than will be complex manufactured goods and intellectual goods.

Locke’s argument for full rights would be stronger if it could be shown that the non-labour component is vanishingly small. This is what Locke attempts to do with his labour theory of value. He says at one place 9/10 (II 37), at another 99/100 (II 37 and II 41) and at yet another 999/1000 (II 43), the value of a product is from labour. So there is only a negligible difference between the worth of the appropriator’s labour and the value of the object he now controls. Waldron concurs, putting cultivated land in the “high labour” box, yet I argue this is a mistaken concession. Land is fruitful because of a host of contributions (the nitrogen cycle, pollination, and nutrient flows) not due to human labour.

It is my view that a “high-labour content” classification for the fruit of the land results from the following fallacy: Locke’s discussion turns on the idea that labour gives 99% (etc) of the value since that is the excess that can be produced with labour over that produced without it. Locke believes that when we do the maths we will find that labour’s contribution will be 99% and nature’s 1%.

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83 Nozick, p 175
84 Though in the case of fossil fuels, while the natural resource component is high, the extraction component is large also.
Yet is this a good way to calculate relative contribution? Imagine a human chain of people down a treacherous hillside to reach a stricken child. The last person in the chain may say “without me, this chain is useless”. This is true, but the same can also be said of the other links. From the fact that the chain - without the last person - is useless for its purpose, it does not follow that all, or almost all, the value rests in that person.

To see this, the argument can be run the other way to yield the result that without the seeds, water, soil, and plants, labour is useless. Relying on the same “fuzzy math”, nature’s contribution would be what nature and labour yield together, minus the yield that labour would produce on its own. Labour without natural resources would yield nothing. In fact, the very fact that energy corporations invest so much labour in extraction of oil demonstrates how valuable nature’s contribution is. If they struck only water, they would not be able to sell that water for a high price simply because they expended so much labour.

The mistake is in defining the contribution of one element by reference to what can be produced without it. Oil may be useless in the ground, but we cannot conclude that the whole value of oil is in labour. If oil did not exist naturally, labour could not pump it to your car. A bird in the hand may be worth two in the bush, but two hands in a bird-less bush are worth nothing at all.

2.6 The “Maker’s Right” Interpretation

In 2.5.4, I outlined the two contenders for the form of the labour mixing argument Locke employs. These were the traditional, literal, “mixing” account and an account that sees a product’s maker as gaining a right to the produce. We have seen the problems for the former. In this section I discuss the latter.

The problems outlined in section 2.5 can be seen in two ways. Either Locke intends the interpretation traditionally ascribed to him and these problems show up difficulties for his theory or Locke intends something else and these problems undermine the traditional interpretation. James Tully plumps for the latter, arguing that Locke means instead that a maker has a right in and over his workmanship: the doctrine of ‘maker’s right’.

This view sees the ownership rights of an appropriator as a species of those of a creator. Locke, on this view, draws an analogy between the processes of God’s creating and human making. Tully, using Locke’s Essays, ascribes to him two senses of making: that which causes another thing to begin to be (creating) and that which collects up pre-existing entities into a new thing (making). The claim that the item is new, rather than a collection of old objects is consistent with Locke’s view that
a person may “compound and divide the Materials, which are made to his hand” and so bring into
the world an object whose identity and existence is truly novel. 85

The analogy rests on the similarity between the conscious, goal-directed intellectual activity of God,
and that of humans. 86 Filling in the assumptions from the analogy, the maker’s right view is best
understood as replacing premises 4 through 8 of the general argument in 2.5.1 with the following
five premises.

10 Making and creating are species of cause. Both are mental or idea–based processes and
the idea gives the artefact its essence.
Therefore

11 Making is relevantly similar to creating.
12 If one creates something, one owns it.
Therefore (from 11 and 12)
13 If one makes a thing out of raw materials that one is entitled to, then one owns it.
Therefore (from 13 and 3 (from 2.5.1))
14 Provided he meets the spoliation and sufficiency provisos, no one may take the object
from the labourer without his consent. This is to say, the object is the labourer’s
property. (This conclusion is identical to (9) in 2.5.1)

With the attenuated force carried by premises 1 and 2 of the argument in 2.5.1, this interpretation
effectively replaces those as well. This point reveals both a strength and a weakness for the view.
The weakness is that the original premises are a common-sense reading of the Lockean text in II
27, whereas many of those above need appeal to views Locke is claimed to hold, drawn from other
parts of the Two Treatises and from his other writings. The strength is that the criticisms we have
encountered so far apply most directly to the traditional interpretation. The maker’s right doctrine
has the advantage of needing neither a literal account of labour mixing nor as strong a sense of self-
ownership, both of which we have found problematic. Further, it avoids the “can of tomato juice”
objecion in Section 2.5.5. Mixing a can of tomato juice with the sea may qualify as mixing labour but
it hardly qualifies as making. Can this provide a way to make sense of Locke’s argument without
relying on these troubled concepts to extend ownership to objects?

I will address two problems for this view. The first concerns the rights-type: are they too strong? The
second targets a consistency problem: is this solution inconsistent with Locke’s view on fathers not
creating their children?

85 Locke, Essays, bkII, ch vi, sect 40
86 An entity lacking the property of intellect cannot “make” on this view. If making alone gives rise to property, can this
same entity ever hold property? It would seem not. This would fit well with Locke’s view that it is only in respect of
similarity to God, qua intellectual being, that humans are capable of dominion (I 30, 40).
2.6.1 Are the Rights too Strong? Premises 11 through 13

Waldron attacks Tully’s view, claiming it yields too strong a conclusion since creators’ rights are absolute rights, without any duties attached.\footnote{Waldron, \textit{The Right to Private Property}, pp 198-202. I will accept premise 12 (that a creator owns what she creates) throughout this discussion. I will also assume, in the interests of assessing problems independently, that the consent problem can be solved. (There is a serious disanalogy between a creator \textit{ex nihilo} (who has by definition, no raw materials to acquire before creating can commence) and human makers (who must appropriate materials first). Hence, there is a consent problem, but if Locke’s argument to circumvent consent succeeds this problem can be solved.)} Waldron describes appropriators’ rights as a form of creators’ rights, effectively making creators’ rights a superset, of which appropriators’ rights are a subset. So his objection proceeds thus: the standard incidents that apply to creators’ rights must also be true of the subset, makers’ rights. But they are not true of the latter rights (since creators’ rights are absolute and appropriators’ rights are not) and therefore, appropriators’ rights are not a form of creators’ rights. So this interpretation of Locke’s “labour mixing” yields too strong a set of rights to be consistent with Locke, and so must be rejected.

Waldron goes astray in his conception of the relationship between a maker and a creator, namely, in his assumption that making is a subset of creating. If instead, making and creating are seen as fellow species within a genus, between which an analogy is being drawn, the two can be analogous without every property of creators’ rights being also a property of makers’ rights. On this description, to show appropriators’ rights differ in their standard incidents from creators’ rights is insufficient to show the two cannot be related in a way useful for an analogy. Part of the force of Waldron’s objection is that we must attribute to Locke an elementary oversight in not seeing how treating makers’ rights as a species of creators’ rights would make ownership absolute and without conditions. But that force is undermined by this new description. Rights of creators and makers need only be similar enough to yield some form of ownership, but not so similar that the stronger, unwanted, conclusions - ones giving absolute and God-like ownership - follow too.

What is it that needs to be relevantly similar? To be Lockean, there would need to be labouring activity, engaged in consciously, which yields a product. This is true of both creator and maker. How does a makers’ right avoid being absolute by analogy with creators’ rights? Creation is \textit{ex nihilo} so the creator owns the creation in an absolute sense. Making is not \textit{ex nihilo}, so the rights granted are less absolute. The upshot is that viewing the rights of a maker as analogous to those of a creator does not commit us to the view that the former rights are absolute. So the makers’ right argument can indeed generate the less absolute ownership rights required.

This raises the question, however, of exactly how restricted the rights are. There is some guidance given here since limits to property rights can be based on their difference from creation \textit{ex nihilo}. These will be similar to the limits discussed in 2.5.5 since they too stem from the less-than-full value that labour adds.
2.6.2 The Father Problem and Sreenivasan's Solution: Premise 10

The second problem is a scope issue. Making is analogous to creation in that both are idea–based causal processes and the idea gives the artefact its essence (from premise 1a). But while Locke needs the analogy to be close, he still needs space for his refutation of Filmer's claim that fathers have absolute rights over their children because conceiving a child is an act of creation.\(^88\) Locke rejects the claim that fathers create their children on the grounds that fathers do not understand the process by which children are made. This gives him the required space, but at the cost of narrowing the scope of ownership, for as Nozick points out, Locke cannot say this without threatening ownership in all sorts of property we normally take to be obvious instances. If lack of knowledge removes the child from the scope of ownables of the parent, it also removes the crop from the list of ownables of the farmer.

To refute this objection and defend Tully's view, one needs to find a relevant difference in what is known by a father about the child and what is known by a gardener (say) about crops - a difference which Locke would accept and hopefully one he explicitly held. Nozick interprets Locke as saying that making obtains just in case the maker "controls and understands all parts of the process of making".\(^89\) Sreenivasan rightly objects that this is too strong to be a good reading of Locke and offers his own version: it is a question of whether the maker knows the essence of the thing he has made. Locke affirms we have this knowledge of our products (\textit{Essay} III.vi.40) but denies we have it of human beings (\textit{Essay} III.vi.3). This, it turns out, tells against the labour mixing thesis, rather than against the doctrine of the maker's right. If the labour mixing view were correct, Locke's denial of the fact that fathers make their children would not be sufficient to disprove they own them, since fathers still mixed their labour(!) Making is only one way of mixing labour, so to refute the idea that fathers make their children is not to refute the claim of ownership.\(^90\)

This solution has the desirable features of repairing the maker's right doctrine and of doing so using a distinction Locke himself made. Yet I suggest it makes it difficult for Locke's labour argument to be sustained for at least two reasons.

First, there does not seem to be any sense of "knowing an essence" that will clearly apply to all the products we make and all the objects we claim ownership of, while at the same time clearly \textit{not} applying to humans. If a property right arises in virtue of a person's making the object then such rights are restricted to the kinds of things it is possible to make. Perhaps property is possible in cultivated fields, mechanical objects, crafts, devices, and some foodstuffs. But products involving

\(^{88}\) Locke and Filmer focus on the father, yet of course, if an argument from maker’s right were to be plausible, it would be maternal not paternal labour that grounds ownership.

\(^{89}\) Nozick, p 288

\(^{90}\) Sreenivasan, p 84
more natural processes - humans, fruit, animals, land - would not qualify.\textsuperscript{91} Certainly, to draw the line with humans as the only item on one side is too convenient. In consequence, our claims to ownership of many things currently owned will not gain support from this argument. Worse, the distinction involves saying that whatever is on the latter side \textit{cannot be owned}. Any other argument one might marshal to support ownership of these things will be in direct conflict with this one.

Second, the argument would tie the extension of ownable items to our ever-changing knowledge of them. Primal cultures would have less power to own objects than scientific cultures. This seems conceptually odd as well as unjust.

Sreenivasan, in his defence of the workmanship interpretation, hopes to locate any difficulties not in the interpretation but in Locke’s theory itself. No interpretation can cover all the instances of property Locke assumes are covered, because the theory itself cannot stretch that far.\textsuperscript{92} There is, indeed, an inherent implausibility about Locke’s theory of labour, independent of any interpretation of it. His examples of apple picking and drinking from a stream are simply not convincing instances of labour. The traditional interpretation is able to cover these cases as it straightforwardly includes them as labour. But if the theory is intuitively implausible, the fact that the traditional interpretation can embrace these examples is hardly a strength. The “making” hypothesis preserves the implausibility of Locke’s theory in those instances.

The concept of labour, both in a self-ownership argument through “labour mixing” and in the thesis of rights over workmanship, fails to fully justify property rights. Both the labour mixing and the makers’ right views have strengths as interpretations, but neither will do as a justifier of the full rights that Locke desires. Yet the intuition that labour gives us a reason for ascribing rights over products is a persistent one. This suggests that labour can be used in a different way that draws on the intuitions Locke appeals to without saddling us with the limitations of his manner of appealing to it.

\textbf{2.7 Conclusion}

After exploring the nature of original appropriation arguments, in this chapter I addressed two main issues in Locke’s theory. The first is a conception of the Lockean state of nature. I argued that no commoner has private property but each has claim rights over resources needed for the means of their own subsistence, coupled with a duty to make extra resources available to another’s survival if there is a surplus to basic needs.

\textsuperscript{91} Perhaps the difficulty is a little more subtle than this. In the case of the latter list, cultivation of fruit and domestication of animals may plausibly be construed as making, but in this case, Locke attributes property in them prematurely, before the making process has begun.

\textsuperscript{92} Sreenivasan, p 85
The second is a view of the labour-based argument for property. Two main interpretations were considered. Rather than commit to a view about which is best, I sought to show the implications of each for the shape of property rights they yield. As a self-ownership argument, the argument fails. It could perhaps be rescued, yet it would then yield no case for libertarian-style rights. To say that we own ourselves in the sense of anything like full liberal rights yields odd results. Further, we cannot easily justify property rights over parts of the world by an extension of self-ownership through labour. It would be better to appeal to the rights and liberties that define one’s moral space, and then to the interests in the products generated by the expression (through labour) of those rights and liberties. The extent of entitlement justified by the ‘labour mixing’ argument is also threatened. An alternative interpretation, that of a maker’s right, was shown to suffer from similar problems.

Locke’s case yields more limits on ownership than he himself admitted. These emerge from (among others) the fact that entitlement to labour’s produce cannot extend to parts of the means of production that are not themselves labour’s product and the fact that multiple forms of property are compatible with Locke’s ideas. The assumption that the rights-form must be full liberal right is not only unjustified as a first assumption, but is inconsistent with what is surely a more compelling approach: to look to the justification given in each case to guide us toward the type of property rights that flow from that, while paying attention to the type of property object. Control within greater limits can yield sufficient control to be consistent with the aims of the argument. Full liberal rights are not needed for the values and freedoms that motivate the arguments.

This chapter and the following one point to chapter 4, where I outline the results of the defensible parts of Lockean theory, what limits they point to, and how they can be incorporated into an overall theory.
Chapter Three

The Consent Problem and Locke’s Proviso

3.1 Introduction

For Locke, each commoner holds a set of rights and liberties that crucially include a right to self-preservation. To each person, he grants the power to create exclusive property rights over particular objects - land and produce – through labouring in the common territory. The ascription of this power raises a justificatory challenge for original acquisition theories as its exercise causes such dramatic moral changes, notably on the freedom of others. The labourer must show he has not done what he seems to have done, that is, acted to “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another” (II 6). Earlier, I termed this the “consent problem”. Locke aims to answer objections levelled against the fairness of the resulting distribution of both rights and goods.

In Chapter V of the Two Treatises, Locke addresses the question of why an appropriator is not in violation of the common rights of others. In II 28 he says:

And will anyone say, that he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.

Locke’s theory, then, is a theory of unilateral appropriation. In the course of his argument for why the consent of others is not needed, he famously requires that an appropriator leave “enough, and as good, for others” to make similar appropriations (II 27). Appropriation that satisfies this takes nothing which other commoners had a right to, and hence does not stand in need of their approval. This clause has become known variously as the “Lockean proviso” or the “sufficiency condition”. Discovering the exact relationship of this requirement to the validity of property is an essential task and the one I take up here. The type of proviso needed to circumvent consent will determine the legitimate limits to property acquisition and use, shaping the rights that attach to property. It will help show us how the balance between public and private interests is to be struck in an original acquisition theory of property.

The following quotes from the Second Treatise form the primary textual sources for attributing a sufficiency condition to Locke.

“For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left, in common for others.” (II 27)
“Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more yet than the unprovided could use. So that in effect, there was never less left for others because of his inclosure for himself. He that leaves as much as another can make use of, does as good as take nothing at all” (II 33)

“Besides, the remainder, after such enclosure, would not be as good to the rest of the Commoners as the whole was, when they could all make use of the whole: whereas in the beginning and first peopling of the great Common of the World, it was quite otherwise” (II 35).  

Many attempts have been made to understand what Locke has in mind here. Each interpretation posits requirements for the legitimacy of appropriation and in doing so answers a number of important questions. As I see it, the three most important interpretative questions are as follows. Firstly, is leaving enough and as good a necessary condition, sufficient condition, or neither? Secondly, must the goods left for others be type-identical or are they fungible? Thirdly, given that the ability to meet the proviso may change in the transition from abundance to scarcity, does it still hold under scarcity? It may be questioned whether a system of private property which satisfies the sufficiency condition is ever consistent with the scarcity of land.

Other questions will be answered along the way. Does Locke preserve a right to ownership for all or only a right of access? Are there any rights commoners held when land was common, that they lack under a private property regime? Crucially, and the target of so many of these questions: Is the proviso successful in circumventing the need for consent?

I note that, while commentators argue over whether or not this proviso is a necessary condition on appropriation, most write as if the proviso is sufficient for it. But this is not strictly true as spoliation and labouring criteria still apply. The sufficiency proviso is at best jointly sufficient with these. In view of this, for completeness, when formulating the rival interpretations I use the idiom: “Given that all other Lockean criteria for appropriation are met, an appropriation is legitimate if and only if...” This preserves the non-sufficiency of the proviso, and so is preferable over the simpler: “An appropriation is legitimate if and only if...” which does not.

The best typological division involves starting with the first of the interpretive questions: that of whether or not the proviso is a necessary condition. Those who think so may then be split according to their answers to the other two questions. I will consider the two schools of thought that have

53 The names for these two periods in the state of nature - “abundance” and “scarcity” - originate in Olivecrona, p 220. The labels refer to the availability of land, rather than to the level of material wealth.
developed among scholars who endorse the Lockean proviso as a necessary condition. The interpretation that is labelled ‘traditional’ (by scholars writing since the mid 1980’s), holds that Locke does intend it to be a necessary condition on appropriation, and that it is revoked (in some sense of ‘revoke’) upon the introduction of scarcity. This position, typified by C.B. McPherson, I will address first in section 3.2, arguing that it fails. The other school denies it can be revoked and draws the conclusion that it is too stringent a requirement to be morally acceptable and I turn to this in section 3.3. I then discuss the main positions taken by those who relax the necessity claim and the reasons they give for doing so. These schools are represented by Jeremy Waldron (section 3.4) and Gopal Sreenivasan (section 3.5). I conclude that the last is the best qua morally appropriate restriction on acquisition, if not the best qua interpretation of Locke.

3.2 MacPherson: A Necessary but Transcended Proviso

The most prominent scholar in the Lockean literature holding that Locke allows commoners’ rights to be transcended is C.B. MacPherson. There is more to dispute in MacPherson’s position than his views on the provisos but I restrict my attention to this matter.94 I will formulate the view in the following way:

(LP1) Given that all other Lockean criteria on appropriation are met, an appropriation is legitimate if and only if the appropriator leaves enough resources of the same type and quality for others to appropriate.

The options taken by Lockean scholars who endorse this view diverge over its implications for the rest of Locke’s theory. MacPherson’s particular view of the function of the proviso arises from the conjunction of LP1 with the following claim: the legitimacy of a system of property rights in land is compatible with its scarcity, but only because it is possible for the sufficiency limitation to be transcended.

MacPherson’s textual evidence for his position is a passage from II 36. Locke says that there may still be enough land in the Americas for every person’s use and that he has “heard it affirmed” that in certain waste lands in Spain, the same is true. He then says,

But be this as it will, which I lay no stress on; This I dare boldly affirm, That the same Rule of Property, (viz) that every Man should have as much as he could make use of, would still hold in the World, without straitning any body, since there is Land enough in the World to suffice double the Inhabitants had not the Invention of Money, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them. (II 36)

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94 For example, for a (successful in my view) refutation of MacPherson’s “two classes” interpretation of Locke on the matter of property and political participation, see David Miller, “The MacPherson Version”, *Political Studies* 30(1) (1982): 120-7
After citing this passage from Locke, MacPherson says:

This is quite explicit. The natural law rule, which by its specific terms limited the amount anyone could appropriate so that everyone could have as much as he could use, does not now hold; it “would hold ... had not ... Money ... introduced (by Consent) larger Possessions and a Right to them”.  

and

The introduction of money by tacit consent has removed the previous natural limitations of rightful appropriation and has invalidated the natural provision that everyone could have as much as he could make use of.  

3.2.1 Spoliation

MacPherson’s interpretation of the Lockean passage identifies “the natural law rule” (which Locke refers to as “the same Rule of Property”) as that rule which limits the amount it is fair to appropriate to that amount consistent with others having as much as they could make use of. That is, MacPherson thinks it is the spoilage and sufficiency limitations that Locke says no longer apply.

But it is ‘quite explicit’ that this is not what Locke means by the “rule of property”. Locke says the rule of property is just the fact that everyone should have as much as they can make use of. That is, prior to the advent of money, one would not have the chance to become as rich as one could with a monetary currency and so unappropriated land would still be available. No one would be “straitned” by others’ appropriation. It is this that no longer holds. There is no hint here that the provisos are themselves done away with, transcended, or can be violated.

With respect to the spoliation proviso, Locke’s claim reduces to the not very controversial point that money removes most of the instances where spoliation is applicable (since it allows the trade of depreciable goods for non-depreciable ones) thereby causing this proviso to lose most of its force. The proviso is not ‘transcended’, but the range of appropriations it will effectively restrict, is severely attenuated. (If this is what MacPherson means by ‘transcended’ then I concede the point, but it is a point hardly worth making and could be better described with a less grandiose term).

3.2.2 Transcending Sufficiency: The First Supposed Argument

Turning to the sufficiency proviso, MacPherson says “there is no doubt Locke took it to be overcome”. I argue that he is mistaken. MacPherson identifies two places where Locke intends this. Firstly, MacPherson acknowledges that in the first edition of the Two Treatises there is no

96 ibid, p 204  
97 ibid, p 211
specific argument, yet he identifies (from II 36, 45, and 48) an argument which Locke’s “chain of thought seems to have been”\textsuperscript{98}, and I construct MacPherson’s argument in premise form here:

1 A commercial economy is the automatic consequence of the introduction of money.
2 The creation of the commercial economy gives rise to a market for the produce of lands previously not worth cultivating.
3 Hence land previously not worth cultivating will be appropriated.
4 Consent to the use of money is consent to the consequences.

Therefore

5 Consent to others’ appropriation of land previously not worth cultivating has been granted.

Therefore

6 One can justifiably appropriate land even when enough and as good has not been left for others.

I have no real quibble with premises 1 and 2. Premise 3 is true enough, although it is not clear yet who is justified in performing the appropriative acts. It is not obvious that someone who already owns enough land and produce is justified in appropriating more if some are thereby prevented from appropriating. If this is Locke’s “chain of thought” he seems to have already assumed the proviso can be overridden.

But in premise 4 we encounter the main problem. It suffers from vagueness. Has one consented to all the consequences? For example, consent to money produces the possibility of great wealth. Among the many consequences of this is a new interest in attaining and protecting property that can lead, in some agents, to the disposition to disregard others in the pursuit of such wealth. If I were to be killed by such an agent in her pursuit of wealth, my murderer can hardly say I agreed to the institution of money, and so I agreed to this consequence. The point here is that the right not to be killed is more basic than the right to pursue money by whatever means and cannot be included in the class of rights I waived when I consented to money.

This indicates that this premise must be clarified and weakened. I propose that at its strongest this premise can only read:

4a Consent to money is consent to all consequences up to, but not exceeding, the point where those consequences violate rights I held previously.\textsuperscript{99}

\textsuperscript{98} ibid, p 211

\textsuperscript{99} A concern with this premise may be that, through unwise but legitimate transactions, I may have to sell something I owned previously (to cover debt), losing the rights to it. This is unobjectionable, but would be ruled out by the premise. Yet “rights I held previously” could be defined so as not to include specific rights to specific things, which are not natural rights in Locke’s sense. Rights “held previously” would include rights not to be killed, rights to the means of preservation, to own property, and here, rights to have others leave enough and as good.
But now 5 and 6 do not follow. If one has a right to joint ownership of and access to the common, then some acts of appropriating land will violate these. Again, Locke could only think 5 and 6 are true if he has already assumed the proviso can be overridden. And since that assumption is exactly what is at stake, MacPherson’s ascription of the view to Locke must be judged circular. I suspect MacPherson imputes this failed argument to Locke because he needs to locate some argument in the First Edition to sustain his interpretation. A much simpler explanation for Locke’s failure to provide an argument to the affect that the proviso is transcended is that he never intended it to be so.

3.2.3 Transcending Sufficiency: The Second Supposed Argument

MacPherson locates the second argument (that the sufficiency proviso is to be transcended) in early editions of the Two Treatises where Locke says that the tacit agreement to introduce money changed citizens’ environment from one of abundance to one of scarcity since money leads to wider possessions and the incentive to enclose all available land. Locke needs a reason why this enclosure will not violate the rights of latecomers to the appropriative game.

MacPherson’s suggestion that Locke sees the introduction of money itself as reason enough cannot stand as an interpretation of Locke’s words in these early editions. Yet in later editions an argument is added to II 37. MacPherson seizes on this as an attempt by Locke to bolster his view that the proviso is transcended, saying “Locke apparently felt that a more direct argument was needed”. The new passage in the Third Edition (II 37) reads:

To which let me add, that he who appropriates land to himself by his labour, does not lessen but increase the common stock of Mankind. For the provisions serving to the support of humane life, produced by one acre of enclosed and cultivated land, are (to speak much within compass) ten times more, than those, which are yielded by an acre of Land, of an equal richness, lyeing wast in common. And therefore he, that incloses Land and has a greater plenty of the conveniencycs of life from ten acres, than he could have from an hundred left to Nature, may truly be said to give ninety acres to Mankind. For his labour now supplys him with the provisions out of ten acres, which were but the product of an hundred lying in common.

McPherson concludes that “although more land than leaves enough and as good for others may be appropriated, the greater productivity of the appropriated land more than makes up for the lack of land available for others”. Locke may indeed hold that produce is an adequate substitute for land, fulfilling his intended proviso. But the key questions here are whether this passage is introduced to argue for this claim and even if it were, whether it implies the proviso is transcended in MacPherson’s sense. The answer, I argue, must be ‘no’ for five reasons.

\[1\text{00} \text{MacPherson, p 212}\]
First, MacPherson’s conclusion is a scarcely believable interpretation of the above passage, which in fact illustrates why labour increases productivity and why privatising land does not have to detract from the common. It contains no explicit suggestion that the appropriator is suddenly unbound from the proviso, nor even any reference to the proviso. This passage has more in common with later passages where Locke develops a labour theory of value, and so is part of a general argument for private property, not an argument for overriding a restriction.\textsuperscript{101}

Second, there is a much better reading. My reading of this passage is that the appropriator, because she improves the productivity of any land she encloses, needs less land to survive than she would on the common. So the produce of the common, which she no longer needs, is then open to others to use without her competition. For example, if there are 10 commoners and 1000 acres then the commoner-to-common-land ratio stands at 1:100. After the (extremely productive) appropriation of 10 acres by one person, since the appropriator no longer requires access to the common, the ratio increases, since there are now 9 people to 990 acres, to 1:110. As Locke says she “may truly be said, to give ninety acres to Mankind”. Locke locates the benefit of labour less in the \textit{additional produce of privately owned acres} and more in the \textit{reduced pressure on the remaining acres}.\textsuperscript{102}

A third reason to reject MacPherson’s interpretation turns on Locke’s wider aims in II 36-37. These two sections address how money expands possessions beyond simple needs. The passage in II 37 seems to illustrate why private labour increases productivity without harm to others. Locke inserts this in the Third Edition because it explains how labourers are able to enhance productivity to the extent that a surplus is available to exchange for money. This seems to be the simplest and most elegant explanation for why Locke adds this passage: it supports the repeated argument concerning how money increases possessions. The passage seems intended to neither usurp nor even \textit{address} the sufficiency condition.

Fourth, MacPherson’s reading immediately creates problems my interpretation does not. MacPherson’s picture is of a landowner taking more land without leaving enough for others, but at the same time, not harming them. This can obtain only if he is then obligated to provide employment or charity. There are two problems here. The first is that MacPherson himself (in his 1973 book \textit{Democratic Theory}) lists among the features of a property right that it “is not conditional on the owner’s performance of any social function”.\textsuperscript{103} The second and main problem is that these

\textsuperscript{101} Waldron makes a similar point in “Enough and as Good Left for Others”, \textit{Philosophical Quarterly} 29 (1979): 319-28. However, his purpose is a different one. For him, the sufficiency condition is not a proviso and so, there is no need for an argument to remove it. I see it as a real restriction, yet believe that Locke did not intend an argument for its removal and thus did not furnish us with one.

\textsuperscript{102} This assumes that she no longer works the common. Only Waldron and Cohen, among commentators I am aware of, make this assumption explicit, but it is surely the most natural reading of Locke. See Waldron, \textit{Enough and as Good Left for Others}, p 320 and Gerald Cohen, \textit{Marx and Locke on Land and Labour} (London: British Academy, 1985), p 380.

obligations of employment and charity are not mentioned in this text. MacPherson has to add a premise to make the interpretation work. He says

“This assumes, of course, that the increase in the whole product will be distributed to the benefit, or at least not to the loss, of those left without enough land. Locke makes this assumption. Even the land-less day labourer gets a bare subsistence...Private appropriation, in this way, actually increases the amount that is left to others”

Macpherson thinks appropriation enhances the position of others by enabling them to work for wages (etc). But Locke says directly that appropriation amplifies their material welfare by a quite different route: the gift, in Locke’s text, does not refer to the product of her labour distributed to others, but to the common land increasing per capita. MacPherson’s addition is arbitrary and its need is caused only by his interpretation.

There is a fifth and final worry. As I said above, Locke thinks appropriation of land into private hands leaves more land (per capita) in common. How, from this, do we get a justification for appropriating more than per-capita shares? Certainly the appropriator has done a good thing, but what is the appropriate reward? Admiration? A gift of gratitude from the other commoners (out of their excess produce from their greater per-capita land)? Perhaps. The chance to appropriate more land than is required to feed her, making her richer? This she already has, within her per-capita share. But surely an appropriate reward cannot be the right to appropriate more than equal shares, for this would be inconsistent with its justification! If we are to reward her for leaving commoners with more per-capita land, that reward cannot be the right to leave them with less per-capita land.

To conclude, MacPherson fails to establish that the passage (from II37) is directed at transcending the proviso. Even if it were so directed, it fails to establish that an appropriator can avoid leaving enough and as good land for others. If Locke’s proviso is supposed to guarantee enough and as good land remains, then MacPherson’s argument misreads the text and strains credibility. If on the other hand, Locke’s proviso is supposed to guarantee only the right to the means to subsistence, then MacPherson’s argument is not needed. For if the proviso in II 27 (etc) was never intended to restrict land appropriation to equal shares, then Locke justifies substitution directly and there is nothing to transcend. Locke gets by without MacPherson’s help.

As a final note, the unifying thesis through MacPherson’s book is that the very pro-capitalist, individualist, anti-egalitarian conclusions that Locke and others arrive at, result from assumptions about human nature which MacPherson dubs “possessive individualism”. However if he is wrong about the labourer being freed, by private appropriation, to transcend the proviso, then these pro-capitalist, individualist, anti-egalitarian conclusions may not even follow from Locke’s argument in the first place. MacPherson may have nothing for human nature to explain.

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104 Perhaps MacPherson has overlooked the fact that there is not only more production on the appropriated land, but also one less commoner for the common land to feed.
3.3 The Sceptics: The Proviso as Necessary and Fatal

In the view of the proviso under consideration, the sufficiency proviso is a necessary-and-in-kind condition on appropriation. We are, however, not inevitably committed to think that Locke sees it as transcended under scarcity. A large group of scholars draw an implication very different from MacPherson’s. They conclude that Locke intends it to stand both before and after the advent of currency. Those theorists believe that, because it is not possible for the sufficiency limitation to be transcended, no property system remotely resembling Western systems can be justified by Locke’s arguments.

Why might the proviso be inconsistent with unequal property systems of the kind we and Locke are familiar with? The main sceptical worry about Locke’s proviso is that the proviso cannot be a reasonable restriction since it is not possible to appropriate land and other goods and still leave enough and as good. If enough and as good land must be left for land taken, then each commoner effectively gains a right to no less than equal shares of the land. Yet if this is the case, a notorious regress threatens the progress of the piecemeal appropriations that Locke envisions. This is outlined in Robert Nozick’s ‘zipper’ argument.

It is often said that this proviso once held but now no longer does. But … if the proviso no longer holds, then it cannot ever have held so as to yield permanent and inheritable property rights. Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z’s situation. So Y’s appropriation is not allowed under Locke’s proviso. Therefore the next to last person X to appropriate left Y in a worse position, for X’s act ended permissible appropriation…. And so on back to the first person A to appropriate a permanent property right. 105

Nozick suggests that property rights per se are rendered illegitimate. If each appropriator takes more than equal shares, then the first person to be prevented ownership of their share has been wronged by the others. The penultimate appropriator was wronged by the antepenultimate one and all before her since they left her without the option of morally justified appropriation, even if they did physically leave enough for her to appropriate.

Rolf Sartorius writes:

Understood as an original limitation on the right to appropriate natural resources, the condition that there be enough and as good left for others could not of course be literally satisfied by any system of private property rights. 106

105 Nozick, p 176
Judith Jarvis Thomson concurs:

I suspect that there is no plausible construal of what Locke had in mind by “enough and as good” under which anyone taking land for himself would leave enough and as good for all other owners… I therefore suspect that if we take leaving enough and as good for all other owners as a necessary condition for property acquisition, then it will follow that there can be no private ownership of land.¹⁰⁷

She notes that one reason Locke (supposedly) missed this was that he radically underestimated how large the class of owners would be. If we add future generations to the list of those we must account for, the situation only worsens. The conclusion drawn by these scholars and others is that all property appropriation is vitiated when this occurs. They seem to suggest that the regress makes the whole of the enclosure by the first appropriator invalid.¹⁰⁸ This is too strong a conclusion. Only that part of the enclosure in excess of (and so in violation of) the directive to leave enough for others would lapse to the common. Each could still appropriate shares not exceeding a per capita equal share. Further, the extra land would lapse to the common immediately and not only when the ‘straitning’ of any latecomer occurred, since mathematically, enough and as good would not be left at the time of appropriation. Under this ‘fair shares’ appropriation, neither the extra appropriation nor ‘straitning’ of any man, would occur and the regress would have nothing on which to bite.

However, a weaker conclusion (which has the additional merit of being correct) is also fatal to a ‘necessary and in kind’ proviso, when juxtaposed with Locke’s aims and his beliefs about the pattern of ownership that his overall theory of property justifies. Such a proviso justifies at most equal appropriation of land and this is inconsistent with Locke’s clear belief that “the Invention of Money, and the tacit Agreement of Men to put a value on it, [has] introduced (by Consent) larger Possessions, and a Right to them.” (II 36).

If this is not enough of a concern, there are further reasons for doubting that leaving enough and as good is possible. These arise from ambiguities in the wording of the proviso. Does leaving “enough” mean leaving equal shares? Fairness would seem to require it, however depending on the level of scarcity, enough for each other person may be more or less than equal shares. Which is it to be?¹⁰⁹ Further, the “as good” clause only serves to complicate matters for appropriators. Does this rule out appropriating sites of great fertility or beauty? The first to arrive cannot simply select the sunny location beside the sparkling stream that we would all be most naturally drawn to. If land left is half as fertile, must they leave twice as much? Or must they take some inferior land as well, leaving

¹⁰⁸ The exception to this is J. T. Sanders who, apprehending the future generation problem, says: “it is hard to imagine that the proviso would allow you to mix your labour with more than an infinitesimal slice of land.” (John T. Sanders, “Justice and the Initial Appropriation of Private Property”, Harvard Journal of Law and Public Policy 10 (1987): 367-99, p 377.) He acknowledges the fact that leaving enough and as good is consistent with some small appropriations.
¹⁰⁹ In fact, for Locke if “enough” is more than equal shares then the appropriator need not leave either, since self-preservation is trumping.
equal shares of the good land? If some land is uniquely valuable for its fertility or beauty and cannot be realistically divided, must it be left in common? (A positive answer here would provide great impetus for environmentalists campaigning for nature reserves!) The problems for this view accumulate in this fashion.

In light of this, a number of options can be explored. First, perhaps Locke’s solution to the consent problem must be abandoned. John Arthur says that “[i]f one approaches the problem of resource allocation from the perspective of the Lockean ‘proviso’, that enough and as good must be left in common, then the typical method of acquiring property under capitalism is unjust”.\textsuperscript{110} If one is to hold both that some version of original appropriation can be just and that this proviso is the one Locke intends, one must abandon it in a theory of appropriation. John T. Sanders is one who asks us to do this.\textsuperscript{111}

However, while abandoning Locke’s proviso may lead us to close the \textit{Two Treatises}, it does not inevitably do so. A second option is to mine the intuitions behind it to construct a new proviso. The most famous attempt at this is that of Nozick, who replaces it with a condition that appropriators not worsen the situation of others.\textsuperscript{112} There is no requirement here for an in-kind leaving (so this has more in common with the interpretation of Locke we will uncover in 3.5). Clark Wolf, in a recent paper on property and intergenerationally valuable resources develops a similar proviso, this time focussing on not harming others.\textsuperscript{113} We will encounter these views in chapters 5 and 4 respectively, so I will say no more about them here.

Finally we could believe, with James Tully that Locke accepts the egalitarian implication for natural property and falls back on civil government to justify unequal possessions. Tully agrees that an appropriator must necessarily leave enough resources, crucially land, of the same quality for others to appropriate. If some appropriate more than their equal share and land becomes scarce, then “men’s claim rights conflict [and] the theory of natural appropriation and use has no application”.\textsuperscript{114} However, for Tully the conclusion is different. Exclusive rights to land, developed under abundance, are then invalidated and land reverts to common ownership. Under scarcity, thinks Tully, civil law must be established to do the job of protecting the right to the means of preservation, which original acquisition achieved under conditions of plenty.

This preserves a role for the proviso, but I maintain it is not Locke’s view. Locke sees moral wrong neither in the idea that all land would one day be appropriated nor in the fact that this would result in unequal land holdings. Money has been consented to and this is taken by Locke to justify “larger

\textsuperscript{111} Sanders, p 377
\textsuperscript{112} Nozick, pp 178-82
\textsuperscript{114} Tully, p 165
Possessions, and a Right to them” and certain kinds of inequality including inequality of land ownership (II 36). All this occurs under scarcity and before the advent of civil government.

To conclude, under whichever of these options we take, the proviso falls on stony ground. Yet the appeal of Locke’s proviso and the ongoing attempt to formulate something like it to capture Locke’s intent cannot be ignored. The intuition that under some set of ideal conditions, unowned or commonly owned property can be appropriated by an individual or by a group without violating any right or strong interest and without universal consent is surely a sound one. We should avoid interpretations of Locke that attribute obvious failings of logic or observation to him if his text leaves other interpretations open.

So the problems identified in 3.2 and 3.3 are good reasons for thinking the proviso is to be interpreted differently. The problems discussed are produced by the conjunction of two claims. These are the claim that the proviso is a necessary condition and the insistence that what is left in common must be left in kind. The abject failure of this interpretation of the proviso to achieve Locke’s intention, as I have argued, gives a solid basis for rejecting this conjunction of claims.

In the remaining sections we will consider options available if we discard this conjunction. Rejection of the necessity claim is explored through a discussion of Waldron. The ‘in-kind’ claim is challenged through a discussion of a recent contribution by Sreenivasan supporting the view that the proviso allows resource substitution.

3.4 Waldron’s Descriptive Thesis: The Proviso as ‘Proviso’

Through the 1980’s Jeremy Waldron began to defend a new interpretation of the sufficiency proviso. He believes it is not a full proviso in the sense of a necessary limitation on property acquisition. Locke’s real limitation is the requirement that no one is deprived of the means of preservation and this imposes “different, much stronger restraints on private property to achieve the purpose for which the ‘enough and as good’ clause is generally supposed to have been introduced”.115 Waldron concludes that unequal amounts of land can be owned, as long as access to the means of preservation is provided for all. The sufficiency proviso is not needed in this derivation. Upon outlining Waldron’s view, I argue that his position commits three errors which make it both unnecessary and hard to sustain, as an interpretation of Locke.

3.4.1 Waldron on Spoliation and Sufficiency

The spoliation proviso functions to eliminate wasteful destruction and rules out accumulating wealth to beggar your neighbour, but does not give a qualitative limit to accumulation. Most scholars of Locke see the spoliation condition as the first of two provisos. Waldron however, believes Locke

115 Waldron, Enough and as Good Left for Others, p 321

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introduces spoliation as if he intends it to be the sole proviso. He rejects the view that appropriation is legitimate if and only if the appropriator leaves enough resources of the same type and quality for others to appropriate. He does so for a number of reasons. The central one, for this discussion, is that Locke’s idiom “at least where” (II 27) does not restrict legitimate appropriations to those that leave enough and as good. The logic of “at least where” is not that of a necessary condition. These passages would yield at best:

(LP2) Given that all other Lockean criteria for appropriation are met, an appropriation is legitimate if, but not only if, the appropriator leaves enough resources of the same quality for others to appropriate.

The ‘proviso’ is prima facie not a restriction at all in the sense of a limitation on appropriation which must be fulfilled to legitimate appropriation.

Waldron (following Tully) says Locke introduces the idea of enough and as good to recognise that everyone had an original claim right to an adequate subsistence from the world’s resources. If others are left in need through your appropriation, then your property rights will be limited. While this general right to subsistence does limit property in this way, this itself is not the sufficiency condition (which is the general claim right to appropriate, not the general claim right to subsistence).

The sufficiency condition is only one way of satisfying Locke’s general right to subsistence. Other ways include providing employment or charity. In fact Waldron concludes that any Lockean sufficiency condition becomes just a special case of the doctrine of charity.116 He suggests this sufficiency condition could be operational, but be lexically below the charity condition. From this, we can construct Waldron’s interpretation of the proviso:

(LP3) Given that all other Lockean criteria for appropriation are met, an appropriation is legitimate if and only if it fits a pattern which does not limit our capacity to ensure general subsistence. One way to achieve this is for the appropriator to leave enough resources of the same quality for others to appropriate.

Waldron sees the passage from II 35 as a description of the effect of the spoliation proviso in early appropriation stages, rather than a limitation – a second proviso - in its own right. Enough and as good would be left when early appropriators enclose only as much as they could before it spoils.

Importantly, the existence of unequal shares and the appropriation of all land by a population subset can be made consistent with this proviso (LP3). They are made so by ensuring that, in the process,

116 In my view, it more accurate to say that, this proviso and that of charity are both special cases of the right to the means of subsistence.
each person is left with the means of subsistence.\textsuperscript{117} In the following sections, I take issue with Waldron on three fronts. First (3.4.2), I show how an unnecessary assumption about what is required to achieve the (in my view) right conclusion leads him to err about what Locke intends. Second (3.4.3), I question his use of the key Lockean phrase “at least where”. Last (3.4.4), I suggest a mistaken understanding about the nature of scarcity feeds his rejection of the necessity of the proviso. The force of these three objections leads me to reject Waldron’s interpretation.

\textbf{3.4.2 A Long Way to go a Short Distance}

I will argue that an assumption Waldron holds (namely, that if the proviso were a necessary condition, it would require equal amounts of land to be left for each to appropriate) requires him to interpret Locke as he does, leading him on an unnecessarily convoluted path to the conclusion that unequal amounts of privately owned land is justified. One can arrive at the same (correct) conclusion as Waldron, directly from Locke’s proviso when it is taken seriously as a proviso with content. This has the added advantage of being more charitable to Locke, in that it does not require us to view him as (repeatedly) offering a lame duck, unnecessary proviso.

The traditional interpretation gives a claim right to appropriate. As a \textit{reductio} of the traditional interpretation, Waldron uses the case where there is only enough land for some to appropriate for subsistence. Under the traditional interpretation since not all can appropriate then all must stay working on the common. Yet, he points out, his own ‘proviso’ (which appeals only to the right to subsistence) implies some can appropriate as long as they produce enough surplus to feed at least as many as when the land was still common. Given greater yields on enclosed land, that is likely to be fulfilled.

Yet this is an unduly torturous way to obtain a result that drops out more quickly if we do not insist that what is left in common need be left in kind. Waldron’s whole discussion is necessitated only by the fact he assumes that unless one adopts his position, leaving “enough and as good” will amount to leaving others the same opportunity to appropriate the same types of goods as the appropriator had; that one must leave resources in kind. This assumption determines all else about his interpretation.

Waldron need not follow this complex route if he allowed resource fungibility in the first place. If leaving “enough and as good” means leaving the same access to the means of preservation that each had before appropriation, then Waldron’s preferred option, (namely, that the existence of unequal shares and the appropriation of all land by a population subset can be made consistent with

\textsuperscript{117} In fact, David Schmidtz has argued that, due to the tragedy of the commons appropriation of all resources by a few may be \textit{required} in order to ensure general subsistence. I will return to this in section 3.5. See David Schmidtz, “When is Original Appropriation Required?”, \textit{Monist} 73 (1990): 504-18
the proviso), would derive directly from Locke’s proviso, rather than being squeezed out via a status down-grade for the proviso.

3.4.3 The Meaning of “At Least Where”

A related weakness in Waldron’s account is that denying the necessity of the proviso seems to empty it of content. It accomplishes nothing not already accomplished by the right to the means of preservation and the doctrine of charity. Yet Locke clearly utilises it in his solution to the consent problem. Appropriation satisfying it does not take anything from the common with respect to the rights (to the means of preservation) of other commoners. If Waldron is right that the sufficiency proviso is not a necessary condition, we need to preserve some significant content for it. It is not an empty gesture on Locke’s part.

As we shall see in section 3.5, some theorists accept Waldron’s point, but try to rescue some content for the proviso. However, I think that this approach concedes too much to Waldron. My objection centres on Waldron’s treatment of Locke’s phrase “at least where” in II 27. The key passage reads:

> “For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left, in common for others (II 27).

How are we to interpret this? Waldron explains his suggestion of Locke’s intent by expanding the text. His reading is:

> “For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, certainly at least where there is enough, and as good, left in common for others, and perhaps even if there is not enough and as good.” (italics mine, indicating Waldron’s additions)\(^{118}\)

Formally, Waldron is right that “X at least where Y” says that X is true whenever Y is true, but leaves open the possibility that X could be true when Y is not. It is a logical connective introducing a sufficient condition: Y is not a necessary condition of X. Yet a different picture emerges if we consider this phrase in everyday speech. Someone attempting to show that act X is justified under certain conditions may desire to head off counter examples to the truth of X. In the face of the denial of X, such a person may reply “Well, X is true at least where Y is true”. But what is the intention of the speaker? Is it to suggest that there actually are cases where X is true while Y is not? Or is it merely using Y to defend a class of cases where X is true? Surely, in common speech, it is more a defence of X being true in the stated case, than a claim about other possible cases.

Take the sentence “I carry an umbrella, at least I do when it is raining.” The point of “at least I do when” is not to suggest that I carry an umbrella when it is not raining – in fact it emphasises that rain

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\(^{118}\) Waldron, *Enough and as Good Left for Others*, p 321
is the *particular circumstance* in which I do carry an umbrella. In the case in question then, the statement: “one appropriates justly at least where enough and as good is left for others”, is intended to emphasise that the writer is aware that there are conditions on just appropriation because of worries about the injustice of some appropriations. It is much less likely to be designed to show that appropriations are often justified without enough and as good being left. If that were the intent, one would expect Locke to supply the additional text rather than relying on Waldron to do so. Locke may have, by this expression, left open the *logical possibility* of justified appropriation without fulfilment of the proviso. It is less clear that he positively thinks there are significant legitimate acquisitions without this caveat. It is not even clear it was his intention to leave the logical possibility open since he gives no example of such an appropriation.

These comments cannot show that Waldron is wrong to conclude that Locke does not intend an “enough and as good” proviso. But they do suggest caution before opting for such an interpretation.

Waldron attempts to bolster his case by pointing out that in II 36, where Locke enumerates the limits on appropriation that the advent of money obviates, the spoilage and labour conditions are included in the list, yet the enough and as good clause is not. It is mentioned, Waldron admits, but as an effect of the operation of the other restrictions, rather than as one of their number. The key passage is:

> The measure of Property, Nature has well set, by the Extent of Mens Labour, and the Conveniency of Life; no Mans Labour could subdue, or appropriate all: nor could his Enjoyment consume more than a small part; so that it was impossible for any Man, this way, to intrench upon the right of another, or acquire, to himself, a Property, to the Prejudice of his Neighbour, who would still have room, for as good, and as large a Possession (after the other had taken out his) as before it was appropriated.

While I see Waldron’s point, I maintain, for two reasons, that this passage gives insufficient warrant to his conclusion that the sufficiency “condition” is not a true condition. First, Locke’s practice is to enumerate restrictions together in sets only when they are of the same class. The fact that sufficiency is not mentioned with the other two shows only that Locke regards the latter two in the same class, namely absolute restrictions from nature: they cannot be overridden by consent, whereas the sufficiency condition could be. For a restriction to arise from a different source is not for it to fail to be a restriction.

Second, the effect of the “measure of Property, [which] Nature has well set, by the Extent of Mens Labour, and the Conveniency of Life” is clearly seen by Locke as a *justifying, not an incidental*, effect. If man’s labour subdues, or if his enjoyment consumes, resources in such a way as to lead to violations of the sufficiency condition, this would constitute a moral problem. To see why this is

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119 Compare II 142. Here the restrictions on the legislature, enumerated together, all issue from the same place, namely, society and the law of God and nature.
indeed a limiting and justifying condition, compare this to Nozick’s treatment of the proviso (that we will encounter in chapter 5). For him, appropriations should not worsen the condition of commoners. He believes that the operation of the market will render it extremely unlikely that this will ever occur. Yet we should not conclude from the fact that such non-violation is an effect of the market, that Nozick does not regard his proviso as a true condition. For both Nozick and Locke, non-violation is an effect necessary to the moral probity of property. It is not incidental to that probity.

3.4.4 Waldron’s use of “Moderate Scarcity”

My last reason for rejecting Waldron’s interpretation focuses on the nature of scarcity. It is important because Waldron (largely following Nozick) uses the effect of scarcity to rule out any interpretation that requires enough and as good land be left. He does this through what he calls “moderate scarcity”. Moderate scarcity obtains just in case there exists enough land for some but not all to appropriate a “workable patch” - by which he means a track of land large enough to support one person. Under the traditional interpretation, nobody may appropriate a workable patch unless all can. Hence, under moderate scarcity, all must stay working on the common. I am suspicious of this move, as I suspect Waldron equivocates about what counts as scarcity. Here I analyse scarcity of land by identifying its sub-types. I then identify where I think Waldron’s mistake lies.

Let us define the following terms:

**Absolute Abundance:** There is enough land so that no commoner’s appropriation of any amount she can feasibly use could limit the amount another commoner can appropriate for his similar use.

**Absolute Scarcity:** There is not even enough land for anyone to appropriate a “workable patch” (to provide sustenance and comfort).

The justice of allocations is only problematic at all if neither of these obtain. We can limit our treatment of abundance and scarcity to the more realistic cases. So let us define:

**Moderate Abundance:** There is enough land so that no one’s appropriation of a workable patch can limit the possibility of any other commoner appropriating a workable patch.

If this does not obtain, then the actual situation must be some variety of scarcity. One option (dismissed above) is absolute scarcity, the other is Waldron’s definition of moderate scarcity.

**Moderate Scarcity:** There is only enough land for some, but not all, to appropriate a workable patch.
Waldron’s conclusion is that, under moderate scarcity, the proviso would rule out appropriation and all must remain on the common. I submit that Waldron has falsely assumed that under these conditions it is possible for them to do so. That is, he has assumed that, under conditions of moderate scarcity, land is still sufficiently abundant for the commons to sustain the commoners. But this assumption is false. Its falsehood means that the situation is one in which Locke would approve of a commoner’s attempt at appropriation for the means of preservation anyway, proviso or none, since appropriation would be necessary for self-preservation. It therefore does not follow that scarcity rules out any interpretation that requires enough and as good land be left.

To see this, the definitions of abundance and scarcity need to be nuanced further. As analysed above they address differences in how many people the land can support under private appropriation, but ignore differences in how many people the land can support if left in common. We need to expand our two definitions - moderate scarcity and moderate abundance - to four.

**Moderate Abundance:**
There is enough land such that:
1) No one’s appropriation of a workable patch can limit the possibility of any other commoner appropriating a workable patch, and
2) If all land remains common, all can sustain themselves.

**Appropriation-Specific Abundance:**
There is only enough land such that:
1) No one’s appropriation of a workable patch can limit the possibility of any other commoner appropriating a workable patch, and
2) If all land remains common, not all can sustain themselves.

This second obtains when there is less land available than under moderate abundance.¹²⁰ Note that under appropriation-specific abundance, a non-common land system would not only be morally permitted, but morally required.

**Moderate Scarcity:**
There is only enough land for some but not all to appropriate a workable patch, but if all land remains common, all can sustain themselves.

¹²⁰ I am assuming here that privately appropriated land is more productive than land left in common.
**Extreme Scarcity:** There is only enough land for some but not all to appropriate a workable patch, and if all land remains common, not all can sustain themselves.

I label this “extreme scarcity” since it is the case where some commoners must starve - hardly a “moderate” condition. This yields the following table:

| Is there enough land so that no one’s appropriation of a “workable patch” can limit the possibility of any other commoner appropriating a workable patch? |
|---|---|
| **Is there enough so that if all land remains common, all can sustain themselves?** | **Yes** | **No** |
| **Box A** | Moderate Abundance | **Box B** | Moderate Scarcity |
| **Box C** | Appropriation -Specific Abundance | **Box D** | Extreme Scarcity |

We can now identify Waldron’s mistake. His crucial claim is that since not everyone can secure a workable patch, then no one can appropriate land and at the same time fulfil the proviso. Hence all must stay working on the common. Private appropriation is impossible. Yet technically, even given Waldron’s assumptions, the conclusion does not follow. It would be possible for each to appropriate a patch that is smaller than a workable patch and to also labour on what is left of the common. For example, commoners may agree that half the available land is open to appropriation, subject to the proviso. So each can appropriate no more than the greatest universalisable share of that half, and the other half shall remain in common. So appropriation of land is not itself ruled out.

Yet my main concern is with Waldron’s assumptions about what is possible under his “moderate scarcity”. Waldron says that there is not enough land for each to appropriate a workable patch. This eliminates boxes A and C in the table. He concludes all must remain working on the common. Yet the question arises as to whether the common land is sufficiently bountiful to sustain them. That is, which of box B and D obtains? Assume land distributed equally among private owners is at least as productive as the same land operated as a common. If this holds, then the moderate scarcity of

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121 One may think that commoners could be sustained by charity. However if this is possible, appropriators must own more land than a patch workable for their own subsistence. Yet, in that case, the surplus land should have been left for others to appropriate.

122 This assumption is certainly true when commoners are not actively cultivating and is true for many (though probably not all) schemes of collective cultivation as well. Further, it was clearly Locke’s assumption.
box B is not possible! Only extreme scarcity (box D) obtains. So the scenario under which insufficient land exists for each to appropriate a workable patch arises only if there is not enough land to support those people whether under common or private ownership. For example, if there are 100 people and insufficient land for all to appropriate a patch that can support at least one person then 1/100 of the land in private cultivation cannot support one person. 100 privately cultivated patches cannot support 100 people. But then neither can the whole, if left in common, support them. The case Waldron describes is actually a case of extreme scarcity - where some must starve.

This spells trouble for Waldron, since Locke allows appropriation for one’s own preservation. The proviso is overruled when this obtains. The proviso only seeks to protect the rights of others not to be deprived of the means to subsistence by one’s appropriation of more than one needs. It does not require one to give up one’s own means to preservation to ensure others are not so deprived.

Is this case evidence against the view that Locke intends the proviso as a real proviso, as Waldron concludes? No. In order to dismiss the proviso, Waldron needs both of the following to obtain: first, that without the proviso some people (but not all) can appropriate a workable patch, and second, that with the proviso any appropriation of a workable patch is illegitimate. But in the example he chooses, the proviso has no force since it is overridden by the right to attempt to preserve oneself. The appropriation of a workable patch is morally legitimate whether or not the proviso applies. What this example shows instead is that Locke’s account of justified appropriation has, as its backdrop, more abundant conditions than those of such extreme scarcity. The sufficiency condition is a true condition, but it too operates only in these more hospitable conditions. So Waldron’s most important non-textual argument against the sufficiency condition’s being a proper limitation, fails.

The real contribution of Waldron’s work is in focussing the spotlight on the role of the right to the means of preservation in Locke. Waldron is correct when he says that the “justification of individual appropriation in Locke’s theory is connected so intimately with this general right to subsistence that it is impossible to imagine that the property rights generated by the former could ever have priority over the demands of abject need generated by the latter”.123

3.5 What Locke Protects: Appropriation or Access?

Must what is left in the commons be type-identical to what was appropriated? Is an appropriator required to leave enough and as good land, if labouring on land, or are substitutes allowed? So far we have assumed a positive answer. I now take up the possibility that a negative answer can be given. There are two immediate implications of this. First, Locke preserves for commoners a right of access to the means of preservation not a right to appropriation. If land must be left for land, then a right to appropriate land is guaranteed. Conversely, if substitutions are allowed, then leaving some

123 Waldron, The Right to Private Property, p 282
resource, product, or right that is as good as the value of the land is an acceptable option. Perhaps, for example, leaving waged employment is good enough. It is the type of power over goods (access) that Locke seeks to leave enough and as good as, rather than tokens of specific goods.

(There are reasons why one may think that losing the right to appropriate is a genuine loss. Perhaps the chance to have property in order to embody oneself and to impose one’s will on objects in a way recognisable by others is morally important. Yet these reasons are more Hegelian than Lockean and so have little force against the interpretation of the proviso we are considering.124)

Second, a negative answer here would diminish the importance of answering the question of whether or not the proviso is necessary. If a proviso is a necessary condition, but “enough and as good left” is interpreted as allowing substitutes, then unequal appropriation can proceed if sufficient goods necessary for preservation are left. If, on the other hand, Waldron is right in his denial of necessity (3.4.1) an outcome very similar to this ensues. Appropriators are not required to leave enough and as good (whether or not type equivalent) but must ensure to all people the means of preservation. This outcome convergence, from two of the most popular recent interpretations, is itself a useful result in Lockean scholarship, but its value goes beyond this. The fact that they converge on a view that renders Locke’s idea useful (as it does not deny the legitimacy of most or all appropriations as some rival interpretations do) gives hope that the recurring and evocative intuition, (viz. that labour on resources generates some right over them which does not violate the rights of others), can be made morally defensible.

Representative of the class of theorists who allow substitution is Gopal Sreenivasan. He argues that Locke attempts to respect commoners’ rights of access to the means of preservation, but not to respect any right to appropriate land.125 This could obtain if every plot of appropriated land sustains at least as many people as it was able to sustain prior to being appropriated.

In this section I first set out the negative answer through an exposition of Sreenivasan (3.5.1) and then examine how this view may work (3.5.2). I have a question over some effects of Sreenivasan’s interpretation which I explore in 3.5.3. I conclude that this interpretation is the only one that both is consistent with Locke’s intent and renders Lockean theory applicable in the modern world.

125 Sreenivasan, p 49
Sreenivasan’s Interpretation of the Lockean Proviso.

Sreenivasan’s position on the rights held prior to appropriation is a variant of the one we arrived at in chapter 2, at 2.5. This is captured in the first of the premises I use here to describe Sreenivasan’s view of Locke’s argument to solve the consent problem.  

1 The initial property rights held in common are rights to the means of preservation.
2 Specifically this is the claim right not to be excluded from the use of the common materials for subsistence.
3 This right will not be violated (in conditions where enough exists) as long as no one is prevented access to these materials.
4 3 is satisfied if either
   there is sufficient unappropriated land remaining for everyone to produce subsistence
   or
   every plot of appropriated land is sufficiently productive to sustain as many people as it was capable of sustaining prior to being appropriated and the landless people are permitted access to it (for example, by employment) to produce or earn their subsistence.
5 If this disjunction is satisfied, then consent is not needed for appropriation.

Premise 3 amounts to his interpretation of the proviso, and premise 4 describes the conditions under which it will be met. Sreenivasan uneasily agrees with Waldron that the sufficiency proviso is not a necessary condition. His unease stems from the fear that if it is not necessary, it becomes empty and one may well wonder why Locke (repeatedly) mentions it. In fact, the most transparent reason for Locke’s introducing the proviso is that he uses it to obviate universal consent. The sufficiency condition enters Locke’s argument to solve the consent problem, by safeguarding the natural right to the means of preservation: “acts of appropriation satisfying it do not take anything from the common as to injure the rights (to the means of preservation) of commoners”. Such appropriation affords them no ground for complaint.

Sreenivasan, it seems, holds that the sufficiency condition is some version of a ‘no worse off’ principle, or a ‘harm’ principle. I will formalise this as:

For completeness, I outline Sreenivasan’s view of the spoilage condition. He holds that this limitation concerns animals and the natural products of nature directly, but land only indirectly, through the spoilage of the products on improved land. This proviso is of a higher order than the sufficiency proviso. The latter is introduced as condition arising from contingencies of scarcity. The former however is part of natural law. In the age of abundance, the spoilage condition “effectively guarantees that more than enough land will be available for all” (Sreenivasan, p 35). But the introduction of imperishable money ushers in the age of scarcity, since it allows some to expand possessions through exchanging spoilable goods for money.

I have highlighted weaknesses in Waldron account in 3.4, but this suggests a further one: his proviso is so minimal a requirement that it is hard to explain why Locke uses it, and repeats it four times.  

Sreenivasan, p 111
Given that all other Lockean criteria for appropriation are met, an appropriation is legitimate if and only if the appropriator leaves to other commoners enough and as good access to the means of preservation as they had before.

One may appropriate more than equal shares of land, but leave equally valuable goods or opportunities. While I have less - or even no - land available to appropriate, I may not be harmed if, through greater production on that land, the price of needed goods decreases and I can purchase more of them or if I can work on that land for a wage. Access to - rather than ownership of - the means of preservation (crucially land) is the item preserved.

The scarcity of land necessarily arrests the possibility of ownership, but not the possibility of access. For example the landless are allowed to work on land, to glean, or are given their means of preservation via a tax system.\textsuperscript{129} So, the sufficiency proviso implies obligations to employ those without land. Payment would be not less than the means of comfort and support. Locke’s doctrine of charity to the disabled poor would apply against any surplus.\textsuperscript{130}

As regards land, scarcity need not imperil any of the rights the Lockean proviso is meant to safeguard. As regards stocks of natural resources, one way to meet the obligation to leave sufficient resources would be to leave a better technology so that your successors could make more effective use of the diminished stocks that remain.

### 3.5.2 An Operative Proviso?

Here, I defend the interpretation as having the advantage of blunting a number of standard objections to Locke’s proviso, and to the resultant applicability of his theory.\textsuperscript{131} In 3.3, I introduced a sceptical worry about Locke’s proviso pressed by Nozick in what has become known as the “zipper” argument. The proviso, this view holds, cannot be a reasonable restriction since it is not possible to appropriate land and other goods and still leave enough and as good. Yet under an interpretation that allows resource fungibility, two factors arrest this worry. First, appropriation is not a zero-sum game. Locke recognizes that land is productive and so compensation is possible. When appropriation is well under way those who miss out on land are far from disadvantaged since they live within a system whose productive power far outstrips that of common ownership. Locke comments, of the Americas, that “a king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-labourer in England”.\textsuperscript{132} (II 41) Latecomers, including both ourselves and the day labourer of Locke’s time, reap most of the benefits from enclosure. As David Schmidtz

\textsuperscript{129} I think this last, a welfare state, may be the bare minimum required. A more rigorous interpretation could require that jobs be provided, so that labouring means to preservation are fulfilled. This would be very Lockean!

\textsuperscript{130} While Sreenivasan believes LP4 is the best interpretation of Locke, he doesn’t endorse it as an adequate proviso to safeguard the rights Locke wants to safeguard. His reason is the existence of inequalities arising through appropriation that were absent before it.

\textsuperscript{131} In chapter 4 I introduce a new problem for (even) this proviso.

\textsuperscript{132} He was, of course, very wrong. However the principle this was taken to illustrate is sound.
comments "original appropriation is a cornucopia of wealth, but mainly for latecomers, rather than for the original appropriators themselves".\textsuperscript{133} Progressive land proprietorship diminishes the supply of what can be originally appropriated, but that is not the same thing as diminishing the stock of what can be owned.

Second the "tragedy of the commons"\textsuperscript{134} suggests appropriation may sometimes be \textit{required} in order to ensure others get enough. The commons is often a negative-sum game. Schmidtz uses an example of the degradation of the coral reef in Tonga.\textsuperscript{135} Fishermen take to explosive blasting to increase their short-term yield. Once a few do this, there is an incentive for others to join or they will be economically punished. The solution is to remove the resource from the commons by making it accessible to those who will utilise it in a manner consistent with its capacity to renew itself.\textsuperscript{136} So the moral obligation to leave enough for future generations can sometimes require not forbid appropriation in some form. Leaving resources in common does not always result in leaving them in pristine form. Sometimes we need to appropriate first, in order to preserve and pass on.

A view of the proviso that allows fungibility incorporates these two factors by providing adequate protection against harmful appropriation by others, without prohibiting appropriations needed to prevent harms. Original appropriation replaces, with a positive-sum game, a game that is at best zero-sum and sometimes negative sum. This makes sense of how sanguine Locke seems to have been about private appropriation being morally acceptable.

\section*{3.5.3 A Concern for the Substitution Thesis}

In this section I identify a worry about this substitution interpretation of the proviso. It paints Locke as viewing appropriations that seem wrong (such as the appropriation of all, or almost all, of a resource by a few) as justifiable. I construct a 'desert island' scenario. Imagine that:

Ten people and a copy of the \textit{Two Treatises} are stranded on a small island. Before setting to work to acquire the means of preservation the castaways spend the first day reading the \textit{Two Treatises} and interpret Locke as Sreenivasan does. The next day nine of them, to their horror, find that the other has been busy through the night tilling and planting the whole island and claims to have appropriated all the land. She says to the nine that they will all be offered employment and will be paid an amount no less than that required for their means to preservation.

\textsuperscript{133} Schmidtz, \textit{When is Original Appropriation Required?}, p 508
\textsuperscript{134} See chapter 6 for a fuller account of the Tragedy of the Commons, and Garrett Hardin’s article of that name (in Bruce Ackerman (ed), \textit{Economic Foundations of Property Law} (Boston: Little Brown, 1975)).
\textsuperscript{135} Schmidtz, \textit{When is Original Appropriation Required?}, p 512
\textsuperscript{136} As we saw in chapter 2, removal from the commons does not necessitate \textit{private} property. A collective system with effective regulation will do. Further, the point of removal, namely, to ensure the resource be utilised in a manner consistent with its capacity to renew itself suggests preservationist obligations on owners rather than full liberal rights. However, here I am interested in the impact of private appropriation on the possibility of leaving enough and as good, not in whether it is the best method of doing so.
Is there anything morally wrong with her appropriation? As currently interpreted, the sufficiency condition is met by this appropriation and the landless cannot complain. Yet it seems that something is amiss here: something has been lost by the other commoners. For a start, the choice they previously had over whether or not they would appropriate land has been taken from them. Sreenivasan must think one of the following is true: that Locke would think this a moral problem but did not see it; that Locke thought this would be a moral problem, but that it would not occur; or that Locke considers this situation to be unobjectionable.

Correspondingly, the interpretation could be defended in one of three ways. First, Locke underestimates the number of inhabitants the land would one day bear, so it may have slipped beneath his moral radar. Locke may be saddled with the problem, not because of a failure in the interpretation, but because a failure in his foresight made its way into his theory. But the more interesting defences arise if we assume he recognised the possibility of fully enclosed land.

The second possibility is that Locke thinks this would be a moral problem, but that it would never eventuate. It is clear from his comments on land in the Americas that he envisioned the process as taking hundreds of years. Does the timing make a difference? Whatever portion of the ethical qualm is due to the element of surprise, stolen opportunity and sudden change in options is mitigated by the fact that no one “wakes up” to find her moral situation transformed. Each had plenty of warning and either chose not to appropriate or failed to avail themselves of the genuine opportunity to do so. Neither generates a direct moral objection against those who appropriated.

Third, perhaps Locke thinks the situation would be morally unobjectionable (as Schmidtz does). If those who lose the chance to appropriate lose nothing so long as they retain access, then it should not matter morally. Yet intuitively, this does matter. I suspect commoners lose more than the chance to own property (which they are then compensated for). This highlights a question about the nature of the consent that Locke seems to circumvent and this I explore in the next chapter.

3.6 Conclusion

Locke is right to believe that something must be said by way of justification if original appropriation is to be accepted, for such appropriation brings under exclusive control of a subset, that which previously had been openly accessible by all. This need tightens under scarcity. Locke is on track in specifying the nature of such justification. One may not appropriate in just any fashion but must consider the fairness of the effect on others: What is one leaving for them? Is this a fair amount? Will it leave them able to meet their preservation needs? The exact nature of the proviso this generates is an important factor in generating contours and limits to the rights Lockean property will support.
If Locke’s sufficiency proviso requires leaving enough and as good, and requires what is left to be left in-kind, then his proviso is not consistent with any system of property remotely similar to modern forms. This is why Thomson, Sartorius, Sanders, Nozick, and Wolf all think that a proviso of this sort must be rejected. Tully accepts it but strips Locke’s arguments of the power to legitimate unequal shares of private property, saddling Locke with fatal contradictions that are surely too obvious to have escaped him. MacPherson tries to rescue the proviso by finding evidence that Locke jettisons it after introduction of a currency-based economy. But his interpretation is either a misreading or unnecessary. For Waldron, the proviso is more a description of an effect than a restriction.

I outlined and supported an alternative: preserving a right of access for all, rather than a right of appropriation and ownership. This yields a more plausible type of proviso, as posited by Sreenivasan. In fact, latter day Lockeans, such as Nozick and Wolf, have developed their own provisos along the contours set out by this view of Locke. Resource substitution allows all these provisos to be met. This highlights Locke’s insistence on the priority of rights to access the means of preservation. This is the central limiting principle in Locke’s account of property.  

Near the beginning of this chapter, I asked two questions: Are there any rights commoners lack under a private property regime that they held when land was common? And indeed, is the proviso successful in circumventing the need for consent? In the next chapter I argue that even Sreenivasan’s view of Locke’s proviso shares a common flaw with the other interpretations considered. Namely, it fails to account for some inequalities introduced, interests ignored, and freedoms taken. In particular, commoners enjoyed participatory rights over their significant interests, which they no longer have after it has proceeded. This will form part of the basis for arguing that property rights affecting environmentally significant resources are less strong than full liberal rights.

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137 I identify at least four sources of this limitation: that Locke thought appropriation must occur, lest all starve; his concern to show, contra Filmer, that land was held in common for the use of all; the repeated attempts to apply a sufficiency condition; the fact that private rights stem from labour, the first goal of which is preservation.
Chapter Four

Locke Reconstructed

4.1 Introduction

In this chapter I take leave of interpretive concerns and shift to an evaluation of Lockean property and its use in the modern context. An original acquisition theory of property rights is Lockean if it both divorces the legitimacy of appropriation from the requirement of others’ consent and posits that we are entitled to a property in the products of our labour on unowned resources. I aim to use the defensible aspects of Lockean property in a wider theory. This requires that two tasks be completed.

The first is to work out what species of property rights the defensible aspects point to. I begin by enquiring as to the nature of Lockean property when we trace through its implications. I show what rights are granted and how their justification serves to circumscribe them. Further, I develop reasons for thinking that Locke ignored the loss of certain rights and interests that are of such importance that the omission will require revision of his solution to the consent problem.

As we will see, I believe Lockean property yields results that require us to abandon the attempt to base a stand-alone theory of property upon original acquisition. So, the second task involves showing how the central and sound intuitions Locke appealed to can be used to construct a theory of property (especially here, in environmental resources, but the implications will be wider).

The important difference between Locke and the view I want to construct lies in the justification most fundamentally appealed to in a theory of property. Locke himself was enamoured by the doctrine that there are natural rights of ownership and that one must start from a conception of individuals as self-owning. Property rights are either natural or created by contract between individuals who are essentially proprietors.

Yet this is not the only possible starting point for a theory that appeals to interests based on labour. A theory of property can harness Locke’s intuitions differently by rejecting the claim that property rights are natural rights and instead see ownership as an artefact dependent on the sum of (possibly competing) considerations. In this we accept that individuals have rights that are in some sense natural or at least non artificial and non–legal, but deny that property rights are of this kind. We then identify those considerations. The interests and rights appealed to in typical original acquisition theories, such as those based on need, liberty, the interests in products of our making, and desert,

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take their place as components. Finally, I lay the groundwork for a theory that accommodates the strength of each constituent vector.

In view of these tasks, this chapter divides into three main parts. First, I collate the results of the previous two chapters, highlighting both the features that suggest the appropriate role that a labour argument should play and features that point to the limits to property rights inherent in a Lockean view, so that a labour argument can be useful as an ingredient in shaping the property rights and duties that will emerge in a wider theory. This I do in sections 4.2 (on considerations pertaining to the labour argument) and 4.3 (on considerations pertaining to the proviso).

Second, I suggest other problems with original appropriation theory that Locke did not adequately address. I suggest there are rights that commoners lack under a private property regime that they held when land was common. I argue that interpretations of Locke’s proviso share a common flaw, namely, they fail to account for some inequalities introduced, interests ignored, and freedoms taken. I argue that commoners enjoyed participatory rights over their significant interests that they no longer hold. I will argue that appropriation leaves attenuated liberty and control. This will form section 4.4.

The third part (4.5 and 4.6) reconstructs Lockean theory by employing its central intuitions (of the generative importance of labour and of the need for a fairness condition) in a labour argument for property, drawing on desert. Throughout this chapter, I highlight problems, possible solutions, and other features of original appropriation arguments that point the way to a coherent theory of property in environmental goods.

4.2 Limits to Lockean Property from the Labour Argument

In the previous two chapters we found problems concerning the following: self-ownership, mixing labour, the indeterminacy of property type, the limits inherent in Lockean property, and the extent of entitlement. I will address these in turn, suggesting how they will become useful to my own account.

4.2.1 Self-Ownership and Mixing Labour

Three results from chapter 2 point us away from a strict self-ownership argument and from any hope that full liberal rights will emerge from it. We found that, as a strict self-ownership argument it fails. It can only be rescued by including important boundaries around property rights, leaving little case for libertarian-style rights. To construe the relationship to ourselves as a property right in any sense similar to full liberal rights yields odd results. Given that it excludes liability of execution, waivability of exclusion, and transfer, the form of property that would emerge from this lacks useful incidents we value in property over external objects and is certainly inconsistent with any form of capitalist
economy. I found that there is no real advantage in employing the language of proprietorship over simply articulating individuals’ rights, liberties, and immunities.

Other findings from chapter 2 also cast doubt on labour mixing as the mechanism for grounding ownership of the world. It was, for example, seen to be of doubtful force, through Nozick’s ‘tomato juice’ argument.

Rather than abandoning the powerful intuition that products of labour should largely vest in the labourer, can we make more fruitful use of it? A more promising approach is to appeal to the rights and liberties that define one’s moral space and to the interests in the products generated by the expression (through labour) of those rights and liberties. In section 4.5, I argue that labour instead grounds a desert claim to property and this claim is supported by the utility of fulfilling labour-based expectations and generating incentives to productivity.

### 4.2.2 Rights Forms Consistent with Locke’s Theory

When we enquire as to the rights-type Lockean arguments justify, we find two further problems. The first is that Locke has not shown that private rights – as opposed to say, collective cultivation - are necessary. Every driver toward cultivation – the threat of starvation, the human desire to productively labour, even the interest in partaking in the product of your labour – is consistent with collective cultivation and collective ownership. If a Lockean is to establish private ownership as a unique solution to the paradox of plenty, she must do so on other grounds. She could find empirical evidence to show private cultivation is clearly the most productive form, yet in that case the rights regime is established on the basis of utility, rather than by appeal to the implications of a natural right.

Even if we grant that the private rights regime follows from Lockean premises, a second problem remains. This is an ambiguity as to the kind of private institutions that are implied. The specific incidents justified by an original appropriation argument offering labour, even fully self-owned labour, as the criterion for gaining title to land are not sufficiently determinate to force the conclusion that full liberal rights are justified over competing forms of property.

Private usufruct is one form that is compatible with Lockean arguments. Private usufruct gives rights to use and manage the land as well as rights to income and against trespass. What is withheld is the right to alienate. When the land is no longer used it reverts to the common. Ownership on a deeper level is vested with the society.\(^{139}\) Another form, sketched here and developed later in the thesis, we might call “private stewardship”. In this form, rights of use, management, income, exclusion and transfer, inhere in the private owner. Some of these incidents are attenuated from the

\(^{139}\) See Grunebaum, pp 57-8 for a fuller discussion of this type.
form they would have under full liberal ownership to conform with democratic decisions over use patterns and protection of local ecological values. This includes some restrictions and obligations deriving from environmental sustainability and, as the name implies, it introduces an ingredient of stewardship.

Further details of these forms would need to be given, but the important point is this: in both these cases, individuals own their labour and those who mix their labour with unowned resources come to control the land. Clearly, at least these forms of ownership are consistent with Locke’s argument. They bestow sufficient control to be consistent with the aims of the argument. It is not at all obvious that, for example, labour ownership should create rights that exist after one’s land use ceases, pointing us only to forms of ownership that contain transmissibility, eliminating private usufruct. Full liberal rights are not required for preservation of the rights and liberties that motivate the argument. Locke, probably, did not apprehend this result, but his prowess in drawing implications is not the issue here. What is relevant is that private ownership of labour does not uniquely imply strong private ownership of land and external goods.

4.2.3 Lockean Property Yields Only Limited Rights

What are the specific rights that Locke’s property account entitles one to and what conditions are imposed? If we take Honore’s list of full liberal incidents as an index against which to assess Locke’s property, we find the specific rights Locke argues for are few, with severe conditions. His explicit comments are confined to the stipulation that property is that which cannot be taken without consent and the permission to use “to any advantage of life” (II 31). But what is included in “use” and what of alienability, exchange, bequest, and inheritance? It is not necessary to make the strong claim that “use” cannot stretch to cover all these incidents, but a gulf exists, requiring an argument, between a use right and full liberal ownership. There are many constellations of rights that the notion of use can undergird. Locke’s near complete silence about the specific rights owners hold renders property indeterminate and leaves much work to civil government.

This much we can glean from Locke’s discussion and from tracing through the implications, whether or not Locke himself saw them: it is clear that rights to possession, use, management, income, security, and to the residuary character of property, all inhere in a Lockean owner. There are however, some limitations disqualifying Lockean property from the designation “full liberal”. Underlying many of these is a central principle in Locke: the right to the means of preservation of life:

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140 See chapter 1 (section 1.3.4) for the ‘standard incidents’ of Honore’s full liberal property or, from the horses mouth, see Honore, pp 179-84

141 For examples, see II 138, II 193, and obliquely in II 27

142 Locke seems to assume the correctness of the inheritance of certain powers in the First Treatise (I 73), yet he never discusses inheritance of property in the Second Treatise.
God... has given no one... such a property... but that he has given his needy brother a right to the surplusage of his goods... As justice gives every man a title to the product of his honest industry... so charity gives every man a title to so much out of another’s plenty, as will keep him from extreme want, where he has no means to subsist otherwise. I 42

This is the basis of Locke's two well-known conditions: the sufficiency condition that I will discuss in section 4.4 and the spoliation condition. The latter amounts to a due use condition. If a farmer's goods “perished, in his possession, without their due use; if the fruits rotted, or the venison putrified, before he could spend it, ... he invaded his neighbours share”(II 24). This, in a monetary economy, would be rarely invoked but it remains as a background feature.

When we turn to the specific incidents that make up the various modes of transfer, we run into a problem. Locke’s theory is a theory of property acquisition by labour. The prospective owner, the transferee, neither mixes nor exerts labour in the production process and, prima facie, this seems to rule out transfers. This is a weakness in any theory that places almost exclusive emphasis on one mode of property acquisition. What are we to make of the modes of transfer and can any of them be included in Lockean property?

In order for property to be transmissible, the owner must have a right to transfer, and the receiver must have a liberty to receive. The first plausibly obtains if transmission is an instance of use.143 The second holds if either we can find an argument to the effect that everyone has a presumptive liberty to receive already owned property, or the individual that receives the property can be said to have laboured on it, or the transfer is the necessary fulfilment of a prior Lockean duty, overriding the labour requirement. Without an argument to the truth of the ‘either’ disjunct, we are left with the two ‘or’ disjuncts. In view of this the following three incidents of transmissibility may survive the labour problem:

Duty of Charity. The duty of charity translates as the right of the disabled poor to the means of subsistence from the surplus of those who manage to produce one. This functions as a limitation on the extent of property and, so is a redistributive duty. While Locke calls this charity, this is a misnomer. As a duty corresponding to a right inhering in the poor, it is properly a requirement of justice.

Exchange. Locke thought that contract was a legitimate means of gaining property in an object, without labouring upon it. But, given his insistence on the labour theory, is he justified in this? It is possible to regard the labour expended in the product, which the second person is exchanging for the property of the first, as equivalent to the first’s labour. A bedfellow of this view is Marx’s idea that

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143 Sreenivasan, p 107-8
capital is the fruit of past labour. Exchange, it seems, must be among the justified incidents of Lockean property.

**Maintenance and Limited Inheritance.** Children, while still minors, have a right to maintenance as they are unable to support themselves. Consequently, the right of maintenance founds the right of inheritance, but only to the level necessary to fulfil the duty of maintenance. The latter is the post-humus fulfilment of the former. These are not subject to the labour problem; they are direct duties stemming from a separate principle.

On the other hand, it is hard to see how transfer can be defended, in Lockean terms, for the following cases and so Lockean property yields only limited rights:

**Non-Maintenance Inheritance.** There is no reason generated in Locke’s argument for inheritance over and above the level necessary for maintenance of any minor children. The fact that no labour has been expended by the recipients suggests inheritance will be limited to just what is required for the support of children. Any surplus should revert to the common.

**Gifts and Bequests.** For these, there is no sense of labour expenditure. Rolf Sartorius argues that gifts are justified by Lockean property as I violate no rights if I give away an item, even if I drive down the price for those who are selling it. Yet Sartorious, in focusing on the right of the holder to transfer, misses the requirement that the receiver hold the liberty to receive. While Locke clearly thought the incidents of gifts, bequests, and inheritance were justified, it is hard to see, from a theory so focussed on labour, how they can be.

### 4.2.4 The Extent of Entitlement

Locke supports the labour argument with the claim that labour supplies the overwhelmingly greater part of the value of the product. I argued (in section 2.6.6) that this argument is flawed due to a mistaken methodology in the calculation of relative contribution.

Now, this failure of the labour theory of value (that labour creates all or almost all value) need not sink a labour theory of *entitlement* (that labourers have the right to the products they labour on). Yet the extent of entitlement a labour theory will ground is severely threatened. While I may own land and may improve it by my self-owned labour, I did not create it, and so my title to it cannot be grounded solely in my exercise of that which I own. Everything now owned has some element of...

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144 Marx sees capital as accumulated labour. But see Waldron, *The Right to Private Property*, pp 261-2 for difficulties, though I do not consider them serious.

145 Though Locke himself seems to assume all of a father’s property is heritable.

146 Sartorius, p 208
nature in its value chain.\textsuperscript{147} Entitlement, as John Stuart Mill has it, “cannot apply to what is not the produce of labour, the raw material of the earth”.\textsuperscript{148} Not enough has been made of Locke’s failure here.\textsuperscript{149} The fact that the labour value is less than the total means that the labour theory of entitlement plays only a partial role in fulfilling the justifying aim of property and answering questions about its distribution.

Yet the intuition that labour gives us a reason for ascribing rights over products is a persistent one. In order to make sense of initial acquisition of unowned resources, one must move away from the letter of Locke’s account. Labour can be used in an alternative way, drawing on the intuitions Locke appeals to, without saddling us with the limitations of his manner of appealing to it. Rather than retry the failed attempt to establish full and exclusive rights over the object, we can observe that both the strong interests of the labourer and the interest of others (stemming from additional principles of justice) must be given due weight.

Hints at how this may be done will be developed further in the context of concerns I raise in section 4.4, but here we can note two characteristics that will help us determine the strengths of the relevant interests. First, is the range of labour content in produce. At most, labour generates, for the labourer, a share proportionate to the amount of labour invested in the product. The second characteristic is the mode of embodiment of partial rights. How is the less-than-full nature of these rights to be embodied? We need a property rights regime that honours the right of the labourer and the rights of others in that product. We could decide to locate standard incidents of property mostly in the labourer and partly in others. In practice, to attempt this directly would be near impossible. Decisions about use cannot be easily divided up between the labourer and the others. Any hopes Locke held of thinking he has founded property without the need for consent would come to nothing. This could perhaps be rescued by an indirect approach: rather than expressing others’ views in every decision, we could express them as limits on the type of use and overall use patterns, reflecting the community’s interest. Outlawing use that results in environmental harm is a good example.

Alternatively, some standard incidents could be located in the labourer and some in others. For example, the labourer could be granted rights of use, possession, transfer and some rights to capital, but others receive some of the rights to a share in the capital. This could occur through a tax on income, transfers, gifts, and inheritance. This prevents the inefficiency of commoners sharing use rights of another’s product. It will be more efficient to employ a tax, especially on natural

\textsuperscript{147} See Will Kymlicka, \textit{Contemporary Political Philosophy} (Oxford: Oxford University Press, 1990), pp 107-24 for extended discussion of this point.
resource use, to capture the non-labour component and limits to what the rights entail (especially limits to uses which threaten the others’ partial rights). The interests and rights of the commoners are partly concerned with benefiting from the use of the product, but also pertain to being neither excluded nor harmed.

4.2.5 Conclusion
A key conclusion to section 4.2 is that labour-generated property rights are likely to be attenuated, especially those with a high resource component. Further, we found that Locke’s case itself yields more limits than he admits. The assumption that the rights-form must be full liberal is not only unjustified as a first assumption, but is inconsistent with the approach - surely a more compelling one - that I hinted at: to be guided in our choice of property rights type by the justifying factors present in each case, while paying attention to the type of property object.

We also saw the need to abandon using labour in the way Locke did and I suggested we could instead appeal to the rights and liberties that define one’s moral space, and then to the interests in the products generated by the expression (through labour) of those rights and liberties. Therefore, the labourer can stake only a strong *prima facie* claim for according his interest special status among competing interests, which must be given consideration and respect in the design of property regimes. This seems incompatible with full liberal private ownership and, in fact, with any system that does not allow space for communal decision making over patterns of use.

4.3 Evaluating the Proviso: Some Inequalities
The main task of this section and the one following it is to ask whether the proviso succeeds in preserving the rights and liberties held prior to the commencement of first appropriation and any other rights and liberties these entail. I pursue this initially by considering inequalities produced, post-appropriation. In section 4.4 I go on to ask whether there remain inequalities that Locke’s description of the state of nature rights and liberties conceals. I advance one claim in particular. After identifying the inequalities, I trace their implications.

4.3.1 Implications from Locke’s Proviso
The issues of concern in chapter 3 included those issues *internal* to the formulation of the proviso (such as, whether leaving enough and as good is a necessary condition) and others that are *external* to the formulation of the proviso (such as, what rights commoners enjoyed before private property). Locke is right to believe that something must be said by way of justification if original appropriation is to be accepted, for such appropriation brings under exclusive control what previously had been openly accessible. Appropriations should not be unfair to others. The exact
nature of the proviso this generates is an important factor in giving contours and limits to the rights Lockean property will support.

We found that the traditional proviso, in that it preserved the right to appropriate up to the greatest universalisable share, is not consistent with any system of property remotely similar to modern forms or even with the seventeenth-century land enclosures Locke wanted to endorse.\textsuperscript{150}

Waldron sees a right over subsistence resources as the trumping right that Locke seeks to preserve in all cases. This is the central limiting principle in Locke’s account of property. In this, Waldron concurs with the view of the proviso defended by Sreenivasan. Locke aims to preserve a right of access for all, rather than preserving a right of appropriation and ownership. So long as each person is guaranteed access to these means, appropriation may proceed. For Locke, property rights must never stand in the way of subsistence since the \textit{raison d’être} of property rights is subsistence. This may imply an obligation to employ those without land, offering wages not less than necessary for the means of subsistence.

Of note is the power of the right to the means of preservation. It entails that some use restrictions must attach to property and gives a right that overall patterns of use do not threaten it. It disqualifies the views of some libertarians from being true Lockean views, however much they protest the opposite. These claim that any limitations on property rights arise in opposition to property. Conversely, important limitations actually spring from the very justification of property itself.\textsuperscript{151} Of further note is that goods for which no substitutes are possible must be left intact. A reasonable standard of clean air and water, for example, cannot be substituted for.

\textbf{4.3.2 Inequalities Left by the Proviso}

Does the proviso succeed in preserving rights and interests each commoner had prior to the commencement of first appropriation? I turn now to explore reasons for thinking that it fails to solve the consent problem. This task will be discharged if we can show important ways in which individuals are worse off under private ownership than no-ownership.

I note first that without such a proviso, appropriation would violate the equality and non-subordination of commoners that existed prior to acquisition. James Grunebaum thinks that to preserve equality and non-subordination it would need to be the case that no landless class exist. But this is not necessary. The type of equality and non-subordination Locke sought is preserved if each person has guaranteed access to the means of preservation, even if they lack rights of ownership. It is true that some forms of private property could result in some commoners facing a

\textsuperscript{150} There is some debate as to Locke’s motives. See Richard Ashcraft, \textit{Revolutionary Politics & Locke’s Two Treatises of Government} (Princeton: Princeton University Press, 1986), chapters 1-2

\textsuperscript{151} Elegido, p 411
situation where all non-subordinate options are removed from them. But property regimes that are sensitive to others’ needs and to preventing subordination are valid alternatives to this.

In this section, I discuss and reject two inequalities that have received recent attention by some who claim they are morally significant. Will Kymlicka, Gerald Cohen, and Sreenivasan identify problems that amount to those that I discuss.152

The first supposed problem is that formerly, commoners had a liberty to make a surplus from the common and a claim right to keep it. Now, their share is set by the minimum measure of subsistence. The second issue is a claimed inequality. Under common ownership, liberty of access is equal. But with appropriation and scarcity the access of landless commoners is less than that of landowners.

I do not consider that either of these represents a moral problem, at least in the form given. While commoners were blessed with a liberty to make a surplus from the common, the loss of this is unproblematic, since it is offset by a new liberty: the liberty to bargain with their employer for a greater share. Their share is not automatically limited to the minimum and if the new liberty is equal to or greater than their prior one, the inequality highlighted is not objectionable.

In the case of the second claim, while access has become unequal, it has not reduced. If access is not diminished, how, apart from under a monistic egalitarian principle, does this automatically constitute harm? The moral intuitions behind Rawls' difference principle also underlie this situation and if those are valid, harm has not necessarily entered the picture. Locke is not required to preserve equality of access to goods. Indeed, his argument deliberately takes up the task of showing how unequal possessions are justified. This would be a strange goal for one who thought he was defending equality of access. “Access to means of preservation and comfort from the common” and “equal access to the common” are not equivalent. The latter may happily depart without carrying the former with it.

4.4 How Really to Solve the Consent Problem

Section 4.3 raised the question of whether there are any rights commoners possess when land was common that they lack under a private property regime. Here, I develop claims concerning what Locke has missed in the transition from common ownership and, in effect, challenge his conception of the state of nature. This will give further reasons for limits on rights in ownership. The basis of these further reasons, I argue, is not the means of preservation and Locke’s insistence on the

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Christian duty of charity, but is the degree to which original community affords important interests that are not accounted for by the advent of new (private) property rules.

In chapter 2, I suggested that original acquisition theories proceed in four stages. The first - the one relevant here - was to describe the rights and liberties held by inhabitants of a pre-political, pre-acquisition scenario and to give an account of any material or social conditions (such as the threat of the tragedy of the commons) that may motivate the move away from this state of nature. I also argued that Locke’s view of the rights and liberties in the state of nature is best captured by the following:

Each commoner has equal moral worth and none is subordinate to any other. No one has private property but each has claim rights over resources needed for the means of their own subsistence (provided there is sufficient for this), coupled with a duty to make any surplus resources available to others whose survival is threatened. Each has a right not to be excluded from the use of common materials.

I will now revisit this and suggest that commoners have additional interests that have been ignored both by Locke himself and by subsequent first appropriation scholarship. I want to argue that, apart from the right to subsistence from the land, prior to first appropriation commoners enjoy participatory rights over their significant interests, which they no longer have after it has proceeded. I will argue appropriation, as discussed by these theorists, fails to take account of some inequalities introduced, interests ignored, and freedoms removed. While Locke may have solved the consent problem on one level, it remains unsolved on another. To solve it on both levels, we must represent those neglected interests in the design of a property regime.

4.4.1 Back to the State of Nature

Locke sees the resources of the earth as a common pool to be drawn on for mutual advantage. “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience.” (II 26) Thus he recognised the material need for sustenance from the earth. This need can be fulfilled under land privatisation, when constrained by the proviso. Those who lose the chance to appropriate are compensated materially for the loss of land, by jobs and income. To the extent that the problems noted in 4.3 can be solved, Locke has circumvented the need for consent.

Yet this justified exclusion from land possession holds only as far as the sustenance/productive aspects of the land are concerned. It is justifiable, on grounds of enabling one to plant privately and in security, to exclude the interests others have in tilling the land, physically possessing it, and in gaining income from one’s labour on those goods. Locke’s solution to the consent problem would hold only if the interest in secure sustenance is the only interest vested in the land. I claim that commoners had other interests in land that deserve consideration and respect, which Locke’s
arguments do not overthrow. This threatens to reintroduce a version of the consent problem. Commoners lose more than the chance to own property.

This highlights the nature of the consent that Locke seeks to circumvent. It focuses us on the question - which remains unasked in the Locke literature - of consent to what, exactly? The proviso circumvents consent for the appropriator to exclusively develop a plot of land. It picks up the fact that others continue to have options to meet their material needs. Yet has the appropriator obviated the need for consent to nullify all interests commoners had over the land he now encloses? The fact (if it is a fact) that commoners lose nothing by being excluded from a labourer’s product and from the ability to use his land for their own production, does not entail they lose nothing by being excluded from all interests they held in the land.

To understand what they do or do not lose, we need a more nuanced account of what they initially held. This requires us to enquire as to the form of property holdings when the land was held in common. It is clear that no commoner had either claim rights to particular plots or to any other item on the common. Yet, in this original community of liberty and equality, the land was owned collectively and so all had a right not to be excluded from it (II 4). Commentators have focussed on the main interest this property-in-the-common functions to protect: the right to the means of preservation. However, I argue that they err in reducing the interests and rights of commoners in the land merely to this right. I claim that “common ownership” in the state of nature, when properly understood, extends beyond this to protection of the following wider interests commoners had, which are deserving of consideration and respect. I will herein refer to these as “residual interests”, because they are residual both in the sense that they remain after the standard Lockean proviso is accounted for and in the sense that they reside in the land as it passes into private hands. The list of residual interests I enumerate here is not exhaustive. The interests I focus upon are those pertinent to the crafting of rights over environmental property.

First, as each person had autonomy, each must respect all others’ equal right to decide for themselves what is in their own good and how to pursue it. In Locke’s work, the requirements, that we do not harm each other and that we do not meddle in what is properly the sphere of others, amount to a right to autonomy. If one is working from the self-ownership paradigm as Locke was, this gives a form of ownership close to private ownership over one’s self and one’s labour. But over land, since it is commonly owned, the situation is quite different. Here, to the extent that decisions of others threaten one’s autonomy, through certain important externalities, autonomy gives an important interest in participation in decisions on overall use.  

153 Contra Tully, p 61 and pp 127-8
154 For the type of externalities that are important in this regard see chapters 5.6 and 6.4.
Second, each had a choice about whether or not to work the land. This entails that each had a say in whether some would be left unappropriated by others, so that they could exercise that choice. This in turn gives a say in overall use patterns, since without this, that choice could be unilaterally removed. Third, each had an interest in the environmental services of the land (which themselves are not internalised to any particular patch of land). Over a scarce wetland, for example, each has interests in its recycling and other services. These include strong interests that its capacity for this service not be destroyed. When such destruction poses a serious threat to the viability to the local ecosystem, the interest is very strong. Lastly, each had a liberty to access regional sites of scenic and spiritual value. In the case of a scenic highlight, many will have interests in its beauty, symbolism, and the spiritual experiences it may invoke. ¹⁵⁵ (This interest is more subjective and morally less significant than the preceding three. It is a less basic good than the others, yet it is still one accessible by commoners and highly valued by many.)

In the forgoing, I appeal not to the right to preservation but to elements of the nature of land and the scope of commoners’ interests in it, both of which, it seems, Locke misapprehended. Locke’s explicit description of interests and rights held in the state of nature omits some interests and possibly, rights, which are implicit in his general vision.

We must be careful not to accept an inflationary rights discourse; to automatically promote every feature of commoners’ lives to the status of a right in order to press the claim that they lose rights during appropriation. I do not claim here that any of the above four residual interests have the status of rights on a par with the right to preservation. It is important to note that none of these interests manifest as claim rights over particular objects or sites. By implication, we cannot say these interests prevent others appropriating – but they are respect-deserving interests which have not been gathered up alongside the interests Locke thinks he has included, in his argument for why consent is not needed. They are, instead, each person’s interest in what happens to, and the effects of, resources that become another’s property. None function in a way that must prevent property appropriation, but are consistent with it provided we see appropriation as granting some rights, but not others.

Some residual interests concern important features of moral life, such as having input into decisions that could adversely affect your life or health. Via an interest theory of rights, the stronger of these interests could sum to environmental rights. Other residual interests involve lesser features of pre-appropriation life that have been removed. These require respect, but will not have the action-constraining strength of the ones above. Residual interests, taken together, are strong enough to limit the strength of property rights an owner will be justifiably granted. Rights that fail to be

¹⁵⁵ Arguably, a similar interest was captured in medieval property law by the “right of innocent use” allowing one access to others’ property for transit and picnicking, so long as one caused no harm or serious inconvenience to the owners.
generated are those in conflict with the interests I identified, the removal of which has neither been given consent nor shown not to require it.

To summarise, according to Locke, any claim commoners can stake (for example, the needs-based claim to the right to preservation) can be met if you can appropriate without prejudice to others with respect to their ability to preserve their lives. This justifies exclusion of all others from the patch of land one appropriates. Primarily, this concerns exclusion from physical possession. Yet the exclusion cannot extend to marginalisation of the other interests commoners have in that resource, stemming from those features of goods that are irreducibly common or in which all have an interest. A theory of justified initial enclosure will need to recognise the irreducibly public aspect of land and natural resources. This result is strengthened if we juxtapose it with the result from section 4.2.4 where the fact that not all the value of the product of enclosed land was from labour required us to limit the entitlement of the owner.

It is possible that Locke himself noticed this. Why, if ‘support and comfort of their being’ (II 25) were the only interest protected, would Locke refer to commoners’ rights as common ownership rights? Ownership carries wider connotations than the limited form of the property incident “right to a living income from”, which is what this narrow interest reduces to. Yet, even if we are charitable to Locke in ascribing this thought to him, in showing others are not left to starve, Locke soon forgets that these resources have a wider character; that drawing on them for mutual advantage cannot be captured by mere material sustenance. These wider interests in the land stem from interests held in features of natural resources other than their productive uses.

One reason Locke misses this is the weight he places on labour. He says “Nor is it so strange … that the property of labour should be able to overbalance the community of land: for it is labour indeed that puts the difference of value on every thing” (II 40). If all interests other than the labourer’s are really so small (as they would seem to one focussing narrowly on interests in food and treating land and labour merely as food producers), ignoring them may be justified. But if land has value and characteristics that Locke missed and if commoners have interests in it beyond the material aspects that labour ‘puts the difference of value on’, then the argument cannot proceed so quickly. The property of labour cannot so easily overbalance the community of land.

4.4.2 Implications for the Design of Property Regimes

The interests generated through labour may justify the vesting of property rights in that labourer, overriding certain interests others have, if appropriate fairness criteria are observed. This we learn straightforwardly from Locke. The interest from labour, however, may not always override the interests of those others. Further, the interest in labour could conceivably be met without removing

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156 I use “claim” here in the sense of staking a claim, the strength of which must subsequently be assessed. I do not mean claim in the sense of a right. When I intend the latter I use “claim right”.
all the rights of others. For example, some cluster of rights for one person over an object could be compatible with vesting other rights for others, in the same object.

I have argued that prior to first appropriation commoners enjoyed opportunities and guarantees, with respect to their significant interests, which they no longer have after it has proceeded. The consent problem remains unsolved on another level. Aspects of land are part of the commons even if the land passes into private hands. A just conception of property will allow the residual interests of commoners to have force in generating and limiting property rights.

The appropriator’s interest in autonomy can be represented in the crafting of property rights and duties in the following way by a property regime: the appropriator acquires a substantial interest in the object she has worked on, justified by the interest in labour and productive incentives. Her interest is in producing without undue interference and in having by far the largest share in the income from the produce, guaranteed to her. These can be fulfilled by granting rights of use, possession, exclusion from trespass and theft, transfer, and a large share in the income.

The commoners’ residual interests can be represented by, firstly, a democratically expressed voice on legal limits to property use, reflecting the community’s interest. This would translate their state of nature interests in aspects of their environment into the post-appropriation, civil society equivalent - a democratic voice in overall use patterns. In practice, this could proceed through prohibitions on certain uses in specific geographical areas or taxes on income from some uses. Secondly, by limiting property rights to prohibit use patterns that threaten the viability of environmental services in an area; for example, through externalities degrading these environmental services. This effectively gives those in an appropriate locality, collective rights to certain values: environmental rights. I spell this out further in chapters 7 and 8.

The upshot is a conception of property more limited than full liberal rights, yet I argue it is still a form of private property. ‘Property’ is best represented by a continuum along which the strengths of rights shade into each other. The American Law Institute, for example, differentiates “complete property” from lesser configurations. Further, the standard incidents of property are capable of distribution to a potentially vast range of persons. At that level, the concept "ownership" dissolves into differently constituted aggregations or bundles of exercisable powers. The designation "owner" functions to indicate where the predominant strengths of interests lie. I can have ‘property’ in assets owned by others.

This form of property is not without precedent. I refer here not to non-Western concepts of property, though precedents abound there, but to forms of property within the Western tradition. There is a clutch of non-environmental examples in law that show synergistic movement toward the kind of

157 American Law Institute, Restatement of the Law of Property (St Paul: A.L.I, 1936) vol 1, p11 (s.5, comment e)
property I envision. The first is ‘quasi-public places’, for example, railway stations and shopping centres that, while privately owned, exist specifically to be public and are characterised by rights of access. The second is the 'new property', in welfare, franchises, licences, and subsidies advocated by Charles Reich.\footnote{158} Since people need to be protected from arbitrary deprivation of these in the same way as they do of property, these have grown to be like, but were not recognised as, property. Reich argued they should be so recognised. Third, is the property form known as ‘private usufruct’ that we have encountered already. Finally, native title rights of access granted by Western courts.\footnote{159} This includes an access dimension.

In all these cases, private and public interests influence the shape of property rights. My idea shares some of these features. It will recognise an ‘equitable property’ for individuals in the quality and conservation of the natural world that will limit the use rights of owners in certain cases as well as (re-)introduce responsibilities alongside the traditional emphasis on rights.

\subsection{Conclusions}

To conclude this section, I have argued that if a proviso recognises the full range of interests people have, it will generate even more restricted rights over natural resources than would emerge from a proviso designed only to ensure the means of preservation. This is grounded on a more extensive account of what is lost from a richer understanding of common rights (and hence, from a more complete account of what interests, rights, and access commoners held, pre-appropriation). This aligns with the implications of the fact that not all the value of the product of enclosed land results from labour.

We found that commoners need a democratic say in overall use patterns in order to represent significant interests they possess.\footnote{160} The appropriator’s interest can be fulfilled by granting property rights that are crafted to honour non-owners’ interests.

This seems incompatible with full liberal private ownership and, in fact, with any system that does not allow space for communal decision making over use patterns and other protections I indicated. Although Locke may not have recognised this, I have argued that a more subtle understanding of the initial rights and interests of commoners will yield it.

\subsection{A Reconstruction of Locke}

In this section, I outline a view of property consistent with the aims of original acquisition that takes labour seriously and accommodates the intuitions behind the provisos designed to solve the

\footnote{159} See for example, the original Mabo decision on native title and rights of access in Australia. Mabo v. Queensland (No2) CLR 175 (1992)
consent problem, without saddling us with Locke's limitations. I do this by highlighting the promise of a labour argument from desert and describing how labour functions in it (4.5.1). I then sketch the argument itself, noting that to complete it we need to decide the fittingness of forms of property to the task of rewarding a producer (4.5.2). I analyse the factors that influence fittingness, under three headings, in sections 4.5.3 to 4.5.5. Lastly, I describe some strengths of the account (4.5.6). This represents the labour/desert-based vectors in a total view of property. (The other main vector, utility, will be analysed in chapter 6 before the final account is developed in chapters 7 and 8.)

4.5.1 The Use of Desert in a Quasi-Lockean Theory

In order to find an account of the initial acquisition of resources that is coherent, ethically justifiable, and useful, one must move away from the letter of Locke. One of the flaws in Locke’s account of property is his attempt to answer too many questions with too few tools. Questions about property include ones about: its definition; under what circumstances it is a good institution to maintain; who is eligible to hold it; ways in which individuals and groups become entitled to it; and the allowable extent of property people may accumulate. Locke attempts to answer these very different questions by his use of a single explanatory notion: “the labour of (a man’s) body and the work of his hands” and in doing so, he distorts the role of labour and spreads much confusion.

One source of this flaw is that Locke operated within the confines of natural law theory and its attendant natural rights of ownership. A nation’s law merely upholds these rights and contracts. The focus is on individual initial acquisition in the state of nature and acquisition must draw on this narrow set of natural rights. Consequently, ownership of one’s labour - one of the few possible rights that can “put a distinction between” (II28) what becomes mine and what remains common - is too heavily leant upon.

I will build my account on the following, different approach. This approach accepts that individuals have rights that are in some sense ‘non artificial’ and non–legal, but they are not natural rights. The shape of the property rights the law may grant individuals is constrained by the rights they have prior to the law, but other interests may function in the design of those property rights. The exact nature of the rights granted is determined by the balance of the relevant interests and morally important concerns that operate in an original acquisition situation.

Further, as discussed in chapter 1, the conception of rights chosen here includes the feature that rights are not easily overridden. An understanding of rights that allows them to be easily overridden could yield relatively simple and sweeping specific incidents. All the difficult moral work would occur when deciding when it is to be overridden and what factors, including other rights, will enter into this decision. My approach is to accept that rights cannot be overridden, except in extreme circumstances. In this case the exact set of rights, liberties, powers, and immunities will need to be more complex - sensitive to wider concerns than those of self-ownership and labour. In many cases,
the resulting rights will look very complicated, be multiply constrained, and have numerous qualifications and exception clauses.

With that as a framework, we can see that the natural right to self-owned labour will not be used to generate property entitlements. Instead, a potentially diverse range of factors will enter and while labour will be chief among them, it will function differently. Without the appeal to natural rights, the moral weight of labour functions as a desert claim. As a primary human activity associated with accruing personal and communal benefits, it must be rewarded. \(^{161}\)

One can locate only scraps of a desert argument in the *Two Treatises*. However, the idea that workers deserve holdings on the basis of their industrious labour is a pervasive and fundamental principle of morality and is arguably the intuition behind Locke’s argument, even though he steers it down an alternate route. It picks up an idea similar to the ‘maker’s right’ interpretation of Locke, without appealing to the analogy with a creator, and so avoids the associated problems. This will be the main hope for any labour theory.

To make use of desert here, we need a clear intuition that workers deserve a stake in their produce large enough to fall under the rubric of ‘property’. The expenditure of mere effort will not do, as destructive or talent-less effort may deserve only reprimand, scorn, or pity. It would be odd to award property as reward for the production of the genuinely useless. If the product is only valuable to oneself, any strong form of property right would be inappropriate. In Locke’s own argument, there is much appeal to the usefulness of the product not only to the appropriator, but also to others. The product must be valuable to others who may want to possess it, to ground property as the appropriate reward. (This is not the same as the idea that non-acquirers can be compensated for the duties imposed on them (say, by the opportunity to trade for the good. Desert holds in virtue of the action, not in virtue of the spin-offs.)

I will be assuming, with Joel Feinberg, first, that if a person deserves some sort of treatment, she does so in virtue of a possessed characteristic or prior activity (the desert base) and, second, that the fact that a person deserves certain treatment, while certainly a reason, is but a *defeasible* reason, for treating her thus. These features of desert are widely agreed upon. \(^{162}\) I will use Feinberg’s schema for desert:

\[
\text{“S deserves X in virtue of F”}
\]

where:

\[
\begin{align*}
S & \text{ is a person,} \\
X & \text{ is a mode of treatment, and}
\end{align*}
\]

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\(^{161}\) Though the universality of this claim may be questioned. The ancient Greek and Roman tradition would say that labour is too demeaning to be regarded as a primary human activity.

To make X and F determinate this schema appeals to a *fittingness condition* (X must be the appropriate reward for the action which comprises the desert basis) and a *proportionality condition* (the ‘amount’ of X varies in accordance with that action). Putting these features together, we can harness the desert intuition in an argument for property. Given a labourer has the liberty to use her body in the way called for by the work and given that she has no moral duty to work, she deserves property rights of some sort as an appropriate reward, at least in some cases, when she expends effort to produce what is objectively, or widely considered to be, valuable.

In what follows I develop a desert argument to capture the intent behind the labour arguments. I draw on established work in desert by Feinberg (as above), on desert-based property arguments by Lawrence Becker, as well as on recent work by Gillian Brock (on the relationship of desert to needs) and Clark Wolf (on the conditions under which property rights are justified). I argue that a desert account of original acquisition will constrain property rights such that what is deserved cannot be unfair to others or threaten their basic interests. I show how this affects the rights granted. Specifically, a proviso must attach and the concerns I raised in sections 4.3 and 4.4 must be met.

### 4.5.2 Labour as a Desert Base

Here I sketch how the intuition about first appropriation and labour tapped by Locke can apply in a modern theory of property and its limits. Though not Locke’s view, it remains Lockean in that it grows from the defensible elements of Locke’s own theory.

In chapter 2 (section 2.2), I suggested original appropriation theories proceed in four stages and I will conform to this. The *first* describes the pre-political scenario. I will assume the Lockean story here, with the addition of the residual interests I developed in 4.4. The *second* gives an account of the set of actions that are taken to result in the appropriation of specific objects and reasons for asserting that these actions (and not others) should give rise to property rights. It seeks to establish or contribute to the defence of property rights by offering a moral account of how they could legitimately arise. In the desert account, labour will dominate, as it did in Locke’s theory. The *third* gives a set of conditions that ensure the above acts will yield property in a morally justifiable way. In the desert account, the fittingness of a reward for desert garnering actions will depend on certain moral principles concerning fairness. Results of sections 4.3 and 4.4, as well as a ‘harm proviso’, will bear on this. *Fourth*, an original appropriation theory must describe the content of the right to property that emerges from it. I show how the argument so far will yield guidelines on this.

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164 Also known as a ‘propriety condition’. I will avoid this term to avert confusion over the equivocal use of this word between the sense used here and that used in discussions of property itself.

165 Desert from labour (rather than, say, the view that virtuous people deserve property, whether they have laboured or not) is chosen to capture the same common intuition Locke drew on, viz, that, with respect to specific goods, she who produced them has greater claim than those who did not, other things being equal.
Desert itself is a basic constituent principle of morality: one that is entailed by our habit of attaching blame and praise, to the extent we are justified in doing so. The act of labour is a clear candidate for a desert basis. We bring potentially productive resources into use when we labour on them, so some reward is due. To assess the rewards that are right to grant, we must apply the conditions of proportionality and fittingness.

This raises hope of a desert argument to capture the intuitive link between labour and property. We need a mark against which to measure fittingness. In Becker's account, the standard of fittingness must come from three sources: the value of labour, the intent of the labourer, and the value and type of the product. This may sometimes suggest or even require property rights, but not always. A uniquely appropriate reward for the production and improvement of useful items, in some cases, is a property right over them – if only possession and use. Those cases are, typically, when such a right is desired by the labourer and is part of the goal of the labour. This idea gets moral support from the value of project-pursuit. It does so because the individual ownership of particular objects is intimately related to the formation and application of a coherent set of projects that are the major parts of a self-shaped life.

So "labour mixing" generates a desert claim. When appropriate (fitting and proportional), the desert claim generates property claims over goods. But to deserve something is only a prima-facie reason to have it. The labourer's claim would be lessened if either the labourer had a duty to others or if non-labourers had broader rights with respect to that property. Here I am using Feinberg's conception of rights as undefeated prima facie claims. In my application of Feinberg, the exertion of labour is viewed as a claim-generating fact, alongside other claim-generating facts, with respect to a distributive situation involving people and resources. In this situation, rights are granted when one of the claims remains undefeated by the others. This is in contrast to the more traditional self-ownership view, where labour fulfils the much stronger role of producing a direct right to the resource.

In this vein, I follow Clark Wolf who argues that appropriation proceeds in a number of conceptual (though not necessarily temporal) steps. First, the labourer stakes a claim over the resource. The next step is to determine the strength of the claim labour produces, by considering the relative importance of the effort, ability, and industriousness. So far, while the claim must be taken into moral account, it does not have the status of a right. It will be upgraded to a right (the final step) if no one has a defeating claim.

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166 Becker first discusses seemingly fatal problems with the idea that "people are entitled to hold, as property, whatever they produce by their own initiative, intelligence and industry" (Becker, p 48). He observes that this idea is a persistent one since "labour is (in some circumstances) psychological appropriation". Becker crafts a desert argument from one part Locke and one part Mill, though neither intended to develop such an argument.

This, I believe, is the most plausible way to make Locke’s approach work. It uses labour in a more coherent way than self-ownership accounts do, through the morally respectable principle of desert. It also gives flexibility over when property rights are the appropriately deserved reward and allows variation in the strength of those rights. This flexibility Locke himself does not grant, even though his arguments (as Lockean) cry out for it.

Note that the argument is not without provisos. First, property rights are only justified uniquely if no more appropriate substitute is possible. If the desire is for mere use, or for power or fame and these can be provided as the labourer’s reward without granting property rights over the product, then property rights are not the appropriate reward. Second, products with negative value deserve punishment which requires tax or compensation.\(^{168}\)

To complete the desert argument, we must specify the set of conditions that ensure acts of labour will yield property in a morally justifiable way and describe the specific content of the right that emerges from it. Where labour grounds a claim to property, we must know a couple of things. First, what rights the claim, if undefeated, supports. It must show what incidents (use, transfer, duration) it suggests are appropriate to grant as a reward. Second, what the competing claims are. To deserve something is only a prima-facie reason to have it granted. It does not exclude others having some claim to it, including claims from desert on some non-labour basis.

These are both issues that determine fittingness and proportionality. The fittingness of a reward for desert garnering actions will depend on moral principles to ensure fairness. I divide the factors that determine fittingness and proportionality into three types: factors from the context of labour; factors from justice principles embodied in the proviso; and factors from justice principles not picked up by the proviso. The task of determining these I begin here (though much of the more detailed work emerges only in chapters 7 and 8).

### 4.5.3 Fittingness Factors from the Context of Labour

At least four factors bear on the fittingness of rewards from the context of labour. First, in section 4.2 we found that labour-generated property rights are attenuated when the objects have a high resource component.

Second, Becker captures the fact that it is (in part) because property was the desire of the labourer that property is the right reward for labour. Yet he fails to address the reason that property was desired. A desire to gain property in order to use it for harmful uses should not be rewarded. This will require that the rights given be crafted to exclude certain harmful uses.

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\(^{168}\) Some limits to Locke’s argument do not apply here, as the rights are not generated solely by labour. For example the problem of generating the right of inheritance and gift-giving (see section 4.2) in Locke’s theory arose because the recipient neither laboured on the good nor exchanged something of equal value. This has no direct bite here.
The third is another weakness inherited from Becker. If the rewards and punishments are determined by labour, the labourer, and the product, we need a normative notion of what value something should have on the market. This depends on the concept of ‘fair market price’, which if not incoherent, is held only by a small minority. This spells trouble for Becker’s own argument, but it need not bother us if we allow transfer mechanisms such as the market, rather than normative measures, to set the component of the reward that stems from the value of the product.

Fourth, Becker’s account is not sensitive to factors that make property rights more or less appropriate as a reward. Crucially, the argument ignores the background condition that some people lack ability to undertake desert-garnering action through no fault of their own. The size of property rewards and punishments should reflect not merely the actions of labourers, as Becker has it, but also the differential abilities, through no choice of their own, of others to access the system of rewards and punishments and to be effected by labourers’ access. This requires a desert account of property to include a commitment to distributing goods according to certain types of needs. Becker’s list of factors that make up fittingness and proportionality must be extended to account for this.

4.5.4 Fittingness Factors from Justice Principles Embodied in the Proviso

Arguably, the most significant factor in determining the fittingness of desert-based property claims will be some sort of Lockean proviso. The proviso functions for Locke to ensure the moral respectability of unilaterally created exclusive property rights. Similarly, property claims will not be an appropriate reward for labour unless some proviso ensures certain moral constraints are met. These include maintenance of the means of preservation and whatever else is needed to ensure general fairness to others. The concerns raised in 4.3 and 4.4, I believe, must also be met.

In chapter 3 I supported a proviso interpretation that saw Locke preserving a right to access for all, rather than preserving a right to appropriation and ownership. One may appropriate more than equal shares of land, but leave other goods or opportunities. Because of this, the sufficiency condition is consistent with the scarcity of resources (and even with the fact some people own no land), since what is left in common need not be left in kind. The proviso arises from the need for fairness by guaranteeing that no one is denied access to materials needed for their preservation.

In a desert argument the same intuition translates into the following principle: the status and validity of current property claims depend on the way the property right institution is likely to influence the welfare of others. Competing claims, especially from need, will influence their fittingness. The exertion of labour is viewed as a claim-generating fact alongside other claim-generating facts with respect to a distributive situation involving people and resources. A Lockean proviso is a condition

169 It also raises the possibility that equality of opportunity is also required. I delay considering this concern until the construction of the final theory in chapter 7. See 7.4 and 7.5
whereby the presumptive claim to property will become legitimate. No one will have a competing claim if this condition is met. The proviso elevates the status of the claim to an undefeated one. Since the ethos here is the prevention of harm, I follow Clark Wolf’s proviso:

A’s appropriation of an unowned resource, X, constitutes a valid property claim iff no other person is harmed by A’s appropriation of X.\(^\text{170}\)

So being first to labour on unowned land may give a *prima facie* claim to that land. This claim may be backed by (say) its benefits to others, but this is not necessary. What *is* necessary is that no present or future person is harmed.\(^\text{171}\) (Locke’s own proviso may be a means to this end and so is sufficient not necessary, so long as there are other ways to meet the ‘no harm’ condition that do not demand enough and as good be left.)

Wolf is on the right track. He appears to believe that his account will be sufficiently wide-ranging in scope. Yet there are problems. The first is that he fails to consider cases where labour, rather than need, generates the claims pressed.\(^\text{172}\) Second, the harms we should be concerned with include “residual interests” and these are not picked up by his discussion. In chapter 7, I show the significance of this and defend a conception of property that takes account of these. As we will see, the proviso turns out to be patterned: no harm must come, not only from appropriative acts, but also from resultant distributions.

### 4.5.5 Fittingness Factors from Justice Principles Missed by the Proviso

The functional role of the proviso is to ensure that appropriations are not unfair to others who are yet to appropriate, or who arrive too late on the scene to join the appropriative game. It embodies the right to the means of preservation. Here, I consider the effect of an element not so far accounted for within the proviso – the residual interests I discussed earlier. I argued that if a proviso recognises the full range of interests people have, it will generate even more restricted rights over natural resources than would emerge from a proviso designed only to ensure their access to the means of preservation. There are Lockean grounds for asserting that community members, not only property holders, have a claim in contributing to decisions on overall use patterns.

This introduces new conditions on property as a fitting reward. The claim a labourer stakes can be fulfilled by granting rights of use, possession, income, and transfer, as well as rights against trespass. Yet these will be crafted to conform to the embodiment of non-owners’ claims. We found,\(^\text{\textsuperscript{170}}\) Wolf, “Contemporary Property Rights…”, p 804

\(^\text{171}\) One objection against original acquisition says the following: Real world appropriation did not happen this way. Property rights should be respected (if at all) because of economic efficiency or social stability, not because of the false claim that they arose fairly. Yet we can discover some features of current rights by looking at features of rights that would arise under ideal conditions. If there are restrictions on land and resource ownership in the ideal case where no one is harmed, then those restrictions will be the very least that will apply in the real world.

\(^\text{\textsuperscript{172}}\) This has been noted by Gillian Brock, “Future Generations, Natural Resources, and Property Rights”, *Ethics and the Environment* 3(2) (1998): 119-130, p 123
in section 4.4, that commoners need a democratic voice in overall use patterns to represent, in civil society, their state of nature interest in non-exclusion from decisions affecting their autonomy and protection of their interests in environmental services. Residual interests will require a sense of public-ness to remain over private land, implemented by certain restrictions. So while property will continue to be a fitting reward, limits to the rights it grants are necessary to protect non-owners’ claims.

4.5.6 Advantages of the Desert Account

We now have a desert view of original acquisition that takes labour seriously and includes the intuitions behind the provisos, without saddling us with Locke’s limitations. I assumed a broadly Lockean story of the pre-political scenario with the addition of the residual interests I developed in 4.4. The account of the set of actions understood to result in the appropriation of specific objects featured labour in a dominant role. The set of conditions that ensure acts of labour yield property in a morally justifiable way focussed on the fittingness and proportionality of rewards for desert garnering actions. These conditions are sourced in principles such as fairness to others, interests in basic needs, and interests in features of the relationships of people to land that must be respected in a transition to exhaustive appropriation.

For land and other environmental resources, full liberal rights are unlikely to be defensible. Limitations on use, where this violates democratically decided overall use patterns will be consistent with, in fact, required by this account. Some restrictions on transfer and duration of rights may arise too, insofar as these are necessary to ensure the combined powers of property do not exceed the limits justified by the theory. This view diverges from those of Locke and Nozick who both think the intuition behind a labour argument will straightforwardly justify full private ownership over land and resources.

I point to three advantages: two pertaining to the nature of property rights and one an application for environmental protection policy.

First, this account does not attempt to answer too many questions with too few tools by overworking the act of labour, as Locke’s does. Many other factors, (such as, need and non-resource interests in land) take their place also. Nor does it leave the task of morally constraining the powers of property in the hands of a once-off acquisition process. As Munzer notes, while a labour argument makes sense in principle, it seems impossible to construct limits derived entirely from the nature of labour that are applicable in modern societies.\(^{173}\)

\(^{173}\) Munzer, pp 273-4
Second, the desert argument gives us flexibility in the strength of rights granted. When the strength of property rights are not taken for granted, it is impossible to find good arguments that point consistently to rights of one particular strength, rather than to the variable strength account I advocate. Desert is a scalar magnitude, varying in strength, but the favoured rights of a strong rights theorist are point-like – you either have them or you have very little. A theorist who argues that full liberal rights are standard must explain why improvements of greater or lesser worth should not yield a property structure granting correspondingly greater or lesser rights, liberties, and powers. I doubt any productive effort is so titanic as to deserve rights that are fully exclusive, permanent, bequeathable, and insensitive to others’ needs and interests.

The third advantage goes beyond academic debates over argument form. Environmental threats often come not from too much appropriation, but from too strong a conception of the rights gained once appropriation has occurred. A harm proviso reflects this point and provides a basis for land use restrictions in principle from within the concept of property itself, rather than merely as an external restriction justified (if at all) from other considerations.

A proviso that asks one merely to leave "enough and as good" does not restrict polluting uses provided one left enough land unappropriated. If appropriators use their land for pollution-generating activities they cause harm to each other and future generations. There is no protection against future harms that are not a result of the resource being made scarce. Locke’s proviso fails directly to prohibit the pollution, from within the resources of the concept of property. Yet the account I gave, building on Wolf’s harm proviso, eliminates the pollution case and yields a conception of property more able to prohibit harmful use by directly excluding it from the shape of property rights granted to owners. The conditions on fittingness I have developed shape property rights, not only by demarcating the set of justified acts of appropriation, but also by demanding certain patterns of results. If we are interested to see how far down the road of use restrictions the concept of property itself can take us, there is a clear advantage here over Locke’s own proviso.

4.6 Conclusions

Locke is on track in specifying the nature of conditions on initial acquisition: one may not appropriate in just any fashion but must consider the effect on others. The exact nature of the proviso this generates is an important factor in mapping the contours of the rights Lockean property will support. Locke's account itself is beset with fatal troubles. Yet since so much of Western property law is based on Locke, one can provide powerful reasons for environmentally motivated restrictions if one can find a defensible Lockean theory of property that generates those restrictions.

In 4.5 I sketched a desert view of original acquisition that takes labour seriously without saddling us with Locke’s limitations and that includes the intuitions behind the provisos needed to solve the
consent problem. This required us to enquire as to, firstly, the nature of labour-generated claims, and secondly, what competing claims exist to act as restrictions.

Prior work in this chapter assisted us in these tasks. As regards the first, I argued, in 4.2, that property rights over objects with a high resource component are likely to be attenuated. Interests of others in the commonly owned constitutive parts of that object cannot be fully excluded. We found that Locke's case itself yields more limits than he admitted when his argument is traced through. Lockean property entails limits that make a case for full liberal rights hard to sustain and point us toward a more limited form.

For the second, this account gave a yet more constrained set of property rights since what is deserved is subject to a range of conditions. These are sourced in principles such as fairness to others, interests in basic needs, and interests in features of the relationships of people to land. In this regard, I suggested that commoners need a say in overall use patterns to represent their interest in both autonomy and environmental services of ecosystems. I argued that if a proviso recognises the full range of interests people have, it will generate even more restricted rights over natural resources than would emerge from a proviso designed only to ensure the means of preservation.

The diversity of type of natural resource will mean the balance between the interests of owner and non owner will be struck in differing ways. This will rule out some stronger forms of ownership. In the case of natural resources more so than for most objects of property, only a lesser right to property seems justified.

This is the contribution that can be made by theories of original acquisition by labour. It helps to constrain the force of other arguments for property, in fact, providing much shape to the regime the set of property arguments give rise to. The final account (in chapters 7 and 8) will not need to be bound to it alone, since, given it is shorn of the appeal to natural rights, we are free to design property rights that reflect the total set of arguments, while including historical interests as but one of many streams.
Chapter Five

The Libertarian Challenge

5.1 Introduction

In this thesis, I develop a conception of property rights in environmental resources that, under certain conditions, allows public influence over use patterns and justifies much environmental law. Arguments for environmental protection often appeal to rights and interests of the general population, which are then pitted against others' rights to use their property as they see fit. I will show that some environmental protection emerges from arguments for property.

Both environmental protection law and my conception of property are significantly threatened by libertarian thought, since libertarians typically posit a conception of property too strong to allow either a public say in resource use or much in the way of environmental protection for future people. An absolute conception of property rights is a very important strand in the libertarian case for confining the state. In this chapter, I attempt to defuse the libertarian threat, while bringing out some surprising conclusions about libertarian thought, applied to the environment. My focus will be on Robert Nozick.

To do so, I must show that one of three things is true of libertarian-style property rights. First, that they are simply mistaken. If this fails, I could show that they yield sufficiently stringent protection of environments to make the kinds of state enforced protection that I advocate necessary. Failing those two, I could demonstrate that they are inapplicable, at least to objects of property that I am concerned with. Such objects are those which either have a high natural resource component (such as oil and forests) or, typically, have a significant effect on those resources which do (such as property, the use of which, generates large amounts of air pollution.

For reasons of space (and also because I do not want "to boldly go" where Cohen, Nagel, Waldron, and so many others have gone before), I will not attempt the first of the above options. Instead, I will address the second and third. One may think that Nozick’s theory will be free of the limitations that I argued are entailed by Locke’s theory, when applied to the environment. Yet I argue that, contrary to most assumptions about the implications of Nozick’s theory, his view justifies large environmentally motivated limits on the use of property. I further argue that libertarian rights, regardless of the surety of the first result, cannot help us in many environmental cases, since they are not applicable to a certain class of objects. Environmental goods are, typically, members of this class. Over many environmental goods, Nozick must either accept a conception of property rights which, since it allows rights to be overridden fairly easily, is weaker than his side-constraint model or he must allow a much more complex array of factors to enter into the design of specific rights. The
first is anathema to the libertarian. The second opens the way for my own conception, which includes room for property rights in environmental resources to be sensitive to factors such as need, participation, and other patterned concerns.

I note that the first result will not help me to defend my own favoured conception of property, but instead, will provide it with an ally. It yields a justification of environmental protections similar to mine, though for different reasons, and achieves this on libertarian grounds. That result is significant and I welcome it. The second result removes the most threatening rival theory of rights as a barrier to the development of my conception. I welcome that also.

The libertarian defence of strong property rights can be organised around the challenge of showing how potentially onerous duties can justifiably be created in others, without their consent. The libertarian is effectively giving what lawyers describe as a “four dogs defence”. The defence has four claims with the structure that each of the last three is needed only as a fall-back in the event of failure of the previous one(s). Here are the four “libertarian dogs”. First, libertarians may claim that original acquisition creates no new duties. Failing that, they argue that the duties it creates are not onerous. I will spend little time showing that these first two dogs will not hunt, since I would be re-treading familiar ground covered by Waldron and others. I tarry here only because Waldron’s account has weaknesses which I highlight and repair.

Were these to fail, the libertarian could retreat to the third dog. She may admit that original acquisition does create onerous duties, but claim that the onerous duties it creates are justified. She would then argue that the acquirer either deserves the product, or gains an entitlement over the product through self-ownership, or gains an automatic right that makers gain over products of their making. The third dog has promise (and I used the desert formulation myself in chapter 4), but I show that it fails to justify the type of property rights Nozick needs. The fourth defence claims that, while original acquisition creates onerous duties that are not fully justified, the burdens of these duties can be compensated for. My main target is this last, best fed, and most promising dog: the compensation dog.

This chapter is structured to play in tune with the above lines of argument. I briefly summarise the relevant aspects of Nozick’s theory (5.2) before the first two defences are considered (5.3). Section 5.4 addresses Nozick on self-ownership and maker’s right. In 5.5, I focus on the last defence and show that the burdens accrued by libertarian property duties cannot be compensated for without stringent environmental protection, much of which must be implemented by the (minimal) state. In

174 A “four dogs defence” is a defence analogous to the following. A man faces charges that his dog bit another man. He starts his defence by saying “I don’t own a dog”. If it is shown that he does indeed own one, he reverts to claiming “that’s not my dog”. If this is shown to be false, he pleads that “my dog doesn’t bite” and finally (if others attest to his dog’s biting habits or, in some macabre way, biting is organised for the court), he claims “my dog didn’t bite him”. I borrow this term from Leif Wenar. See Wenar, p 801
5.6, I change tack to see what happens if the previous arguments fail and show that, even then, Nozick’s conception of property would be inapplicable to environmental goods.

5.2 Nozick on Property

In John Locke’s discussion of property, he grants to each person the power to create property rights over objects without the consent of others. It is specifically the ascription of this power that raises the justificatory challenge for original acquisition theories, as its exercise causes such dramatic moral changes, notably, on the freedom of others. After acquisition, every person, bar the owner, has a duty of non-interference with respect to the use of the acquired object.

Locke famously uses a proviso to help meet the justificatory challenge. As long as the appropriator leaves “enough, and as good, for others”, she effectively takes nothing that leaves the commoners with a moral complaint. Beyond mere Lockean exegesis, this clause has abiding popularity and a version of it appears in most twentieth-century theories of property acquisition. The intuition is that property rights are justifiable if the net affect on others, during the process of acquisition, is defensible. The most notable of these modern theories is that of Nozick.

Nozick is a deontological rights theorist, as he takes rights to be absolute side constraints. This differs from weaker conceptions of rights that take rights violations to be bad consequences that enter as an element, with finite weight, alongside other factors, into the assessment of an action or policy. But for Nozick, rights violations (except in cases I discuss in section 5.5 where compensation is given) are simply forbidden.

Nozick gives an historical entitlement account of the justice of distributions. Such an account sees justice neither in terms of structural features and time-slice distributive outcomes nor in terms of a set of natural dimensions, such as moral merit. Instead, it approaches justice in terms of the procedures by which the distribution was arrived at.\(^\text{175}\) Central to this account is a view of property. This theory attempts to justify strong rights that do not allow violations, even to prevent more extensive violations of others’ rights. According to Nozick, any theory of property must have three principles: a principle of justice in initial acquisition; a principle of justice in transfer; and a principle of justice in rectification (for example, compensation for the victims of crime).\(^\text{176}\) The key principle for the current discussion is the first: justice in initial acquisition (PJA).

Notably, Nozick replaces Locke’s theologically inspired view that land and its unimproved bounty belongs in common to all with the view that commoners completely lack ownership relations with the

\(^{175}\) Nozick, pp 153-60.

\(^{176}\) Ibid, pp 150-3

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The principle of justice in acquisition describes how “unheld things may come to be held”. While it may be thought that this obviates any consent problem, this would be a mistake. All punters in the state of nature are at equal liberty to make use of resources and this is sufficient to generate a consent problem, since acquisition by one imposes obligations that restrict others’ liberty.

The justificatory challenge arises for Nozick in the form of a clash between his two fundamental notions: liberty and property rights. One person’s ownership entails another’s lack of liberty to use the object in question. The moment you appropriate a fertile field I can no longer use it without your permission. This gives rise to two problems. The first is a worry for any theory of property acquisition; what action could you perform that would justify these future restrictions on my liberty? Second, of particular concern to a libertarian, if the acquisition of property rights and liberty conflict, how can we decide which to favour? (The nineteenth-century thinker Herbert Spencer, observing that the property-less would have no rights even to place their feet on the ground, argued, in his early work, that liberty requires state control of property.)

A principle of justice in acquisition will offer a rights-based justification. Intriguingly, although property rights are so fundamental to his theory of justice, Nozick says little about how they might be justified. In common with many accounts, his most thorough discussion of initial acquisition starts with an evaluation of Locke’s labour-mixing argument.

Although Locke’s arguments seem congenial to a libertarian position, Nozick subjects Locke to attacks that many have since thought rigorous and devastating. One such criticism (that we encountered in chapter 3) is directed at the process of labouring. To mix my labour with something unowned may equally be a way of losing my labour as a way of gaining the unowned object. It appears that Nozick takes himself to have refuted Locke (although this is not clear, since Nozick must assume that labour is the main rights-generating activity, even though he rejects Locke’s exact mechanism for how this proceeds). Yet Nozick concurs with Locke at one crucial point; that an appropriator’s effect on others is morally relevant and she must leave something like ‘enough and as good for others’. Nozick focuses his own proviso on the quality, rather than the mere fact, of the change in the situation of others, offering a weaker duty. Any appropriative act that restricts the liberty of others is legitimate, provided it leaves them no worse off.

An appropriation leaves someone worse off if it results in her losing the opportunity to improve her situation. The basis for comparison, which Nozick terms the “baseline”, is pre-appropriation access to resources. Nozick thinks that society owes compensation to people deprived of opportunities to

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177 Kristin Shrader Frechette believes that Nozick misses the fact that, for Locke, original property is common. See Shrader Frechette, p 208. Yet Nozick is consciously modernising Locke, so this is deliberate, not an omission.
178 Nozick, p 150
179 His main attempt is at ibid, pp 174-8
180 ibid, p 175
make use of available resources, but only if this constitutes a net loss. This, he thinks, will reconcile liberty and property and meet the justificatory challenge, since appropriation will not detract from another’s liberty.

One interesting implication is apparent. If someone is starving in the minimal state, yet in a ‘no-ownership’ world they would have had access to resources for their sustenance, they have rights to compensation against all property holders under the principle of justice in rectification. The Lockean proviso, or rather its historical shadow, would have been violated. A situation could arise where a minimal state enforcing Nozickian property rules will be required to interfere to redistribute property rights. Nozick seems to believe that, in a free market system, this would rarely obtain. Who, after all, would do better in the state of nature than they do under modern capitalism?

5.3 Original Acquisition and the Duties of Others

I will briefly consider the claim that original acquisition creates no new duties. Yet, since so many objections can be marshalled against it, I will not linger here long. The more serious possibility is the second “dog”; that the duties created by appropriation are not onerous. Here, too, I will not tarry, as Waldron and others treat this extensively. I explore and repair weaknesses in Waldron’s account.

5.3.1 Acquisition and Duty Creation

Libertarians may claim that original acquisition creates no new duties. This can be pressed by (and some argue that Locke sees his argument as) viewing property acquisition as either “incorporation” or “projection”. The projection route suggests that mixing labour merely extends rights previously confined to the person’s body. These rights come to reside in other objects, but are not new rights and create no new duties. The incorporation route (which Locke applies only to food, but which Samuel Wheeler extends to other resources) suggests objects become part of one’s body or analogous to a body part; one’s body expands, as it does when one fails to exercise.

Both views have an air of sophistry and the objections are legion. To the advocate of projection, we could point out, firstly, that labour is an activity not a substance, so there is nothing which can be mixed to unite the bearer of body rights with external objects. Secondly, Nozick’s objection to Locke’s labour mixing argument casts doubt on the extent of the acquisition, as it is not clear whether the body rights have been extended (so they now cover the object) or attenuated (so they no longer cover the labour). The incorporation approach has the critical weakness that, when we think of rights over the members of our bodies, we do not include all of the incidents of property. Crucial, for any capitalist system, is the right of transfer. We ascribe this right to ourselves when the

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181 Munzer, pp 63-70
183 Wenar, p 808
184 Waldron, The Right to Private Property, pp 180-3
object is external property, yet we do not ascribe it when the object is our bodies. Since those material objects we incorporate would be subject to analogous rights to those over our bodies, they would not become property in the sense we commonly understand and certainly not in the sense that the libertarian thinks of capitalist property. One could perhaps provide an account of how the objects become property without incorporation or projection, but this would be to give up on the claim that no new duties are created.

5.3.2 Unilaterally Imposed, Onerous Duties

I turn to the main target of this section, namely, the thought that, while acquisition creates new duties, those it creates are not onerous. Waldron has argued strongly that unilateral appropriation is illegitimate, as it creates duties that are not only onerous, but quite unfamiliar to political philosophy. He wants to show that the idea that individuals can unilaterally impose property duties on others and that the moral force of this can be transferred by processes like exchange and inheritance is difficult to defend in an unqualified way.

For Nozick, a PJA includes exclusion, which functions to remove, from all non-owners, the liberty they previously held to make use of the object in question, even in life-or-death situations. Yet Waldron complains that there seems to be no other unilateral action that can so morally constrain the actions of others. Worse, acquisition involves the intention to bring this constraint into being. Not even an action that invokes the duty of rescue in others (say, by a person falling into a pool) can as powerfully create duties in others since, in that case, it is not the intention on the part of the newly sodden to impose such a duty. That power is not only unfamiliar, but repugnant.

Waldron’s focus is on whether participants in a contractarian theory of justice would accept a PJA. Unless it is qualified with a strong Lockean proviso, participants would not accept a system where one person can unilaterally impose duties of non-interference in material resources others could previously access. This is especially true in cases where those resources are scarce, duties are uneven, and some can invoke the duty much more easily than others.

A proviso could function to nullify this threat, since the duties would not be onerous if no one were permitted, by their appropriation, to worsen the position of anyone else. One’s situation can be worsened if one suffered materially from another’s use of previously available resources or if the application of another’s right deprived one of the moral liberty to use these resources, even though the resources are not physically removed.

But what strength of proviso would be called for? Waldron says that such a proviso must be continually sensitive to others’ needs. This is true of Locke’s proviso, but not of Nozick’s. The candidate Nozick offers is as follows: a particular appropriation is legitimate if it does not decrease

\[\text{ibid, pp 265-71}\]
other people’s opportunity to improve their situation through removal of the resources, to which they would have access in a state of nature, in a way that worsens them.\textsuperscript{186}

Waldron says it is not enough for Nozick to indicate the absence of net harms. “An adequate Lockean proviso must require that the effect of the PJA it qualifies is\textit{ never} to require those whom it constrains to choose between compliance and the exigencies of their own survival… [Otherwise a PJA]... is not a principle which is capable of unanimous acceptance in good faith by those who are governed by it.”\textsuperscript{187} Nozick rejects rights of subsistence since other people may have entitlements over what you need, and so there is no room for general rights to a minimum material condition.\textsuperscript{188}

For Waldron’s attack to succeed, the duties of forbearance held by non-owners must have an objectionable nature not shared by other instances of duties of forbearance.\textsuperscript{189} At least two lines of defence are possible here. First, one may argue that it is unfair to single out acquisition-based duties from among other duties. Gaus and Lomasky object that all claim rights involve such burdens and, while they require justification, original acquisition duties do not stand in need of any greater support.\textsuperscript{190} Such burdens are not so unfamiliar.

Yet this objection misunderstands the target of Waldron’s attack on the PJA. While all claim rights involve burdens, the objectionable feature of the PJA is that it imposes these burdens unilaterally, deliberately, and in order to limit others’ freedom. Most claim rights do not originate in this way. They are neither unilateral, nor imposed in a non-institutional way by the one in whom the rights come to inhere. The claim rights Gaus and Lomasky cite arise as part of the institutional design of a society and are part of the moral landscape that shapes the nature of each person’s agency. But libertarian property claims do not.

Second, recognising the failure of the above defence, one may claim that there remains a class of familiar duties that are both imposed and unilateral. The obligation to reward desert is one such duty. One can continually impose obligations on others by performing desert-grounding actions.

There is, however, an important difference between these two cases. In the case of desert, we do not expect others to reward us for all meritorious conduct. The conduct for which we expect rewards is typically embedded in institutional contexts wherein policies for rewarding meritorious behaviour (and even then, only some meritorious behaviour), are enshrined. Further, if one were to perform desert engendering actions with the\textit{ intent} of receiving rewards that limit others’ freedom, (as is the case in original appropriation), would not we be inclined to judge one’s actions as no longer

\textsuperscript{186} Nozick, p 176
\textsuperscript{187} Waldron, \textit{The Right to Private Property}, p 281
\textsuperscript{188} Nozick, p 238. Recall, however, that if subsistence is threatened by violations of the proviso, these others would not\textit{ legitimately} hold those entitlements.
\textsuperscript{189} Recall that the focus here is on whether these duties are onerous, not on whether they can be justified regardless of being onerous.
\textsuperscript{190} Gerald Gaus and Loren Lomasky, “Are Property Rights Problematic”, \textit{The Monist} 74(4) (1990): 483-503, pp 496-8
meritorious? When confronted with a rescuer who admits he conducted the rescue solely to be paid a reward by the victim or so that the victim would work for him unpaid for a day we are likely to cease our applause. These actions, as duty generating, seem self-defeating.

A further point can be made in this regard. For an action to be a ground for a desert-based reward that imposes duties on others, the action must not only be beneficial for oneself, but for others. The appropriate reward cannot be something that limits others significantly, or risks harming them. Even if property may be a reward for labour, strong rights - permanent and bequeathable full liberal rights that function as side constraints - are unlikely to be the appropriate type. The obligation to reward desert is not an instance of the unfamiliar, onerous duties that Waldron found objectionable as a feature of original appropriation.

While Gaus and Lomasky’s argument does not stick, A.J. Simmons presses a case for why these obligations are in fact more familiar and less repugnant than Waldron thinks. Simmons speaks of three areas where these obligations arise: special transactions, competitive situations, and the activation of general rights. He offers the following illustrations:

I may make a legal will, unilaterally imposing on all others an obligation to respect its terms ... for the very purpose of limiting others' freedom to dispose of my estate. I may occupy a public tennis court to practice my serve ... unilaterally imposing on all others obligations to refrain from interference, and so do for the very purpose of enjoying [my] activities unhindered... Or I may rush to the patent office and register my invention, unilaterally imposing certain obligations of restraint on all others, for the very purpose of limiting other’s freedom to likewise take advantage with their competing inventions.

He concludes that these are familiar and accepted cases not very different from original appropriation.

Yet, this will not do. A legal will is an institutional device created by agreement about the power one may invoke in a will. Further, your potential inheritors have no right or liberty over property when still in your possession and so their moral position is not altered by your act of writing a will. This is hardly an imposed, onerous duty. Arguably, it is not even a new duty, but a mere change of to whom the duty is owed.

Actions undertaken in Simmon’s other examples are similarly institutional. In a game of tennis the institutions are defined in cultural not legal terms, yet they are orders of magnitude closer to legal institutions than is original acquisition. Further, the duties imposed are neither permanent nor injurious. The court contenders must merely wait their turn. In the act of patenting, one avails

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192 ibid
oneself of an institutionally defined set of rights and duties. These are not unilaterally imposed in the required sense. Further, the applicant denies no others access to a previously available common good.

Each of these lacks some or all of the features that make the duties that followed from original acquisition onerous. They revolve around institutional rules and expectations and the duties are typically mild. Simmons, at one point, admits that these are not onerous, but claims that, often, property duties are not either. Yet, this forgets an important difference between these examples and original acquisition. The *institutional* aspect of property regimes is designed to ensure that the duties sourced in original acquisition are not made unfairly taxing. But this function is absent in state of nature acquisition itself.

Simmons’ examples are no more convincing than those of Gaus and Lomasky. While other instances may possibly be found, the failure of the examples given and the difficulty in uncovering others is instructive. Original acquisition duties are unfamiliar in the combination of their features: being unilateral, non-institutional, and potentially onerous. If Simmons’ argument has any bite, it is only to show that there may be some cases where an appropriator does not produce onerous duties. Yet, a system must be designed to guard against the cases where it does, and this amounts to a proviso. This result confirms the one in chapter 4; that only need-sensitive property rights will be justified.

Original acquisition does appear to impose onerous duties and so cannot, without qualification, justify whole property systems. One must fall back on the third dog: that these onerous duties are morally appropriate to impose, even unilaterally.

### 5.4 Self-Ownership

Is the imposition of onerous property duties justified since the appropriator deserves the rights that generate the duties? In chapter 4, I explored how desert can have justificatory effect in an account of property that included a modified form of original appropriation. Libertarians cannot avail themselves of this possibility, if the results of that chapter are correct. Property rights that emerged were consonant with an approach that balances a range of interests. This is unlikely to yield the strong rights libertarians insist upon. Libertarians, then, cannot appeal straightforwardly to desert.

In fact, few of them do. What they can and do appeal to is the intuition behind desert, namely, that labourers gain a morally significant, rights-generating interest in the products of their labour. There are two ways a libertarian can apply this intuition: appeal to entitlement over the product through self-ownership or appeal to an automatic right that producers gain over products of their crafting. I deal with the first of these in 5.4.1 and 5.4.2, turning to the second in 5.4.3.
5.4.1 Property as Conceptually Necessary for Liberty

Perhaps the fact that one owns one’s body and labour can justify the duties created by property in external objects. Self-ownership, extended through labour to products, could be seen as the libertarian version of labour generating a desert claim over products. Of course, this possibility has been raised in chapter 2 as an interpretation of Locke, where we assessed problems for his view. The idea here is that without strong rights, self-ownership and liberty are compromised. Owning one’s powers entails the right of exercising those powers oneself, the right of income over any benefits flowing from them, and the managerial right to decide who they will benefit. None of these is possible without similar rights over resources. Full property over objects within the world is linked to liberty to act in it.

What is the nature of the link the libertarian posits? It must be either a conceptual link or an instrumental one. I will deal with these in turn.

A libertarian could press the strong claim that property rights are conceptually required for freedom. Hillel Steiner argues that someone is unfree (in the sense of lacking negative liberty), if and only if doing an action is rendered impossible by the action of another. Frustration of my action occurs if and only if one or more of the spatial and material components of your action is identical to the one I seek to perform. So on this view, exclusive property is fundamental to liberty. The ability to perform action A entails that the material and spatial components of doing A are unoccupied or unused by another, at that time. Steiner concludes that “freedom is the personal possession of physical objects.”

If property rights define a person’s negative liberty and are essential to embody one’s self-ownership in the world, the third libertarian dog will hunt. The unilateral imposition of onerous duties would be justified, as they are required to ensure the appropriator’s liberty.

A libertarian needs to establish both that liberty rights require titles to, not merely possession of, objects and that these titles must amount to full liberal rights of ownership. But I claim that neither of these obtain. First, under Steiner’s analysis, a person is free if the object is exclusively present to hand at the time. Therefore, simple physical availability is required, not title. Title would be conceptually necessary if it were the only way to ensure availability of products necessary to effect liberty, but this is simply not true, as the existence of time-shared and leased arrangements attests. One could press a claim that titles are the best way to ensure liberty, but even if this were true, the claim that property rights are necessary has been abandoned.

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193 This is not the same as the “no new duties” line, which could also be run from a self-ownership angle.
194 Here, I draw on the work of Gerald Gaus in “Property Rights and Freedom”, especially pp 231-5
Were titles necessary, which it seems they are not, the second claim needs establishing, namely, that titles must amount to full liberal rights of ownership. There are three reasons why this will not succeed. First, in earlier chapters, we found that Locke falsely assumed that the title granted to an appropriator, in order to affect self-ownership and liberty must be of a particular type. Some objects of external property resist an adequate fit with full liberal rights, so the insistence that all titles must be full liberal will be impossible.

More importantly, if property rights define a person’s negative liberty then the extent of one’s liberty is the sphere of one’s property rights over objects. But not all the incidents of full liberal ownership are necessary for liberty. A rule preventing transfer of property, for example, only ensures that the extent of liberty remains static. It does not violate liberty. Full liberal rights are not necessary for freedom.\(^{196}\) Further, if a libertarian attempts to salvage their case by claiming that liberty does require the ability to transfer, there is an interesting and odd implication. One expands or attenuates one’s freedom as one expands or attenuates one’s property rights! But this is a serious revision of the ideal of equal liberty, so central to liberal and libertarian theory. We demand equal basic liberty to pursue projects, not an equal right to acquire liberty. If we were to insist on the latter, there is a good chance one will end up in an inferior moral position with respect to others. Libertarians cannot accept that the rich have more freedom than the poor. In fact, typically, they vigorously argue precisely the opposite, against those more left leaning.\(^{197}\)

Finally, let us assume, contrary to my earlier arguments, that owning one’s powers entails the right to manage, to gain income from, and to exercise those powers. Let us further assume that this is only possible through rights over resources. This logical connection between self-ownership and property ownership still leaves space for a vast assortment of property regimes. In fact ironically, the most obvious regime-type it excludes is the very one Nozick offers: a regime where some people may lack any access to property. Under the ‘conceptually necessary’ thesis, one bereft of property is bereft of self-ownership.

### 5.4.2 Property as Instrumentally Necessary for Liberty

Nozick argues that ownership of one’s body and talents “circumscribes an area of moral space around an individual”.\(^{198}\) For him, self-ownership amounts to the thesis that only I have the right to direct my actions. In order to have freedom to do so, I must have the right to deploy and exploit my abilities and to keep their fruit. So society ought to ensure that this opportunity is not taken away. Without the freedom to appropriate external objects and pit one’s enterprise against nature,

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\(^{196}\) For libertarian agreement on this point, see Eric Mack, “Self-Ownership and the Right to Property”, *The Monist* 73 (1990): 519-43, p 536. Here, the “organising idea” of private property includes the idea of “sanctioning expansion of personal spheres of authority so as to secure individuals inviolability in their respective life projects”.

\(^{197}\) Gaus, “Property Rights and Freedom”, pp 233-4

\(^{198}\) Nozick, p 32
ownership of self and talents is worthless. Full liberal property rights in the world are instrumentally necessary for liberty.

The weakness with this view lies in how difficult it is to find any compelling reason why self-ownership requires strong property rights. These property rights must be shown to follow naturally from the expression of one’s self-owned talents. But as Waldron has argued, we cannot understand what follows from the expression of self-owned talents independently of social frameworks that define one’s relationship to other people.\(^{199}\) These frameworks vary and where they yield rights, the type they yield will vary too. There is no determinate amount of property or type of rights that constitute it that flows \textit{naturally} as the entitlement for acts that express self-ownership in the world.

Nozick is mistaken in thinking that self-ownership necessarily yields absolute property rights: it is compatible with various regimes of ownership. Self-ownership, liberty and property are linked, not by conceptual or instrumental necessity, but through a more general link between rights and freedom. Rights, especially rights of property and liberty, give each person a moral space within which he is free to operate. As Lomasky has it, rights give him “a kind of sovereignty … [according] a zone of protected activity within which he is to be free from encroachment of others”.\(^{200}\) But these rights have a plurality of justificatory principles; liberty and self-ownership surely but also desert and the wrongfulness of harm to others, are foundational to the justification of property.\(^ {201}\) The type of property institution that emerges will be given by a balance of the moral weight of those principles.

Finally, so far I have assumed that there is something useful to be gained by describing the rights we have with regard to ourselves as self-ownership. But, as I argued in chapter 2, I suspect there is no real advantage in employing the language of ‘propriety’ over a discourse focussed merely upon individuals’ rights of free agency. Nozick argues for self-ownership by dismissing alternative \textit{locations} for ownership rights. That is, he dismisses the idea that we are partly owned by others. He fails to consider that proprietary notions are just out of place. The question “do we have self-ownership?” can only be answered if we are prepared to ask what type of ownership in ourselves we possess. And this question quickly dissolves into the questions “what rights over ourselves do we have?” and “what is the relationship between these and the responsibilities we owe to others?” The assumption that this set of rights and duties amount to full liberal ownership, begs the question. Further, we lose nothing if we abandon talk of property in oneself altogether and talk only of those rights, liberties, and immunities.\(^{202}\) There is no need to rest our ideas of how we distribute powers of control on notions of property alone.

\(^{199}\) Waldron, \textit{The Right to Private Property}, pp 401-4. I adapt Waldron’s point (which is directed at the charge that Rawls denies self-ownership) to make this claim about the indeterminacy of the fruits of self-ownership, more generally. See also John Rawls, \textit{A Theory of Justice} (Cambridge MA: Harvard University Press, 1971), p 74 and p 104.


\(^{201}\) The list will contain at least these. Basic need could be added (see Gillian Brock, “Just Deserts and Needs”, p 169) and this will lead even further from full liberal rights.

\(^{202}\) Ryan, “Self Ownership, Autonomy and Property Rights”, p 248
5.4.3 “Makers’ Right” and the Ownership Problem

Since Nozick holds an historical entitlement theory, the legitimacy of how one becomes an owner is crucial. The defence of a PJA depends not only on showing a proviso is satisfied, but also on showing why a good comes to be owned by a particular person. Without this, the character of Nozick’s theory of justice loses its historical nature.

If self-ownership will not do it, there is a second chance. Nozick could claim that producers gain an automatic right over products of their crafting. Recall that, in his discussion of Locke’s response to the ‘ownership problem’, he rejects Locke’s labour mixing theory. Yet he offers no alternative mechanism to the operation of labour and must appeal to it to ground the entitlement process. He seems to opt for a makers’ right approach without direct acknowledgement of the fact. For example, he says “the situation is not one of something’s getting made, and there being an open question of who is to get it.”203 So, unofficially, Nozick is Lockean on labour. All the limitations that followed for Lockean property will attach to Nozickian property as well. These include: limiting inheritance to the requirements of maintenance and a limit to the extent of entitlement due to the contribution of factors other than labour. These conclusions are hardly libertarian.

Yet Nozick opts for full liberal rights and needs these for his theory to proceed. Are there any grounds for this? Nozick might argue that full rights are entailed by the concept of property itself. Yet this fits uneasily with his own definition of property:

The central core of the notion of a property right in X … [is] the right to choose which of a constrained set of options concerning X shall be realised or attempted. The constraints are set by other principles or laws operating in the society.204 Consequently, the concept of private property is indeterminate, with respect to the specific rights it conveys. The particular laws operating in a society act to make it determinate, but these are variable artefacts.

Nozick could respond by tightening the set of “other principles or laws” that are morally justified, in such a way as to leave full liberal rights as the only option those laws will allow. In fact, he identifies the other principles or laws as “the Lockean rights people possess (under the minimal state)” and this could be seen as an attempt to do just that.205 Yet, this option is scuttled in no less than three ways. First, as we have seen in chapter 4, Lockean rights do not yield such strong property rights. Second, those Lockean rights, themselves, include property rights, so there is no non-circular way for Nozick to make his property rights determinate. Third, the fact that the constraints are externally set by “other principles or laws” immediately cuts the ground from any attempt to claim that full rights are entailed by the concept of property itself. We must conclude that, contrary to his desire, Nozick’s view is saddled with the doctrine of “makers’ right” and all its consequent limitations.

203 Nozick, p 160. See also pp 185-7 and p 225
204 Ibid, p 171
205 Ibid
Throughout section 5.4, I have explored the claim that the duties that acquisition creates are justified. They may be justified, if self-ownership requires the assignment of strong property rights over the objects, upon which a person labours. We have found that no strong link between self-ownership and property can be sustained. Further, even if it could, it would undermine, rather than support, libertarian-style property rights.

5.5 Does Nozick’s Theory Give Environmental Protection?

We are down to the last dog. Can the libertarian position be saved by claiming that the very real burdens of property duties can be compensated? Here I argue that, contrary to most assumptions about the implications of Nozick’s theory in general and his compensation mechanism in particular, his view yields significant environmentally motivated limits.

Most commentators are of the view that Nozick’s theory does not sufficiently protect other people. Specifically, for my purposes, it does not allow the kinds of limits on property rights that environmental protection legislation would entail. Robin Attfield, for example, is critical of the theory, as it does not allow the extensive obligations to future generations that he thinks are obvious. The strategy is to show that sufficient implications of the theory are counter-intuitive and force us to reject or revise it.

I will argue that the assumption that Nozicks’ theory gives only minimal obligations to future generations is a mistake. Obligations to future generations may well be extensive and they derive from core elements of Nozick’s theory, notably, his concept of a ‘baseline’ and the need for compensation. This defends Nozick from the objection that counter-intuitive implications follow from this theory, but saddles him with a more restrictive set of property rights than he would want, disarming those who would use his theory to argue for minimalist environmental legislation. Moral rights, of current and future people, recognised by libertarian justice will include rights to environmental goods. This gives indirect support for environmentalist policies, by showing that such policies are required, even by a view of justice usually deemed unlikely to generate them.

5.5.1 Nozick on the Proviso

Here, I must return to exposition. Nozick comments that the Lockean proviso is “meant to ensure that the situation of others is not worsened”. There are two factors to this idea. The first is the definition of “worsening”. He suggests that worsening can be construed in two ways. One is a more stringent sense: an appropriation worsens if someone loses the opportunity to improve his situation.

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206 See for example Kymlicka, p 98 and p 103; Waldron, The Right to Private Property, p 267.
208 Nozick wants to exclude pecuniary worsening and other forms that arise from limiting the opportunity of others, including the functioning of the free market. There is a possibility of fatal circularity in attempts to exclude these. Since my focus is elsewhere, I will not pursue this.
or if someone is no longer able to use freely what he previously could. The other is weaker and amounts to holding only the former part of the more stringent one: an appropriation would be wrong only if someone lost the opportunity to improve his situation.

Nozick opts for the weaker version. A particular appropriation is legitimate if it does not decrease, in a way that makes anyone worse off, others’ opportunity to improve their situation by taking the resources to which people would have access in a state of nature. Nozick judges “better off” and “worse off” in economic terms; as attainable bundles of goods between which we are indifferent. Nozick evaluates a regime by its increase in production, at the level of the individual. Pivotal in this is the choice of a comparison regime. For Nozick, it is the pre-ownership state. Productive improvements must be Pareto-superior to the state of nature. 209

Nozick concludes that worsening is measured by comparison to a baseline of opportunities to use resources in the state of nature. Importantly, the baseline is not defined as a level of welfare, such as the meeting of basic needs, but it will determine a level of welfare. The baseline is defined, instead, by opportunities to use and enjoy resources available in the state of nature. A difficulty arises in fixing the baseline in a non-arbitrary way. Nozick claims that, since it is set in comparison with the state of nature, it will be low. However, he says little about it, beyond a few lines of text and a footnote. 210

The second factor in Nozick’s account of worsening is the compensation mechanism. It is acceptable to appropriate a good, even every item of that good type, if you leave substitutes, as these prevent others from being worse off. Such a substitute could be anything that equally contributes to a person’s welfare, for example, a technological advance. Nozick thinks that society owes compensation to people deprived of liberties generally, and opportunities to make use of available resources specifically, but only if this constitutes not only a loss, but a net loss, defined in terms of the baseline. This leaves room for legitimately crossing the borders of peoples’ rights (defined by what they would have held in the state of nature, including liberties and opportunities) provided suitable compensation is given. 211

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209 Another problem not pursued is the following: this baseline is so low that most other regimes are also legitimate. Can the development of full liberal rights to property be defended as the most legitimate? Only if all moves toward it from other regimes are Pareto-superior. This is very unlikely. See Cohen, “Nozick on Appropriation”, p 95-101


211 There is another problem with the compensation mechanism. The level of compensation required is calculated by a counter-factual: the price that would have been agreed. Yet, since the market generates outcomes only relative to a given set of initial endowments and, since it is changes in these endowments that are being compensated for, there is no non-circular way to calculate due compensation. I will not pursue this, but see Amartya Sen, “The Moral Standing of Market”, Social Philosophy and Policy 2(1) (1985): 1-19, pp 9-14. Further, Nozick’s compensation mechanism is a big shift in the conception of rights underlying the entitlement theory: from deontological to consequentialist. See section 5.6 below.
5.5.2 The Baseline and Border Crossing

Here I show that, curiously, Nozick’s view threatens to justify significant restrictions on property use. Nozick could avoid this by employing one of a number of strategies, but, I argue, none of them are available to him without large sacrifice. I give two reasons why Nozick’s view will justify strong protection.\(^{212}\) The first is a problem, only on one reading of Nozick. I will deal with this only briefly. The second is a problem, regardless.

The first reason is as follows. One hundred pages prior to his discussion of justice in property acquisition, Nozick outlines more demanding conditions on when border crossing, with respect to person or property is acceptable. He concludes that border-crossing acts could be justified, if fully compensated, provided that attempts to garner consent from the affected party were made, but either the affected party was not able to be reached or negotiation was too costly. (An example of an overly costly consent process would be, if the identity of the affected party can only be ascertained by a costly survey of the whole population.) In his words: “Any border-crossing act which permissibly may be done provided compensation is paid afterwards, will be one to which prior consent is impossible or very costly to negotiate”.\(^{213}\) (The phrase “consent was not possible” refers, not to cases where consent was denied when asked, but to cases where, merely asking, is costly or impossible.)

It would seem that, in all cases where the affected party could be asked for consent, but the reply was negative, border crossings are illegitimate. This would mean any person whose property or person was assaulted by pollution would have their rights violated and not even the offer of full compensation would justify it. Given that, in many cases, pollution covers a wide area, it is overwhelmingly likely that at least one person or property owner will refuse consent. The minimal state would be required to prohibit such polluting activity. This would demand very stringent environmental legislation.

I cannot be sure that this implication will obtain, since Nozick’s discussion of compensation is unclear. He discusses a case of pollution: the “dumping of negative effects upon other people’s property such as their houses, clothing and lungs, and upon unowned things which people benefit from such as clean and beautiful sky”.\(^{214}\) Here he seems to forget his “prior consent [must be] impossible or very costly to negotiate” clause and suggests, instead, that border crossings are permissible provided only that the benefits of the polluting activity outweigh the cost and winners compensate those on whom the pollution falls. In this case, the above problem won’t bite. It is hard to know which his view is, so I will not insist on this point.\(^{215}\) But many of the environmental harms I

\(^{212}\) I will not pursue the usual complaint (pressed by Cohen, Kymlicka et al) that the baseline is too low. This is to reject an element of Nozick’s theory, rather than to accept the theory as it is and see what emerges. The usual strategy may be more direct, but it leaves open the possibility of a flat denial that the baseline is indeed too low.

\(^{213}\) Nozick, p 72

\(^{214}\) ibid, p 79

\(^{215}\) Elliot, p 221
have in mind - cases where future people could be harmed by current acts - are cases where, psychic mediums aside, it is not possible to gain consent. Even if the problem is a real one, it won’t be effective in the cases I desire it to be.

Let us assume the second reading; that Nozick thinks it permissible to impose risks of property violations on others provided only that this occurs within a system that compensates those on whom the risk eventuates. The key issue is appropriate compensation: how do we evaluate what counts as fair compensation, especially when the compensation offered is deemed insufficient? In Nozick’s example of an airport, a noise-affected neighbour may insist that the only appropriate compensation would be the closure of the airport. This threatens to lead Nozick to the unwanted conclusion that severe restrictions on use rights associated with property ownership will be required to protect access to environmental goods.

Nozick could avoid this outcome by employing a number of strategies. The first chance for escape is as follows: perhaps the airport’s neighbour is still in a position of net gain, as she would prefer modern society, even with the noise nuisance, to returning to the state of nature. She is in fact compensated.

Yet if someone values the good very highly, or sincerely argues it is lexically prior to what is offered in return, the compensation will not seem sufficient. To see this, consider a similar example, but where the affected parties are not so attached to the benefits of civilisation. Imagine a family of back-to-nature advocates who acquire land in an idyllic valley, with a small stream and native trees, to live unencumbered by the stress, noise, and bad smells of industry. They grow their own food and make their own clothes, living at a material level above the state of nature baseline, but with little input from industrial society. One day, the family awakens to the sound of jack-hammers. A polluting industry is being constructed upwind and before long they suffer dust, smoke, noise, and other fallout. They are offered compensation, but argue sincerely, that nothing but the closure of the industry, given that this is the only way to stop the fallout, will compensate them.

Nozick thinks that society owes compensation to people deprived of opportunities to make use of available resources, but only if this constitutes a net loss. Yet, we have found a family who sincerely judge that, even with the supposed compensations of society, they are driven beneath the baseline. The victims complain that they do not have free access to something they would have had in the state of nature and, crucially, that the compensation offered is not a net gain. It would appear their Nozickian rights have been violated. On a side-constraints view of rights, the violation seems unjustified. Nozick could recommend that the right be violated anyway, perhaps moving the harassed residents to an area generally accepted to be more desirable and throwing in some extra

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216 I adapt an example used by Robert Elliot. See Elliot, p 222
217 Elliot, p 223
cash. This would not fully compensate them, but may still be deemed reasonable. But this is in clear contradiction of his conception of rights that forbids others to violate those moral constraints in pursuit of their goals.

There is a second and obvious out. One might reply that the family has benefited from civilisation in the past, and so, they have tacitly consented to whatever sacrifice of local environmental quality was necessary to achieve such benefits. This industry is one of the classes of industry necessary for such production. The family are, scurrilously, using a ‘not in my backyard’ complaint, which aims only to make an exception for themselves, rather than opting to play their part.

Robert Elliot has argued, however, that this line of defence is not available to Nozick and this can be seen from the latter’s treatment of the free rider problem.\textsuperscript{218} In an example within that discussion, Nozick asks us to imagine someone fortunate enough to live in a town where some town-folk organise a roster of residents to provide a public education broadcast. This person, who has enjoyed the broadcasts of her peers, but did not consent to do her own, finds that on the 138\textsuperscript{th} day – her allocated day – she would prefer to do other things. She refuses, and her preference to decline is strong enough that she would prefer to have missed out on the previous 137 days of enjoyment, rather than to take her turn. Nozick believes that she has no obligation and he concludes “you may not decide to give me something, for example, a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on”.\textsuperscript{219}

For our rustic family, benefits from past production entail neither consent to the sacrifice of clean environments and intact ecosystems nor a preference for industrial production. Further, consent to some level of industrialisation does not entail consent to any amount of it. The level of comfort found in pre-industrial or early industrial times may be preferred to that found in an advanced one, if the last comes at the sacrifice of the full integrity of ecosystems enjoyed in the state of nature. A local forest is available in the state of nature and at low to moderate levels of development. For some people, no advanced level of civilised life would compensate for its destruction.

Even if Elliot’s reply to this objection were to succeed, I think Nozick could attempt to escape by a third route. He could formulate a rule as to what counts as compensation, which would exclude cases where people have such odd preferences as valuing forests over the products of highly polluting industry. He could say that ‘reasonable’ compensation only, must be offered. If accepting the benefits of technology at the expense of some harm is judged reasonable then the aggrieved parties' borders are not transgressed.

\textsuperscript{218} ibid
\textsuperscript{219} Nozick, p 98
I believe Nozick cannot make this move. It would require assent to the idea that the decision about the value of one’s preferences can be made by other people. Others would decide, for our back-to-nature family, what will compensate them, determining their assessment of the value of unspoilt landscapes. Nozick’s strong commitment to the right of an individual to decide his own conception of the good would seem to rule this out. Preferences, for Nozick, are subjectively valuable. Again, the public address story is instructive here. The protagonist in that tale has the right to decide what to do with her time, regardless of the content of her preference in how to spend it (as long as others’ rights are respected) and, specifically, regardless of what others think she should prefer. Nozick cannot oppose paternalism when it threatens property rights and then endorse it when it is required to generate such rights. If our hippy family values clean air so highly that compensation is not possible, without closing the factory, they are not compensated by anything else.

Nozick’s theory – if sufficiently sensitive to individual’s assessment of the benefits of civilisation and what will not count as compensatory benefits – will limit property use to a greater degree than he intends. The destruction of environmental sites and resources may worsen others’ position, by their subjective lights, in a way they do not regard as compensable. Their Nozickian rights are unjustly violated.

5.5.3 Conservation Policy and the Baseline

When we apply this result to conservation policy and environmental law, strong protection for access to environmental goods will follow. So far as resource conservation policy is concerned, the Nozickian scheme requires the division of resources into two kinds. On one hand are resources that are accessible to an individual in a state of nature. These include pristine beaches, clean air, unpolluted water supplies, wild rivers, virgin wilderness, and landscapes of great scenic beauty, as well as whatever productive resources are available, without technology and developed society. On the other hand there are resources which require a certain technological sophistication to extract and use. These include oil, coal, iron, and most of the resources which contribute to the high levels of welfare associated with modern civilisation.

Some have argued that only the former goods, with few exceptions, will need to be protected. In many cases, what is at stake is preservation of those goods available at the baseline. Many of these things are either no longer available or will not be at hand in the future because of past and current appropriations. If maintenance of the resource baseline for future generations entails sufficient availability of these resources then we will be morally obligated to ensure enough is left.

I concur that these will need protection. I argue, however, that the protection of baseline resources will include some natural resources, not accessible in the state of nature – that is, the second of the two resource classes. We have come to rely on some resources, the conservative use of which may

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220 Elliot, p 225
be necessary to prevent future people or our future selves falling beneath the baseline. A sudden exhaustion of fossil fuels, for example, risks at least some people dropping below the baseline. This could eventuate if the supply chain of goods and services were to be suddenly interrupted. Countries that must import most of their food may be this unfortunate.\textsuperscript{221} In this case, a property scheme that allowed too much appropriation and use to occur too quickly would be illegitimate by Nozick's lights. Such catastrophes do not result from bad luck, but rather from our disruption of ecosystems and their services that were available before or from past human action that ruled out solutions to the disaster.\textsuperscript{222} Further, some resources, which may have vital and catastrophe-avoiding future uses, might already have been appropriated under compensation schemes which, while seeming sufficient at the time, will later prove to be inadequate.

We must ask what environmental protections this will yield. Nozick's proviso limits the legitimacy of appropriations, but it does so, importantly, not by appealing to others' needs, but by appealing to what was available in the state of nature. The baseline, as I noted, is not a level of welfare, but it may set a level of welfare. Since the relevant details in Nozick's theory, especially regarding when border crossing with compensation is justifiable, are thin on the ground, it is difficult to say with certainty what the Nozickian view would be. Yet, from the discussion of resources accessible in the state of nature, policies to ensure there is sufficient access to unspoilt environments and the resources these contain, would be required. Further, the discussion of resources requiring some technological sophistication points to policies that minimise the degree to which people would drop below the baseline, if the worst occurred, including precautions against resource overuse and a conservative energy policy.

These strategies would require some constraints on the activities of the free market, since, without some state intervention, it is difficult to see how market processes could guarantee they do not produce the undesirable effects. They would also require careful sculpting of property rights, which include limits on allowable uses. I suggest that a set of environmental rights (themselves side-constraints?) would emerge, which function to further restrict use of property. This would apply both to objects of property that have themselves a high natural resource component, and to objects of property, the use of which, has a significant effect on those resources which do (such as, industrial property that generates large amounts of air pollution).

To conclude, I note that it is Nozick's side-constraint view of rights that generates these restrictions on the use of property. He could avoid the conclusions I have pressed by weakening his conception of rights, but this would herd him toward a rights conception more like the one I advocate in this thesis, which allows environmental protection by a different route.

\begin{flushleft}\textsuperscript{221} In part, this is a consequence of the large population that has been made possible, in many societies, by an increase in the technological power to access and produce resources. This would not be sustainable if resource availability suddenly crashed.

\textsuperscript{222} Elliot, p 225\end{flushleft}
5.6 Is Nozick’s Theory Applicable to Environmental Cases?

Section 5.5 completes the critique of the “four-dogs defence”. For the sake of argument and counter to my own belief, I have assumed that libertarian property rights are coherent and the correct general theory of property. I have argued that, under Nozick’s theory, potentially extensive environmental protection will be justified, including large limits on property use.

In this section, I observe what happens if I am wrong about that. Assume, what Attfield feared, that libertarian property rights give little protection for non-owners, especially future people, against current owners’ harmful use of property. Is there a way to defuse the threat that we would be stuck with such minimal environmental protection? I believe so. My strategy is to argue that Nozick’s theory is inapplicable to objects of property that I am concerned with.

5.6.1 Pollution as a Negative Externality

Nozick recognises that subsequent to original acquisition, transfers of holdings can have adverse effects on people not party to the transfer. His concern is with extreme cases where, for example, one individual managed to purchase the entire water supply of a country. This, he says, would violate the ‘historical shadow’ on the Lockean proviso. I use his recognition of these adverse effects on third parties, in a different way, through a discussion of negative externalities.\(^{223}\) A Nozickian view of rights may work for classes of object that admit of few externalities (I doubt this, but let us concede it). I argue that, where negative externalities are large (and environmental resources are the most striking case of this), such a conception of rights is inadequate.

I begin by noting that spill-overs and side-effects are the rule, not the exception. The very idea of society as a set of people behind their fences with no effect on each other, except via voluntary exchange, where the effects are known and consented to is hopelessly distorted. Nozick, sensibly, suggests that we cannot plausibly hold that all negative externalities should be prevented. His example is loss of profits due to market competition and there are numerous more mundane instances. For example, buying the last 6-pack at Foodtown has negative externalities on the next shopper, stopping in hurriedly before an All Black test. No world of any complexity can exist without externalities at every turn and only some of these are of moral significance.

We need a less prohibitive view of when such externalities matter. For rights theorists, externalities matter whenever they infringe on rights. For Nozick, when Fred and Wilma make a deal, Barney, having no claim on their holdings before, has no claim on them afterwards and so none of his rights are infringed. Yet externalities to the deal mean that protecting rights necessitates more than preventing force and fraud. The same complications, that sometimes make the results of voluntary exchanges inefficient, may also make them rights violating. This much is familiar and has been said

\(^{223}\)Roughly, “negative externalities” is the name given to costs that do not bear on the decision-maker, but adversely affect others. I discuss this in greater depth in chapter 6.
by Cohen while discussing Nozick’s “Wilt Chamberlain” example.\textsuperscript{224} Also, as Buchanan notes, the claim that transfers, which result in some people starving, upset charity not justice, begs the question as it assumes that “the nature and scope of individual rights and hence the requirements of justice can be specified independently of considering the need to prevent extremely undesirable cumulative effects of actions which in isolation appear to violate no one’s rights”.\textsuperscript{225} “Capitalist acts between consenting adults” can have unintended consequences that violate the rights of others and some of these must be restricted. But I suggest two problems arise here.

5.6.2 The Problem of the Ubiquity of Rights Violations

Nozick’s theory will yield too restrictive an approach in cases where rights-violating externalities are endemic. What is notable about activities requiring high input from natural resources and activities which use the environment as a waste sink is that on a scale with “little or no negative externalities” at one end and “large-scale negative externalities” at the other, these activities are more typically found toward the latter end. Even strangers, who have no direct economic contact with each other, are connected through reliance on a common ecosystem.

In Nozick’s view, rights are absolute side constraints. Rights violations, except in cases I discussed earlier where compensation is given, are simply forbidden. This yields the following problem. If consent is needed before violating anyone’s right then there is almost nothing one can do with one’s property, when it impacts the environment that others share and have rights over.\textsuperscript{226} I could not use fertilizer if it leached next door or into the local lake. Nor could I warm my house with a fire if soot landed on property down the road.

Even the least severe compensation regime where all violations are permissible when compensation is given – a more lenient scheme than Nozick would allow, at his most relaxed – would be overwhelmed by the calculations necessary to determine compensation for a myriad little rights violations. Further, even with compensation, these are still seen as rights \textit{violations} and a theory that allows so many of these starts to look as if it is not really a rights theory at all. Nozick himself, spills ink over many pages arguing we should limit the number of even compensated rights violations.

I suggest the problem stems from a picture of the nature of moral interaction between people. If we take seriously the fact that we are linked to each other via an environment, we soon grasp the patent “inaptness of a conception of morality that pictures individuals as set apart by property-like

\textsuperscript{224} Gerald Cohen, “Self-Ownership, World Ownership and Equality”, in \textit{Justice and Equality, Here and Now}. ed. A. Lucash, (Ithaca: Cornell University Press, 1986), p 25. Note that in the Wilt Chamberlain case, Nozick’s claim, that voluntary transfers produce just results, ignores his discussion of his own proviso, where he admits that voluntary transfers can run afoul of the proviso. For example someone may, by voluntary transfer, acquire rights to all of the only water supply, but this result violates Nozick’s proviso and the rights are no longer valid.


borders, having their effect upon one another largely through intentional action,… free to act as they please within their boundaries, although absolutely constrained by them.\textsuperscript{227}

Perhaps some uses of property will be of the type Nozick pictures, where these boundaries can be well drawn and actions have few morally serious externalities. Here, given our assumption that Nozick’s theory is the right one, his conception of rights will hold. But for those activities with a significant impact on environmental quality, it seems that a rights conception based on this is unworkable. Real markets will set conventions to solve the externalities problem, but they will not look like inviolable side-constraints. The theory is inapplicable to environmental cases.

\textbf{5.6.3 The Problem of Shaping Specific Rights}

If rights are to be side-constraints, perhaps we could circumvent the above problem by designing the incidents of property so that owners’ rights do not extend to prohibiting these small externality-driven violations. But this leads us to another problem.

In chapter 1, I distinguished the formal conception of rights from the substantive conception. Nozick’s conception of rights as side constraints tells us about the absoluteness of the duties attached, once the (substantive) shape of the rights incidents has been decided. But a property rights theory must also tell us how these rights are generated and crafted. Nozick is purely deontological about the factors which shape rights also. I suggest that, without any appeal to consequences to make rights determinate, the principles he relies on are too sparse to do the job.

It is difficult, on the basis of deontological rights and without any utility considerations, to define the specific set of property rights needed to regulate people’s conduct toward each other. Think of what would be needed in order to address the problems raised by externalities within such a framework. Either Nozick must somehow use the general notions that underline such rights - notions of agency, autonomy, and equality - to derive the intricate and precise specifications of property rights needed or he must show how such rights can be legislated, by some legal authority, within the constraints of natural rights.\textsuperscript{228} It is not the nature of rights (as side-constraints) that generates this problem, but the process Nozick uses to determine what powers the rights will give.

The second option is not open to him. For Locke, actual property rights are constrained by natural rights, but are themselves social constructions, from agreement under civil society. But Nozick cannot accept this Lockean option for it grants to states more authority than he thinks is legitimate. What is more, it undermines a purely deontological view of rights. If property rights can be socially constructed, their content depends upon their consequences. If this were to be the case, the purely

\footnotesize{\textsuperscript{227} Peter Railton, “Locke, Stock and Peril: Natural Property Rights, Pollution and Risk”, in To Breathe Freely. ed. Mary Gibson, (Totowa: Rowman and Allenheld, 1985), p 119
\textsuperscript{228} Hausman, p 102}
historical force of Nozick’s thesis – that only the history of interactions, not the resultant patterns or consequences is relevant to justice - would collapse.\textsuperscript{229}

The first option is no better. How can the ethereal notions that underlie such rights - notions of agency, autonomy, equality, and respect – be precise enough to derive the level of detail needed to guide us in discussions concerning when externalities raise questions of justice, and so tell us what natural rights to property will encompass. While I have no real argument to show that this task is impossible, I concur with Hausman in disbelieving that "considerations of moral autonomy will decide what air or mineral rights individuals have".\textsuperscript{230} To put it the other way, real legal rights must be complicated, in ways Nozick cannot allow, given the rest of his theory. And without allowing consequences of rights assignments to influence what rights are granted, the task of showing what specific property incidents natural rights to property will yield seems too fine-grained. But allowing such consequences moves Nozick away from deontological rights.

To conclude, to the extent that a theory of property\textsuperscript{231} gives centre stage to the exceptional case of independent action, free of all spill-overs, it is deficient. While all property theories that appeal to rights will be guilty here, some are more so than others. Those more guilty, will be those that view rights as less violable and those that allow less shaping by consequential factors. Libertarian theories are most guilty, and guilty on both counts.

This highlights a conflict between Nozick's conception of rights and his desire for them to be filled with simple content, based on owners' interests. Nozick cannot both realise a side constraint conception of rights and maintain the simplicity and strength of the incidents of property inhering in owners. He could abandon property as side-constraints and retain strong and simple incidents. Property rights could include the right to use property in whatever way one sees fit, but only if the conception of rights used holds that they are easy to trump, by appeals to competing rights or interests. All the difficult moral work is pushed off from the task of crafting the right to the task of deciding when it is to be overridden and what factors, including other rights, bear upon this decision.

On the other hand, to maintain Nozick's approach that rights cannot be over-ridden, except in extreme circumstances, it becomes obvious that specific property rights, liberties, powers, and immunities will need to be complicated and nuanced. While, in the earlier case, rights could more clearly track the interests of one person, here they must carefully balance the competing claims of all those with a moral stake in the resultant distribution of powers and goods. In many cases, the resulting rights will look very complicated, be multiply constrained, and have numerous qualifications and exception clauses.

\textsuperscript{229} Ibid, p 103
\textsuperscript{230} Ibid
\textsuperscript{231} Of property and of justice more generally, though I will not pursue that here.
I note that the rights conception I favour can avoid both problems I raised above. This conception allows few violations, but is sensitive to many competing factors in decisions about what rights are granted. In the first problem, such a conception would weaken the set of restrictions thought to unduly impinge upon the freedom of others, generating fewer violations. The second problem would not arise as consequences are admitted in the rights-defining process.

Such a view could also account for the negative externalities of decisions made between two people and bring that force to bear as a constraint against the content of some of those decisions. This points us toward the conception of property rights I favour, which gives a public say in the cumulative effect of such decisions.

### 5.7 Conclusion

In this chapter, I have removed successive defences of the libertarian position on property. I focused mainly upon the definition and consequences of Nozick’s proviso and the rights-type he proposes. I argued that Nozick’s theory justifies potentially large environmentally motivated limits on the use of property. The destruction of environmental sites and resources available in the state of nature may violate Nozickian rights.

I reinforced this result by arguing that Nozick’s theory cannot help us in many environmental cases, since it is not applicable to many environmental goods. He could avoid the conclusion by weakening his conception of rights, thereby allowing environmental protection by a different route. This removes the most important barrier to developing my view, that property rights in environmental resources are partially contoured by factors such as need, participation, and other patterned concerns.

We should be drawn away from strictly deontological property rights conceptions, towards rights theories that permit the consequences of rights assignments to influence what rights are granted. A conception of property rights appropriate to environmental resources is unlikely to leave the shape of rights in the hands of a one-off acquisition process. Such a conception will be pluralist, and I note, with Stephen Munzer that “pluralist theories are not second-class citizens, temporary truces or weary compromises whose interest stems entirely from their components”. Rather, they are often the only way to deal honestly with the uncertainty and complexity of moral life. In the case of property, a pluralist theory is sounder than any monist competitor.

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232 Munzer, p 293
Chapter Six

Utility and Efficiency Arguments for Property

6.1 Introduction

This chapter explores utility-based arguments for property. I attempt to answer many questions. Does utility provide a justification for operating a property rights regime? If so, what is the content of those rights? Do certain types of goods, because of their special characteristics, contribute to utility in ways that suggest that the nature of property rights over those goods is different to those over other goods? Specifically, what rights cluster does the utility argument justify over the objects I have in mind: natural resources, landscapes, and sites of important ecological value?

In political philosophy literature, I identify two central utility arguments and a number of sub-arguments, most of which support the central ones. The first, as formulated by Lawrence Becker, I will call the Personal Utility argument. This argument traces the utility that accrues from control over personal and productive goods. The second, which I will call the Economic Efficiency argument, is based upon the efficiency of private control, through the internalization of externalities and the provision of labour incentives. I divide them thus for two reasons. One reason is that the first argument focuses on the direct happiness of individuals that accrues from their own control of objects, while the second emerges from spin-offs from efficient production. The other reason is that they differ over what counts as utility. The second offers a more restricted, economic, definition. This division of utility arguments, while an accurate conceptual distinction, is difficult to trace in classical theorists who tend to make use of both. Thus, Bentham, for example, mixes premises about the personal disutility experienced due to unfulfilled expectations with the need for government to provide incentives for labour to maximize overall production.

In section 6.2, I consider the use to which utility has been put in arguing for property. In section 6.3, I address Becker’s individual utility argument, showing it to restrict the range of justified property regimes more than Becker allows. I focus on environmental cases to illustrate this. In section 6.4, on the economic argument, I take a different approach. Becker’s discussion of this line neither exhausts nor fully describes the arguments available, so I will not restrict myself to it. Instead, I place his arguments alongside others to construct and examine a broader economic case for property. While endorsing the argument in general, I suggest that the specific property regime that utility will demand does not always recommend full liberal rights, especially in some environmental cases. This is counter to the claim of many libertarians and free-market environmentalists.

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233 Becker calls the first the “traditional argument” however this is misleading and less descriptive.
6.2 Property and Utility

6.2.1 The Use of Utility in Arguing for Property

I believe that utilitarian arguments are strongest when they aim to justify the maintenance of an institution of property at all and become progressively less powerful when they attempt to justify more specific rights for specific people - an opposite feature to Lockean arguments. Almost all arguments for property refer to premises detailing the utility produced by the assignment of property rights. Non-utilitarian arguments are dominated by the figure of John Locke, yet even here we see an appeal to utility. Locke includes the following passage in *The Two Treatises*:

> But, on the contrary, the inhabitants think themselves beholden to him who, by his industry on neglected, and consequently waste land, has increased the stock of corn, which they wanted. (II 36)

Private appropriation of land is permissible, in part, because privately cultivated land is productively superior to its uncultivated counterpart. Without this claim, Locke could not be so sanguine about the appropriator injuring no commoner and neither could he imply that the commoners’ consent to acquisition is obviated.

Yet Locke is doing something very different from utilitarians. The important difference lies in the justification that a theory of property most fundamentally appeals to. Theories of property, following this difference, fall into three main types. The first is the doctrine that there are natural rights of self-ownership. Property rights are either natural or created by contract between individuals who are essentially proprietors. The remaining two types deny natural rights of ownership and, instead, see ownership as an artefact, dependent on instrumental considerations. The second accepts that individuals have rights and the shape of property rights the law may grant to individuals is constrained by the rights they have, prior to the law. The third of the three views holds that the justification of property is a matter of showing how a system of property rights and duties best promotes the general welfare. This is the utilitarian account of property. This theory insists that property is essentially a creature of the law and that ownership is justified, or not, for instrumental reasons. Further, it distinctively posits that those instrumental reasons do not themselves involve reference to rights. There will be all sorts of questions raised by an attempt to show which system is optimal from a utilitarian standpoint, but these will not be questions about the protection of people’s natural rights.

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234 Grunebaum offers two interpretations of Locke, the second of which sees Locke as a utilitarian. This is a minority position. See Grunebaum, pp 59-69

235 Nozick criticizes Rawls by saying that the latter views individual talents as communally owned. Much of this criticism amounts to a claim that such treatment of individuals is incompatible with taking rights seriously in this way.

There are two ways to make use of utility in arguments for property. The first is to employ it to produce a stand-alone case. One assumes, classically, that each person’s utiles\(^{237}\) count equally and that these utiles are the sole element with moral significance. Private property will be justified when it maximises utility, with respect to the activities it governs: largely the use, possession, and transfer of resources. While straightforward as a calculative method, this is subject to all the problematic features inherent in utilitarianism itself. The other way to employ utility is to use it within a broader account of property, (as one may if one holds the second option in the classification above). A complete theory of property, as Munzer is surely right to note, must include a principle that recognises the moral import of actions that affect each person’s happiness, welfare, and preference-satisfaction.\(^{238}\) Such a theory can sidestep many of the traditional problems with utilitarianism, since it does not assume that utility is all that matters.

### 6.2.2 The Scope of Utility Arguments

A utilitarian justification can be neither without conditions nor without context. It must be informed by specific contexts, as there is little reason to think that one form of ownership will maximise valuable consequences in all circumstances. A society with a low level of technology and sparse population may find one form of ownership optimal, but this same form may cause nothing but disputes and economic stagnation in a high-technology, high-density society. It cannot be without conditions, since, as conditions change, so may the value of the consequences produced by a specific form of ownership. A utilitarian justification, therefore, must either stipulate some set of conditions under which the argument will have force and the form of ownership will apply or it must empirically examine the context and conditions that actually exist.

Defenders of property rights argue that such rights block utility considerations that may favour redistribution. However, if property rights are justified by utility, they are not of a different and trumping kind from the claims that seek to justify redistribution. Property rights must, to be rights at all, trump most claims most of the time and even the claims of government some of the time, but they are not good against the considerations that warrant establishing them in the first place.\(^{239}\)

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237 A “utile” is a unit of utility. Utility can be cashed out in various ways. See 6.2.4 for more detail.

238 Munzer, p 3

239 Ryan, Property and Political Theory, (Oxford: Blackwell, 1984), p 95. This brings us to the question of the uneasy relationship between utility and rights in general. Bentham thought natural rights were nonsense and seemed to think even moral rights were inconsistent with utilitarianism. Mill, however, argued (in J.S. Mill, Utilitarianism edited by Roger Crisp, (Oxford: Oxford University Press, 1998), chapter 5) that a well understood utility theory would yield rights. Any moral theory allows for the existence of rights if it regards the interests of some individuals to be sufficient for holding others subject to duties and I assume that utilitarianism does this. For a defense of the compatibility of utility and rights, see Alan Gibbard, “Utilitarianism and Human Rights”, Social Philosophy and Policy 1(2) (1984): 92-102
6.2.3 Property through Utilitarian Eyes

Those used to thinking of property in Lockean terms must keep in mind that, for utilitarians, property is solely a legal concept indicating a set of rights, liberties, and powers over objects (defined broadly). It arises neither from special claims of the labourer nor through the embodiment of personal volition. Jeremy Bentham and James Mill, (in common, it seems, with most economists and lawyers writing on property) do not ask the question of what property “really” is. For those gentlemen, and for Hume before them, to own an object is just to have the most extensive set of rights over that object, offered by the law. Utilitarians do not see ownership as a concept with a moral life of its own. There is no internal link between people and their property and little is made of the possibility that a person’s labour is sacrosanct to him. Property is justified only through forward-looking concerns; property is designed to work and it works if it taps into individual energies to prosper us all. Thus, as we will see, once the case has been made for why property is justified generally and for why a specific type of property is legitimate, no pains are taken to establish independent moral grounds for why this person should have that item as her property. A common-sense understanding of ordinary human needs and wants, and an acceptance of everyday human ambitions, underpin the theory.

6.2.4 What Will Count as Utility?

Strictly, for a utilitarian, private ownership is justified if and only if the consequences of adopting and operating it are better than those of sustaining any other form of ownership. So, when considering utilitarian accounts of property, we must have some account of which outcomes to measure. Classical utilitarians set out to maximize utility, in terms of the balance of pleasure over pain. More recent versions choose preference satisfaction. This avoids convoluted debates around what counts as happiness or pleasure and the problem of interpersonal utility comparison. It has the further advantage of dovetailing with the efficiency approach, so loved by economists. In policy issues at least, a preference satisfaction account has largely supplanted the classical approach.

Yet in one sense, preference satisfaction merely picks out a central - perhaps the central - element necessary for happiness. People are happy when they get what they prefer. Yet beyond this, we can identify confidently many of the goods that promote happiness and many of the deleterious conditions that diminish it. Most attempts to list these goods will include some measure of control, privacy, individuality, stability, liberty, a healthy environment, the chance to pursue one’s goals, wealth, political participation, and the meeting of basic needs. Any list of the adverse conditions will include alienation, exploitation, poverty, environmental threats, and large power inequalities.

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241 Ryan, Property and Political Theory, p 95
If all goods are assessed solely by their utiles rather than by any independent moral feature, then one important question will be whether concerns people have for environmental protection can match other, sometimes competing concerns. In most of what follows I assume the antecedent of that conditional. However I am also interested in the question of whether some kinds of goods, (such as basic needs, sustainable environments, and preservation of certain natural sites), have especially strong status within any list of concerns. Such a view is promising for the following reason. There is a clear difference between urgent, objective needs and subjective preferences. The difference is not merely conceptual. It yields differential seriousness that each good should command when one evaluates one’s course of action. Utilitarians must be careful to avoid - if indeed they can avoid - assuming that, in a utilitarian calculus, no such distinctions exist. If they do not or cannot avoid this, a utility argument for property is seriously skewed since it ignores the degrees of moral force which these different categories can bring to bear on one’s actions. The goods I listed above are further toward the “urgent, objective need” than the “subjective preference” end of the spectrum.

If the promise of such a line is realized, it may be a helpful way to show how some, more necessary goods can have force against the subjective preferences that are so strongly protected by ownership rights. Unfortunately, this I must pass over, both for the sake of brevity and focus and because it is an issue for theorists of utilitarianism and I am not one of them.

6.3 The Personal Utility Argument

6.3.1 The Argument

To argue for property from utility, one views a private property regime as a means to the end of individual happiness, defined broadly to include the whole range of satisfactions. Becker identifies three forms of this argument: the general form, concerning whether there ought to be any property; the specific form, about what specific sort of property right there should be; and the particular form, concerning whether a particular person ought to own a certain thing. I will use this distinction. It is, however, hard to see how a general justification could proceed until some specific/particular elements are introduced. To stay at the general level, we would need an argument for property rights that neither specified what sort of rights they were nor told us who was to enjoy them. We could not draw a general conclusion that property rights are needed when some regimes would defeat or be inimical to welfare. We need to introduce some specifics at an earlier stage. As it turns out, my analysis, which targets a worry in the general argument that later becomes a larger problem in the specific version, is evidence for this.

242 My discussion of Becker’s personal utility argument dovetails well with this thought. As we shall see, it implicitly requires that such goods count strongly in a utility calculus.
I reproduce Becker’s argument below:\textsuperscript{243}

1. Humans need some rule-governed social institutions in order to achieve (the means to) a reasonable degree of happiness.

2. Some specific institutions are necessary for the achievement of happiness; others are merely useful, or not useful; still others inhibit or prevent the achievement of happiness.

3. Which institutions are necessary is determined by an examination of the social conditions which are required for happiness, but which are less likely to exist without rule-governed institutions. (Similarly, \textit{mutatis mutandis}, for institutions which are useful, useless, or detrimental for achieving happiness).

4. How those necessary institutions are defined is determined by how well the rules (and principles, policies and practices) constitutive of their various possible definitions, when applied to cases, meet the needs which make the institution necessary. (Similarly, \textit{mutatis mutandis}…)

5. People need individually to acquire, possess, use, and consume some things in order to achieve (the means to) a reasonable degree of happiness.

6. Security in possession and use is impossible (given human society as we know it) unless enforced and unless modes of acquisition are controlled. Such control and enforcement amount to the administration of a system of property rights.

7. Insecurity in possession and use, as well as uncontrolled acquisition of the goods people need and want, makes an individual’s achievement of happiness impossible (or very unlikely).

8. Therefore, a system of property rights is necessary (or very nearly so) if individuals are to achieve (the means to) even a reasonable degree of happiness.

To specify the best form of property regime, Becker assumes the soundness of the general argument and adds the following premises:

9. Concerning the needed system of property rights, people need, or persistently want, property rights of sort ‘R’.

10. Denying people what they need or persistently want, without showing that the denial is necessary for some countervailing good, is unjustifiable (and usually productive of social disorder and further government repression as well).

11. Therefore, when there is no countervailing good to consider, people should be permitted the sorts of property rights they need and persistently want.

All that remains to be done is to define the specific incidents that make up such rights and show that they are the ones needed or consistently wanted.

\textsuperscript{243} Becker, pp 57-8. Note that a slightly weaker form of the argument would still work for Becker. He needs only optimality, not necessity. For the purposes of utility \textit{maximising} it is not necessary to show reasonable happiness cannot be obtained by any other system. It is enough to show that property is \textit{superior} to other systems in producing such happiness. Yet, if this change were to be made, my criticisms retain all their force.
I will claim that the argument must be modified in a significant way if it is to be sound. This objection concerns how premise 1 operates in conjunction with 4 through 6 to adduce the optimality of property in a way that omits an important consideration.

### 6.3.2 Assessment of the Premises

There are a number of elements in this argument one could quibble over. The link between institutions and happiness in premise 1 could be challenged. In reply we could turn to Hume. Hume suggests that society’s institutions increase our strength, ability, and security. This leads, directly, to the meeting of both wants and needs.\(^{244}\) Such institutions control violence and let us predict others’ conduct. Premise 2 needs no defence and premise 3 amounts to an inference from those preceding it. The best institutions will be ones that protect goods necessary to happiness. Hume gives a useful classification of these goods: internal mental satisfaction, external advantages of body, and external enjoyment of possessions.\(^{245}\) Premise 4 is but another inference. Premise 6, as Becker admits, is speculative. However, coercive institutions for regulating possession and use are likely to be required in any society too large or disparate to achieve consensus. Yet, even if some coercive institutions are necessary, are property institutions among them? Given scarcity and a fairly weak premise of moderate self-interest, the answer must be yes.

Most saliently, more needs to be said in defence of premise 5. To exploit a resource it is usually necessary to use it, often by consuming it (and hence, to first acquire and possess). This is trivially true for goods necessary to meet the most basic of human needs. But beyond these basic needs the job is more difficult. Appeal could be made to the characteristically human trait of developing goals that transcend our own survival. We are purposive agents with the desire to shape and pursue our own life projects. Doing so has utility in itself, but it is also an instrumental source of ongoing utility. The development and maturity of human personality, which is a further source of happiness, depends on the pursuit of these projects.\(^{246}\) We need possession of some goods in order to carry out these life projects.

Further, since our purposes are often long term ones, possession must be secure. The existence of some rather than no rules lets us know what we may look forward to using and enjoying in peace. This does little to suggest private property in preference to rule-based access to public property, but the case for private control can be made thus: The unavailability, at crucial times, of certain tools and consumables frustrates one’s purposes. While a communal system can make the availability of


\(^{245}\) ibid, pp 487-8

\(^{246}\) Hegel develops his theory of property on the basis of this point. Here I use the point to bolster the utility argument, without requiring general acceptance of Hegel's theory.
such goods secure, it requires much organisation and policing. Communal ownership of tools and consumables works best in small groups with an identifiable community of interests, but is ineffective in large industrial economies. It also lessens one’s control over the success of one’s long-term purposes.\textsuperscript{247} These considerations suggest that, since our happiness is dependent on the pursuit of purposes and this pursuit requires long-term control, we have reasons for vesting control of tools and consumables in the hands of individuals and for securing this possession for as long as their purposes require.

So, in sum, we have good reasons for thinking premise 5 holds in the case of basic goods. Whether the defence of the premise for wider goods will succeed — and in a way that does not beg the question of whether Westerners prefer private ownership solely because our preferences were formed through familiarity with it — is still an open question.

I grant these premises to Becker, however, and focus on an unacknowledged problem. I argue that a set of property regimes that are more restricted than Becker seems to allow will follow from his argument. I claim that the argument must be modified in a significant way if it is to be sound. This is because premise 1 operates in conjunction with 4 though 6 to engender a conclusion about the optimality of property that omits one important consideration. I turn to this now.

6.3.3 Non-Property Goods Needed for Happiness

Premise 5 sets out one prerequisite for happiness, namely, the need or persistent desire to acquire, possess, use, and consume. While many goods are needed for happiness, Becker naturally chooses the one specifically protected by the existence of property rights. Yet other values and goods necessary for happiness may be less well served by an institution of property. The good of secure use and consumption, when used as the basis for justifications of private property, conceals many negative effects of property regimes, since both the range and attainability of values/goods that may be realized by a society is limited in significant ways by the choice of property convention. Becker’s argument, as it stands, would fail to take account of this, so long as property served the good of acquiring, using, and consuming. In premises 1 and 5, Becker’s argument appeals to certain needs people must have fulfilled in order to achieve happiness. These include the need for “some rule-governed social institutions” and the need to “acquire, possess, use, and consume some things”. Yet, if Becker appeals to these needs, he must also take just as seriously needs of the same or lower orders: that is, other goods, values, institutions, and states of affairs which are also necessary sources of happiness.\textsuperscript{248} It had better not be the case that the institution of property

\textsuperscript{247} This is not the economic argument, which would use this fact instrumentally as a pointer to productive disincentives. Rather, it employs the frustration of individual desire as a direct source of unhappiness.

\textsuperscript{248} By “lower order”, I mean needs that are more basic than those at the order we are considering.
conflicts, in an irresolvable way, with other necessary sources of happiness. In order for the sum of our institutions not to commit this crime, we need to bring out a hidden premise:

**HP1** For each institution, it must not be the case that it makes other (equally important, and more important) sources of happiness less secure, through denying people other values/goods which, while not part of the justification for that institution, are conducive to happiness in other ways.

This applies to institutions *generally*. For the institution of property rights, *specifically*, to respect HP1, we need to uncover another enthymeme:

**HP2** It is not the case that other goods that are as important or more important sources of happiness are made impossible or significantly less secure by the existence of property rights.

It is trivial that some forms of private property will pass this test *at the general level*. So, the general argument - up to premise 8 - will be unaffected. However, in a specific argument for a particular property regime, (premises 9 –11), we cannot be so sanguine. Here, we require actuality, not mere possibility: not only *some* conception of property, but the *specific set of property rights proposed*, must fulfil this condition. According to Becker, a justified property rights regime will be shaped by the rights people need or consistently want *in order to provide the security of use and the pursuit of projects*. However this is not enough. If HP1 is not to be violated, the set of rights must also be shaped by whatever else is as necessary for happiness.\(^{249}\)

These additions will weed out some candidates for justified property regimes. Answering two questions will determine exactly how this occurs. First, which other values/goods are at least as necessary for happiness? Second, which of the property regime candidates will promote security of use and the pursuit of projects, while protecting our access to those other needed or wanted values/goods? Enumerating all these needed values/goods would yield a long and contentious list, if not a detailed substantive theory of human flourishing. Fortunately, for my purposes, such completeness is not needed. It is enough to show that the goods/values I am concerned with in the context of this chapter make it onto the list. Hence, to show that certain environmental and other

\(^{249}\) I note that, in premise 10, by the phrase "without showing that the denial is necessary for some countervailing good", Becker seems, rather arbitrarily, to pick up the concern I have introduced here (though he subsequently ignores those countervailing goods). My formulation of the general argument (using HP1) has the advantage of enabling us to include this point in a non-arbitrary way and, unlike Becker's account, explains why it must be addressed. If we run with Becker's formulation then each set of rights, R, would have to pass the test suggested by this phrase in premise 10. My discussion could equally be taken as an attempt to show what some of these countervailing goods may be. This would be a less visible and less precise why of addressing my point. (Note also that what ownership rights are needed will be affected by those other values/goods, so this point starts to take hold at premise 9 as well.
concerns function to constrain the set of justified property regimes, I need only show two things (and these correspond with the two steps outlined above). First, that those environmental and other concerns belong to the set of values/goods that are as necessary or more necessary for human happiness as the need to acquire, possess, use, and consume. I will call this the priority condition. It will be assessed largely on normative grounds. Second, certain property regimes would make those other sources of happiness less secure, through denying people those other values/goods. This I call the incompatibility condition. The incompatibility condition is an empirical matter: how will each regime promote or fetter those other values/goods?

For my purposes, the following values/goods must meet the priority condition.

- People require the ongoing sustainability of planetary and local ecosystems
- People require protection from crop failure, drought, enforced relocation, and other dramatic changes that could result from environmental destruction
- People require their basic human needs to be met

The first and second are necessary conditions for people to enjoy many pleasures, including those from ongoing ownership and consumption. The third is the starting point for Becker’s premise 1, so it must be accepted. (Note that, while these goods/values constrain property, it should not be thought that property is opposed to them conceptually. The existence of property is consistent with them and a good property regime will actually enhance them.)

To see how these values constrain the list of justified regimes we need to examine them, together with each regime, in the light of the incompatibility condition. They shape the contours of justified property in the following way. The set of justified regimes \( R_1 \ldots R_n \) will be limited to those that allow the ongoing sustainability of planetary and local ecosystems and allow all people access to goods necessary to meet their basic needs. This is not to say that these must be mentioned in the specific incidents of the regime, only that the content of the incidents must be shaped by them.

The question that must be answered in the assessment of any property regime is a question of compatibility: is the regime within the set \( R_1 \ldots R_n \)? Here is an example concerning sustainability.

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250 I do not claim that the goods in question are even the most important goods. They are only the most relevant to my purposes. If I were interested in, say, labour, I would include the need for meaningful labour among the set and then argue that this is a good as necessary for happiness as the need to possess.

251 The design of property regimes can also affect such values/goods in ways other than how it promotes or threatens them directly. Property institutions are also internally related to the values, institutions, and possible ways of life countenanced in a society. People living under other regimes may share some or all of the values that are used to justify a particular private property regime - freedom, desert, efficiency, etc. But they may not understand them in the same way, since a society’s understanding of these values is shaped by practices within that society. I will not pursue this more radical point here.
Imagine that the current property system \( R^* \) causes unsustainable ecological damage. \( R^* \) would be judged to be incompatible with the set of values/goods that are as necessary or more necessary for human happiness than the need to acquire, possess, use, and consume.

(I note further that it would be wrong to think this is directly a victory for advocates of more stringent property limits. The reason why a property system is unsustainable could be that it allows destruction, through giving *insufficiently strong or widespread* property rights.)

One may take issue with my selection of goods listed earlier on the grounds that these are not as necessary to happiness as is security in the possession of certain key goods. Plausibly, securing fulfilment of the *most basic and immediate* use, possession, and consumptive needs is more essential to happiness than those on my list. However this claim has little real force. At most, it justifies security of basic *personal* property. Yet no one, surely not even an extreme socialist, would deny a right to such personal property. The interesting cases concern instances of private property well beyond personal property, such as productive property and discretionary consumptive property. Secured possession of *these* is not more basic to happiness than the values/goods on my list.

**6.3.4 Conclusions from the Personal Utility Argument**

A few conclusions can be noted. First, my amendments preserve the formal validity of the argument and reveal more closely the actual structure of the argument. In doing so, they highlight the fact that some forms of property not only better promote the sources of happiness which justify property (Becker’s point), but offer protection to other institutions and states of affairs that are also sources of happiness. Becker focuses solely on the aspect of happiness that is protected by property, skirting questions of how property fits together with other institutions. My amendment remedies this. Further, it reveals the danger of abstracting property from the totality of values a society holds. The utilitarian justification of property risks appealing to one source of happiness, while obscuring others. If we correct for this we may yield a very different set of property rights.

Second, a general argument of the type Becker gives can, with my revisions, yield a case for property rights to grant security in the use of objects. Some forms of property rights will produce higher utility than non-property systems. This rather minimal conclusion is a victory against those (few) who decry any form of property right and so answers the first of the questions with which I began this chapter.
Third, the utilitarian line is promising in justifying the standard incidents of property.\textsuperscript{252} The incident of exclusive use is suggested, to the extent that the utility of one’s use of an object is undermined by another’s use of it. In the case of transfer, private ownership is superior to a system of, say, private usufruct. Utility derivable from an object varies across people and time. Transfer allows objects to come to be owned by those who would derive more utility from them.\textsuperscript{253} How superior the former system will be depends upon the strength of the desire to transfer, upon how much disutility is experienced if the desire is unfulfilled, and upon how much opportunity for more efficient use is lost.

Fourth, not only does the personal utility argument \textit{fail to justify} property regimes of certain sorts, it is \textit{incompatible} with property rights of those sorts. The argument only justifies property insomuch as securing acquisition, use, and consumption leads to the kind of happiness it brings, \textit{without} undermining other sources of happiness. Any property system acting to violate this will not be supported by the argument. Specifically, the argument gives support for none of the following views: that property rights must include the right to pollute; that they must include the right to destroy the nature of an environmentally sensitive region; or that environmental regulations that limit certain uses are at odds with property rights. So long as the happiness generated by the security of acquisition, possession, and use can be met by a set of property rights that do not include destruction, etc, then the argument does not support these rights. I can see no reason for thinking that individuals, apart from the wanton, can derive happiness only from such destruction.

Last, while I have focused on environmental goods rather early in the piece, the objection and amendment has more general force. The priority and incompatibility conditions apply to any set of property rights, not only to those relating to the environment. Other, more general, goods and values, which I chose not to focus on, could be added to the priority list, further constraining the set of justified regimes.\textsuperscript{254}

\section{6.4 The Economic Efficiency Argument}

The latter half of the twentieth century saw economists turning to an institutional paradigm wherein the extent to which property rights are defined and enforced is seen as an important determinant of human action. The ‘property rights approach’ has become a salient component of explanations of

\begin{itemize}
\item \textsuperscript{252} See also Goodin, pp 422-5
\item \textsuperscript{253} Since a lease arrangement can do the same, much more would need to be said before the right to transfer full ownership is supported by this argument.
\item \textsuperscript{254} For example, if the claim that people require the minimization of alienation, exploitation and large power inequalities meets the priority condition, this would constrain how property rights could be used in the workplace, and may provide an argument for resource redistribution. Of course, I will not pursue this here.
\end{itemize}
both economic growth and economic inefficiency. The defence of property rights is tied strongly to the defence of the market, since market exchange relations assume a distribution of legally protected, pre-established property rights over goods. In the economic argument, only those satisfactions sought in economic transactions, measured in ‘dollar votes’ or ‘willingness to pay’, are tracked. The argument attempts to use utility in a more rigorous way to avoid inter-personal comparisons and the vagueness of “happiness”. I will, therefore, refer to efficiency rather than utility, herein.

The efficiency argument assumes that, ceteris paribus, one should choose a system that maximizes overall economic benefits and minimizes overall economic costs. It then attempts to show that a property rights regime will fulfil this normative criterion. The economic argument builds on some of the advantages that make private property a source of direct happiness to individuals and adds extra evidence from the behaviour of rational agents. It points to the instrumental value of property rights. The general argument will stop there. A specific argument will, as far as the precision of economic tools allow, identify a particular set of property rights and argue that this set maximizes overall benefits over costs compared to competing sets.

I begin with a word on the relationship between the two arguments. At the general level, they can supplement each other. The personal utility argument shows that individuals tend to derive net benefits from a property rights system. Economic arguments can show that a system of property rights generates incentives to produce thereby maximizing happiness, in so much as the efficient production of material wealth contributes to this. At the specific level the two arguments may cohere in a similar way. However they may also come apart. The economic argument may provide reasons for choosing rights regime $R^*$ even if the individual argument eliminates $R^*$ from the set of justifiable regimes. Suppose it could be shown that property rights set $R^*$ produced more overall aggregated utility, even though some people were deprived of the goods that I suggested Becker must take account of in the personal argument. Then, by the lights of efficiency, we would have a reason to grant rights set $R^*$ anyway: a result in conflict with the personal argument.

I set out and endorse the general argument and explore the prospects of defining a specific set of rights. I am interested, especially, in the claim that the set of rights that maximizes efficiency will be that set that countenances the least restrictions and allows the least regulation. Will full liberal ownership of environmental goods be a likely contender for utility maximisation?

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6.4.1 The General Argument

Rather than being easily characterized in a point by point argument, I suggest the economic argument has a number of related strands, which together point to the desirability of property rights. Philosophers and economists have often pressed a case from one or two of these strands. For example, Becker uses the first two I identify below. However, there have been few attempts to identify the strands and to present taxonomies of them. I take up this task in this section.

1 The personal and collective costs of failing to guarantee access to goods.

Production depends on access to certain scarce goods, such as productive tools. Ideally each would have access to tools as they are required, so failing to control the use of these tools introduces many costs. Other people can pre-empt or delay one’s access, giving one incentives to over-produce when one finally gets hold of such tools. When these losses outweigh the costs of creating and maintaining a system of ownership rights it will be justified to create such a system. Becker, at one stage, makes this point; however, we need to consider the circumstances in which it may be true or false. I think this argument applies most strongly to cases where the production and control of these tools is a relatively simple affair. Yet some productive tools, especially those which demand large investment or need more than one person to operate them, may require producers to pool their resources. In these cases, a dominance of individual ownership may fail to produce and operate the needed tools. Some form of public or corporate ownership, including a system to allocate access, may be necessary. However, the argument is not that private property is consistently superior; it seeks to establish only that there are many cases where it is. The economic cost of insecure access to tools does give us a reason to prefer private control in many cases.

2 The inferiority of alternative regimes of allocation.

Another benefit is the comparative allocation efficiency of stable property rights. The alternative to property rights, as an allocation method, is a mix of custom, social pressure, and deceit. There is no reason to think this would maximise satisfaction with respect to productive allocations or distribution of goods produced. Stabilising allocation transactions with exclusive ownership rights that include transfer is more efficient.

3 Incentives to labour via stable expectations.

Having considered the individual argument, one may detect a case for a somewhat equal distribution of property. If the key premises in that argument are true for each person, then each person will derive happiness from property. To the extent that, for all people, greater property satisfies more preferences, equal property would maximize utility. The law of diminishing

256 One could resist this conclusion (in the usual way) by insisting that people vary in the extent to which they are satisfied by wealth, yet this is not the defense used in the efficiency argument.
marginal utility gives further support to this view. Yet the economic efficiency argument is notable, in the writings of both modern economists and utilitarian theorists from Hume onwards, for its rejection of this line of thought.

Bentham admits, in his treatment of this problem, that it gives a presumptive case for equality, yet he proceeds to suggest it is overwhelmed by arguments from security. He rests his case for property on two types of expectations: those that exist prior to the law and those which are a creation of the law. Prior to the law, working for subsistence comes naturally and sets up natural expectations. To capitalize on this, the law ensures to each the results of her efforts. Having expectation of benefits is itself a source of happiness, so creating expectations in law also creates happiness directly. Things we did not expect (or have) we may not miss, but if we expected (or possessed) them and they are removed we feel the pangs of frustration. Drawing on an intuition that both Nozick and Rawls would later mine, Bentham notes that constant redistributive effort to achieve equal distribution of property frustrates expectations, so that even those who get the least out of the existing system would suffer in the long run. The worst-off would likely fare better under a regime of secure property rights. In the words of James Mill:

> To obtain all the objects of desire in the greatest possible quantity, we must obtain labour in the greatest possible quantity; and, to obtain labour in the greatest possible quantity, we must raise to the greatest possible height the advantage attached to labour. It is impossible to attach to labour a greater degree of advantage than the whole product of labour ... The greatest possible happiness of society is, therefore, attained by insuring to every man the greatest possible quantity of the produce of his labour.²⁵⁷

This amounts to an argument for secure, exclusive property rights in the products of one’s labour. Utility will be produced if the legislator reinforces natural expectations. If one is already in possession of an item he made, then, unless there is some overriding good or better title, he should be granted ownership. A man will not sow where another may reap. The cooperation and shared understanding needed for anything more elaborate than individual subsistence farming is unimaginable without rules allowing each to plan effectively and predict others’ actions. The legal system must facilitate certain utility-promoting goals such as security, equality, subsistence, and, if only for some, abundance. The wealth of the wealthy and the resulting inequality is the inevitable result of the security of property. Encouraging production will increase overall utility, especially if the exclusive aspect of the property right is coupled with the ability to transfer it. 150 years after Mill and Bentham, economists have approached the notion of property from this perspective. There is a causal connection between the set of property rights enforced in any given society and its level of
economic performance.\textsuperscript{258} In fact, from an economic perspective, the \textit{function} of property rights is to create incentives to use resources efficiently. The general welfare is cited as a reason for letting each person pursue her own welfare.

Note that this argument relies on the assumption that labour is unpleasant in some way, coupled with a theory of motivation that emphasizes self-interest. More specifically, the argument requires the truth of the claim that we labour only because it yields some benefit to us. Further, at least some of those benefits must be the type that accrues only if we have some institution to secure them as the outcome of labour. I consider these to be innocuous assumptions, provided we limit the claim of self-interest to the claim that we are often self-interested, especially as regards our needs near the lower end of the need hierarchy, rather than inflating the claim to a form of psychological egoism.

As a sub-argument in support of this strand of the utilitarian account, note that rights of ownership and contractual freedom are more conducive, not only to labour generally but also to \textit{innovation} than are other institutional arrangements.

\textbf{4 Internalising externalities and the ‘Tragedy of the Commons’}

This point launches from where the last landed. An attempt to internalize externalities aims both to minimise the costs of activities which are transferred to others and to maximize the benefit accruing to the labourer and so, it is connected to the attempt to provide incentives to labour. The concept of an externality, first developed by A. C. Pigou, refers to a cost or benefit of an action or transaction that accrues to persons other than the agent or participating parties. Even assuming self-interest, the existence of positive externalities may not be a disincentive to produce – one can gain from an action that also benefits others. However, if positive externalities come at the price of sufficient benefit to the agent, they will act as a disincentive. The presence of negative externalities is of greater concern. As costs that can be passed on, they function as incentives for an agent to take advantage of them, leading to harm for others.

One common example of negative externalities is termed the “tragedy of the commons” after Garrett Hardin’s 1968 article. This can be illustrated as follows: Consider a group of people whose main resource is a forest of one year old non-owned trees each with a lumber value of $100. I can capture the value of a tree only by cutting it down and if my costs are less than $100, I have an incentive to do so. Yet it may be that the value of the tree is growing at a rate greater than the effective interest rate, so I could maximise my benefit if I were to delay felling it for 20 years.

\textsuperscript{257} Quoted in Jeremy Bentham, “Essay on Government”, in \textit{Utilitarian Logic and Politics}. eds. J Lively and J Rees. (Oxford: Clarendon Press, 1978), p 57. Note that the claim that property is an incentive to labour is not the claim that we deserve rewards for labour.

\textsuperscript{258} Andrew Reeve, \textit{Property} (London: McMillan, 1986), p 124
However, if I refrain from chopping it now, someone else will get in first. Fearing this, I cut the tree immediately. Given that each person’s wealth depends on her percentage share of the trees, immediate harvesting is the most effective strategy for each and soon all the trees will be cut, despite the fact that much more overall wealth would be generated if the trees were harvested in 20 years.

If, instead, I have exclusive property rights over the tree, I can capture the benefits of preserving it for a later date. I need not fear that deferred harvesting will ruin my investment strategy. The tragedy of the commons suggests that when resources are open to uncontrolled access they are wasted due to under-investment, overuse, or both. The equilibrium state in the commons is Pareto-inefficient. Further, (as a sub-argument) control over proximate goods and secure possession of items needed to execute one’s purposes yields a special psychological attachment to and nurture of those goods and their productive capacity.

The tragedy of the commons is often thought of as an advertisement for private ownership. Yet such ownership is not the only solution. The tragedy is more accurately described as a reason to agree on rules of allocation to limit negative externalities. Public ownership, for many goods, can be an alternative allocative solution. The advantage of private property is that it has fewer transaction costs. John Reomer suggests that public ownership of productive enterprises can be as efficient as private ownership in all aspects, except for decision-making about allocations of productive resources. Under private ownership, such decision-making can be decentralized. (This weakness can be seen as a separate argument for private ownership and I treat it as the fifth strand below.)

These considerations point to a positive balance of benefits over costs in assigning private ownership rights, yet these accrue only under certain conditions. In small agrarian societies, especially those without a writing system for recording allocation, the cost of enforcing property rights may well exceed the benefits. Since there is no overcrowding, property rights would confer no static benefits and without techniques for improving the land there are no dynamic benefits either. Yet in all modern societies where these conditions are not typical the benefits accumulate on the side of private rights.

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259 Pejovich says that, by comparison, public property does not internalize cost, which is borne by taxpayers, since it is decided by political elites. Public property gives a weaker incentive to invest time and resources. See Pejovich, p 178. However two factors undermine this claim. Public officials are charged with a duty to pursue the public interest. Personal incentives to maximise one’s own goods do not capture all of human motivation. Further, such officials have performance criteria (and are rewarded accordingly) as do non-owning managers of private companies. The latter are not accused of lacking incentives for good investment.

260 This has led some economists to play speculative anthropologist, suggesting that it explains why many primal cultures developed few property rules and even fewer private property regimes. For example, see Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972), pp 126-130
Decentralisation of decision making and informational needs

Decentralised control over production yields significant efficiency gains. This can be seen if we consider two problems with socialist central planning. Firstly, the planner does not know what to produce as he does not have access to all the information about what people need and desire. His allocation of productive resources produces a surfeit of one thing and scarcity of another, yielding enormous inefficiency. Secondly, even if aware of what quantities of goods to produce, the planner is ignorant of how to produce them and (hence) how to allocate resources to the task. He allocates too many resources to produce one set of required goods and too few to produce another set. By chance, these two sources of inefficiency could cancel each other out, but they are more likely to be cumulative.

These five strands of argument are the building blocks of the economic efficiency argument. The arguments, I suggest, are sufficient to establish that it is better to operate a system where private property dominates than not to, at least in large societies. They are not sufficiently fine-grained to specify the ideal mix of private and public property. Yet most strands suggest that the majority of productive effort should manifest as private ownership of productive goods. Yet it is unlikely that the efficiency principle will recommend the abolition of all public property. If popular preferences include education, parks, police, unemployment compensation, and safety from invasion, and if these are performed better through public institutions, the argument will recommend public provision and ownership of resources aimed at realising these goods.

As discussed in section 6.2, under the utilitarian concept of property, the legislator should choose titles that will maximize utility. The unifying theme in the economic approach is that utility, *ceteris paribus*, is maximized when the harmful or beneficial effects of a person’s activities rebound on him - as far as is possible - rather than on other people. By internalizing the costs and benefits of a decision, the right of ownership creates strong incentives for owners to produce more and to seek the highest value use for the goods they produce. This is more easily achieved when most things can be bought and sold at prices agreed to by willing buyers and sellers and the system of property rights should facilitate such commerce.
6.4.2 Prospects for a Specific Argument for Full Liberal Rights

The principle of economic efficiency furnishes us with an argument for private property, as discussed earlier. It also plays a role in designing the specific institutions of property we choose. At the specific level, the main questions of interest are: what strength of property right is optimal for objects of property and what specific incidents and limitations within each incident are justified?

Given the success of a general argument for property from efficiency, economists tend to assume that the rights granted are full liberal. Yet the claim that “property rights lead to an increase in efficiency” is too general to help us determine rights over environmental goods, for two reasons. First, an institution of private property rights may increase efficiency in most cases, but fail to do so in others. Second, while property rights may increase efficiency (even in all cases) the specific form that achieves this may be other than the full liberal form. The general intuition that, property rights increase efficiency underdetermines the types of property rights to be recommended in each case.

To explore this, I examine the claim, posited by libertarians and free market environmentalists among others, that a regime of full liberal rights with the fewest restrictions is the best candidate for maximising efficiency. I firstly address the main efficiency argument for full liberal rights (6.4.3) and show that there will be significant occasions where a weaker set of rights should be preferred. Second, I construct an argument which casts doubt on the prospect that full rights can adequately protect future people even if they produce Pareto-optimal outcomes (6.4.4). Third, I suggest, in 6.4.5, why we should be especially suspicious of such rights in the case of land and other environmental resources.

6.4.3 Weaknesses of Efficiency Arguments for Full Liberal Rights

I examine two arguments for the view that full liberal rights maximise efficiency. These are an argument from the efficiency of a laissez-faire exchange system, which requires full liberal rights and an argument from human motivation. I suggest not only that they fail to demonstrate the superiority of full liberal rights but also that the intuitions behind these arguments, when coupled with more realistic premises, actually point away from full liberal rights in many cases.

The first argument can be stated as follows. Since the market is efficient (as it enables us to trade less preferred for more preferred goods until a Pareto-optimal equilibrium is reached) and, since the market assumes property rights that include the incidents of exclusive use and transfer, these full liberal rights are straightforwardly the ones that will maximise efficiency. Insofar as efficiency is the

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See, for example, Frank Michelman who ascribes this assumption to economists generally. He is hostile to this practice for reasons other than those I discuss. See Frank Michelman, “Property Utility and Fairness: The Ethical Foundations of Just Compensation”, Harvard Law Review 80 (1968): 1165-258
goal, people should be granted rights that are consistent with the laissez-faire operation of the
market. The archetypical property right, costlessly enforced and freely tradable has been held as
the benchmark against which other forms of property are judged and found wanting.

There are (at least) two problems here. Firstly, the claim is true only of the ideal market. A free
market system is theoretically efficient (in the sense of being Pareto optimal\textsuperscript{262}) only when the
following conditions are met. First, all goods over which we have preferences must be capable of
being bought and sold in the market. Second, competition is perfect, so no supplier can influence
the market price by threat of withdrawal. Third, transaction costs are zero; that is, it costs nothing to
get the parties to do what will actually maximise their welfare. Lastly, there are no externalities. Yet
a real free market (with no government interference, except for enforcement) would deviate in
important ways from the ideal one. We cannot achieve an ideal market, economists agree, without
significant regulatory intervention. Such interference grants a rights-set which diverges from full liberal
rights.

At best, the argument from market efficiency shows that property rights should be defined to
approximate the ideal free market in allocation and distribution. But this leads us away from a
laissez-faire market and full liberal rights. As an example, legislation to prevent monopolies -
allowing the economic system to more closely approximate the ideal feature of perfect competition -
will limit some rights to transfer, such as, some corporate take-over bids. The same feature will
recommend regulation of prices where there is a natural monopoly, producing the same effect.
Similarly, for the control of externalities such as pollution, ideal efficiency suggests we control
harmful emissions in some way. This interferes with use rights.\textsuperscript{263} These market failures (some of
which, it must be noted, are failures to have a market, rather than failures of market operation) can
sometimes be addressed by regulation that alters property rights.

In the presence of externalities, market allocations are not Pareto-optimal and interventions by a
central body will not always decrease efficiency. Some interventions amounting to restrictions on
property rights may be justified. Whether or not a specific intervention would help move toward the
ideal market is an empirical question, so each proposal for intervention should be evaluated for its
efficacy in those terms. While economists are quick to point out that regulation, as a cure, is often

\textsuperscript{262} As distinct from Kalder-Hicks efficiency. A state of affairs, S, is Pareto superior to S* if and only if, in moving from S* to
S, at least one individual increases, and no one decreases, in welfare. A Pareto optimal system has no Pareto superior. S
is Kaldor-Hick efficient with respect to S* if and only if, in moving from S* to S, those whose welfare increases can fully
compensate those whose welfare diminishes and, in the process, at least one individual is better off. However,
compensation must only be possible, not actual.

\textsuperscript{263} The goal of limiting pollution could be achieved through a market in carbon emissions. Yet this is still a restriction on
use rights over the polluting good. The restriction is turned into a cost of production.
worse than the disease, it is likely that at least some deviations from full liberal rights would move us toward the ideal market.

The upshot, I suggest, is that, while property may maximise efficiency (which is the result of the general argument in 6.4.1), it will not always be the full liberal form of property that does so. This gives us reasons for granting individuals property rights, but not for allowing all uses and all unfettered exchanges. Some costs cannot be internalized without placing limits on use or transfer that amount to a less absolute regime of rights.

The second problem with the argument is a familiar one. Even if we granted that real markets are like their ideal counterpart, we would still be left with the erroneous assumption that market allocations track preferences in the economic sphere. Measuring efficiency by dollar votes ignores the fact that the wealthy can express their preferences more powerfully in the market than can the poor, who hold equally strong preferences. In competition for the same good, the rich will outbid the poor. This tendency, if unchecked, risks destroying the fundamental notions of the model. That is, it will steer the market away from perfect competition and voluntary exchange. More subtly, the rich can buy off disutilities that the poor cannot. This can become a vicious circle, since engaging in some buying off is vital to one’s future production and income potential. If avoidance of those disutilities has positive consequences for the production of future goods then the initial advantage of the rich snowballs.

Two examples will help here. In parts of India, poverty prohibits farmers from borrowing to purchase land. Instead, they rent plots from large landowners. Mookherjee argues that this lowers labour productivity. Here, extremes of wealth prevent the expression of some preferences in the market that would increase efficiency were they operative. This provides a counter-example to the thesis that, even ideal markets always increase efficiency by allowing preferences to be expressed. To the extent that this situation is caused by the operation of markets in the transfer of private property, it points away from unrestricted property rights.

The second example is from Roemer. In an economy where there are some polluting firms, the rich tend to buy more of these firms (because of access to funds and because the poor prefer

264 For references, see Hausman, p 104
265 Becker, p 73
266 John Roemer, Property Rights, Incentives and Welfare (London: McMillian, 1997), pp 3-4
267 Two other weaknesses with the model deserve mention. First, it assumes knowledge pre-trade (and even immediately post-trade) of what will make us better off. Some economists change the definition of voluntary exchange to an exchange which would have been made if and only if it was beneficial! In this case, it is analytically true that all voluntary exchanges benefit us, but fewer exchanges make it into the class of voluntary exchanges. The definition is in variance to our usual notion of voluntariness. Second, we desire things under a certain description, which could be misleading. The model is insufficiently complex to pick up how we react to multiple true descriptions, self-deception, and subconscious motivations.
investments that are less risky than industrial ownership). This gives the rich an interest in allowing a fairly large quantity of the “public bad” and few pollution restrictions. But if a political process, via legislation, determines the level of pollution then, since the rich have more chance of influencing the political process, they are more likely to sway the result toward fewer emission controls and greater overall pollution. The market will lead to ubiquitous profit-inducing public bads, such as pollution and unsafe work. Roemer argues that these public bads can lead to worse outcomes for the majority, under ‘strict privatization’, than under ‘limited privatization’ (where certain types of firm are not tradeable). While Roemer sees this as an argument against the tradability of some firms,\textsuperscript{268} it is clear that the benefits of such trade, in general, overwhelm these negative effects. We need an alternative approach that takes seriously the danger of producing public bads, without losing these benefits. In light of this, we would be wise to allow transfer, but achieve the emissions goals via other methods, such as use restrictions. This could be made operational via a tax on pollution or by establishing a market for pollution rights to prevent pollution at the front end, rather than by prohibiting trade.

The first argument fails to demonstrate the superiority of full liberal rights with respect to efficiency. These two problems show, further, that the intuitions behind the argument, when coupled with a more realistic account of the market, actually point away from full liberal rights, in some cases. The emphasis the argument places on efficiency leads to the requirement that externalities be minimised. The stress the argument places on preference satisfaction leads to a need to compensate for the asymmetric ability to express them. Each of these can be achieved only by more limited property rights, in some cases. This completes the discussion of the first argument.

The second argument for the efficiency of full liberal rights claims that these rights most accurately track human motivation in the economic sphere. This argument can be thought of as a specific version of the labour incentives strand of the general argument. People act to maximise preference satisfaction and the desire for property is an important source of such satisfaction. Since property is limited, persons pursuing it are thrown into competition with each other. Under these conditions, effort and efficiency will be maximally enhanced if we allow people to keep whatever they produce by labour and ingenuity. Therefore, the best system is one of inducements based on this desire. These inducements are uniquely promoted by full liberal rights and a decentralised market.

This argument turns on a number of assumptions about human motivation and economic behaviour that cannot be assessed fully here. Yet we can note that the preferences people typically hold and act on plausibly include a range of preferences that are less self-interested and antagonistic than the argument assumes. Desire for property need not always throw us into competition. A more

\textsuperscript{268} Roemer, p 101. His context is the transition from socialism in post-communist Eastern Europe.
complex and accurate picture of human motivation would suggest that a system containing inducements for both competitive and co-operative production will be preferable. It is at least an open question what economic system would be supported by this improved picture of motivation. A system other than full liberal rights - one sensitive to the whole range of human motivations - may do better.

The two arguments considered in this section fail to show the superiority of full liberal rights. While we cannot conclude that no persuasive argument can be provided, such arguments tend to suffer from problems akin to those I highlighted. Either they ignore the effect of externalities, or they assume that willingness to pay tracks preferences, or they build on an impoverished account of human motivation.

6.4.4 Full Liberal Rights and Future People

Famed economist, Harold Demetz argues that private property facilitates a more rational use of land and resources, preventing overly rapid depletion and reducing the costs of externalities. He further claims that an owner will “maximise the present value of his privately-owned land rights...[taking] into account the supply and demand conditions that he thinks will exist after his death”.\(^{269}\) I will examine Demetz second claim, as its truth is not clear. Unless an owner wants to sell or bequeath his goods he may decide to maximize his income by depleting the resource by the time of his death. Unless some assumption about why he would preserve it is operative, there will be no incentive for non-depletion. Any supposed conservation advantage over regulated ownership, or even communal ownership, will be absent.

While we may have no illusions about the efficiency of bureaucratic management of resources or the efficacy of some environmental regulation, we may be at least as sceptical of proposals to leave crucial resources at the mercy of markets. However, this is just what has been recommended by many theorists. I claim that the model of an ideal market does not adequately account for the interests of the future and is, therefore, unacceptably atemporal.

For simplicity, imagine a two-person economy producing two resources. Adam harvests more vegetables but less wood than he needs and Eve does the opposite.\(^{270}\) They produce and exchange their goods in amounts that follow a Pareto-optimal production curve. Adam and Eve can harvest in a sustainable or unsustainable manner; it is possible for the economy to reach a Pareto-optimal outcome in each production period and yet, for successive optima to follow an ever-


decreasing production function. (See figure.) For example, each year Adam and Eve set aside some harvest for next year’s crops to grow from, but if they set aside too little, they create a declining productivity function.

Clearly, justice to future generations dictates that sustainability should be preferred to unnecessary depletion. However, leaving aside distributive justice as a motivator (as in an efficiency argument, we are), so far there are no grounds for self-interested producers to prefer sustainability. What conditions must be added to make the sustainability option rational? Two conditions will jointly achieve this. First, that they expect to be alive in the far future to endure the hardship and, second, that they do not discount their own future. Neither of these features is true of people as we know them. If Adam and Eve have children they would discover an interest in avoiding depletion. But this may not suffice for the longer term consequences. (In addition, in a larger world, we see the return of free rider problems and the fact that those without children lack this incentive).

As Wolf observes, even if perfectly competitive markets achieve Pareto-optima at every production period, the succession of optima achieved may not itself constitute inter-temporal sustainability. Rational maximisers have no reason to prefer sustainability over steady decline. The unregulated market (and the full liberal rights that it assumes) cannot be trusted to ensure sustainability. This is exacerbated by the fact that a high proportion of resources rest in the hands of people in the 50-90 age bracket, who have a short-term horizon for investments.

\[\text{271 Ibid, p 160}\]
There is a standard reply to this fear. Hotelling (and a large school of thought that followed him) argue that, with enlightened owners in control of a stock of non-renewables (or renewables that can be destroyed by overuse), free markets should reach allocations that are both inter-temporally efficient and also effectively respond to social needs (and all this without tax or regulation). Rational miners, say, will extract when the cost is low and sell when the price is high. Over time, the supply of non-renewables will diminish and the price will rise. Yet, a mine owner will not sell ore unless the interest rate is higher than the resource appreciation rate. Future scarcity is reflected in the expectation of higher future prices and this leads each owner to act like a conservationist.

This can be put another way, from the perspective of social benefits. A high price reflects high consumer need and so self-interested owners will release the resource to the market when needed most. If the expected future price is high, (say, because future need is great), they will conserve the resource and bring it to the market in future – at exactly the time the goods are most needed. This is an inter-temporal optimum.

Yet this will not do. Social need is only one among many determinants of price, so the latter is not an adequate indicator of the former. In a multi-good economy, the interest rate is not affected solely by the availability of this particular good. If the interest rate is high, for reasons unrelated to this good, it will inflate the extraction incentive and, hence, the extraction rate. A related problem is a variant of the “willingness-to-pay” issue already encountered. If people are worse off in future (as, Hotelling admits, could well be the case if resources are scarce) then their ability to pay decreases. Producers may over-produce now to avoid being punished later when prices have fallen. With competition, one cannot hold back market goods for later consumption without the risk of losing in a collapsing future market. Hotelling’s assumption that later prices will be higher is based on the further assumption that overall prosperity will not suffer as resources dwindle! His argument that the future will be catered for (and hence be prosperous) if the market is left to run is circular. This undermines the claim that the Hotelling-optima represent a socially desirable, inter-temporal distribution.

Full liberal rights not only allow a present owner to destroy or over-exploit a resource she owns, but also may fail to yield sufficient incentives not to do so. If we are concerned for overall utility and we hold future people as morally considerable, we will want to do better than this. More is required in the way of a guarantee to insure against those whose preferences include inflicting irreversible damage for the sake of their short-term gain.

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274 Ibid, pp 163-4
6.4.5 Efficiency of Full Liberal Rights over Specific Environmental Goods

Some elements of the previous discussions rest on contestable empirical premises on both sides of the debate. However, we may be able to find greater clarity when we enquire about the most efficient system for specific goods. Since I am interested in certain classes of environmental goods, it is these I will focus upon.

It is possible to concede that, for many resources, full liberal rights are the appropriate rights to hold, without conceding that it is true of all. For what types of goods will utility recommend full liberal rights and for what types will it recommend another form? Answering this in a principled way requires us to show (1) that different types of goods have distinct features, which (2) lead to disparate amounts of utility, which in turn (3) make each type more or less amenable to particular regimes of ownership. I will argue that, in some cases of environmental goods, full liberal rights (including the right to destroy) are unlikely to maximise utility. I begin by noting differences among the types of objects that are subject to ownership and then show which features of objects increase the future utility value of these objects. I argue that, if an object of property has high future utility value, full liberal rights are less appropriate for it. In the process I improve upon an argument put forward by Robert Goodin.275

The utilitarian rationale for ownership turns on the use we get from property. The uses that can be made of an ice cream differ from those of a car, a house, or a forest. This trivial fact points to an important indeterminacy that exists in the type of ownership utility arguments will recommend. The utility function of each class of good will vary with type and over time. For some objects of property, the value of destruction will exceed the value of preservation at a particular time and for others it will not. Take the case of the owner of an important ecological site. Many natural environments admit of two kinds of use: destructive uses, where it is converted to a private good used by a few people, mostly in the present generation and non-destructive uses, where it is maintained (either as a public or private good) for multiple generations. Allowing a right to destroy this property would offer the option of closing off its future usefulness. This is unproblematic for many, even most, goods. The right to destructively consume an ice-cream, for example, would be a strange right to disallow. Yet, overall utility is much less likely to justify destruction of things allocated to an individual when those things have a high future use value. A utility argument for a specific regime of property will recommend that “destructive rights”276 should be included in the incidents of property for a class of object only if either of the following obtains:

275 Goodin, pp 422-5
276 Destructive rights could include a number of (separable) things: the right to destroy per se, the right to destroy to create another thing, and the right to alter in certain irreversible ways.
(A) The negative consequences of prohibiting these destructive uses outweigh any good achieved by such prohibition.

(B) The utility derived from destruction exceeds the option-value of all reasonably foreseeable future uses.

The question is: in the case of which resources (and when in their lifetime) does the utility of destruction exceed the sum of other future uses and hence exceed the utility of preservation? Destruction value will exceed preservation value at some point in time for many things. This is certainly true of those goods that can only be used by being degraded or exhausted. (That is the principle underlying economic discussions of the efficient allocation and, hence, destruction of exhaustible resources.)

Robert Goodin argues that utility will not support property rights regimes that allow destructive rights, in many cases. We would find out when the destruction value exceeds the preservation value if we could ask the ideal market, since the destroyer would outbid all other bidders. This is impossible, not only because real markets diverge from ideal ones, but also because some of the bidders are not yet born. Goodin imagines a trans-generational brokerage firm that “makes its profits out of buying from one generation and selling to another”.277 As this economic tool does not exist, Goodin suggests that uncertainty about future option value gives a prima facie case for preservation, since destruction would extinguish the value of all future options.

Yet such a claim is too sweeping. Goodin falls back on uncertainty about the future to produce his presumption for preservation. However, while the idealized market was a potentially fine-grained epistemic tool informing us which goods deserve current preservation, a vague “uncertainty about the future” does not help us distinguish, in a determinate way between the goods that utility will recommend we do and do not protect. There are at least two problems here. First, for many goods, destruction is unproblematic. This presumption for preservation will not apply to just any objects of property. Second, even when such a presumption in favour of preservation is justified in principle, its operation would inevitably involve government-enforced limits on the decisions of owners. Why should we think one set of decision-makers, namely, governments and courts are better than another set of decision-makers, namely, owners? Such regulating bodies are likely to introduce current utility losses for the sake of merely possible utility gains in future.

What is required is a more rigorous approach to the question of when to exclude some destructive uses. Rather than relying on this general presumption for preservation, we can investigate what features of the objects of property make it more likely that the ideal trans-generational market will

277 Goodin, p. 424
assign those objects high future utility value, recommending current preservation and a more restricted set of rights.

I develop, not so much a typology of resources, but a set of features that are relevant to demarcate goods over which different kinds of property rights are appropriate. I suggest that the features of an object of property that make a presumption for ensuring their continued preservation more utility generating are the following:

(1) **Much of the value of the good lies in it operating perpetually according to its “natural” features.** For some goods - land and ecosystems are examples - we need a sufficient quantity operating in their “natural” way in order to under-gird other important sources of utility. These long-term goods have high future utility, since much of their value is only realised in the future. Of course this is too broad. The fact that a sufficient amount is needed does not imply that all instances of that good need be kept in their natural state. Some way of allowing certain developments to proceed, without licensing too many (the difficult task for local planning authorities) must be discovered. But the threat of over-development is sufficient reason to recommend a presumption against rights to disrupt an eco-system completely. When we do allow this disruption in order to realise its utility gain, some form of ecological compensation seems appropriate.

(2) **Destruction of the good holds severe risks for the future. It is, by its nature, essential to multiple generations.** Preserving the use option for the future protects against risks (including the risk that our tastes may change). Risk avoidance is not always morally superior, yet we should be more risk-averse when we are gambling with what is needed to fulfil our basic moral duties (including those toward future people) than we are when gambling with luxuries. Again, an environmental threat to eco-systems is a case in point. A utilitarian justification for the right to destroy such goods is less likely if we include future generations as morally considerable.

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278 Does this feature cover too many cases? Does this, for example, recommend against mining, since the minerals have been perpetually in their natural state in the ground? I think not. The value of the mineral does not lie in it remaining underground. In a sufficiently mineral rich area the value of the mineral when mined will outweigh the value derived from its remaining untouched.
(3) **Individuals are less able accurately to judge the best overall use of the good.**

Owners and contracting parties are often excellent judges of the relative value of use options, but this is less true in cases where not all the costs and benefits rebound on the decision makers and when those people are ignorant of the alternatives. This feature is needed in order to combat the objection, raised above, that even when a presumption in favour of preservation is justified in principle, owners are the best judges of the utility function of a good, over time. Sometimes, even when owners are less good judges, there are reasons for not interfering. Typically, we do not interfere with bad purchasing decisions, for example, where the harm of interference is greater than the harm it attempts to prevent. However, interference is more likely to be justified in cases where the stakes are high, involving more than financial risk, such as, occupational safety and environmental risks.

(4) **The good is not easily replaced or is non-renewable.**

Irreplaceable goods that are of great significance, such as, great works of art, seem particularly strong contenders for preservationist duties. Such goods automatically have higher future option value. In the case of non-renewable resources, what is needed is not preservation but a duty bearing on owners to use the goods sufficiently slowly to allow development of alternatives that fulfil the same function. A further duty on owners to invest a percentage of the value of the non-renewable good in such research is also suggested.

(5) **The good is significant for the meeting of needs**

In non-consequentialist positions, the moral importance of needs could be used to bolster claims of redistribution. In efficiency arguments, however, the meeting of a need has no special status directly. However, an argument could be run as follows. We know more about future basic needs than we know about future non-basic preferences. Therefore, we should prefer to protect the largest set of goods – especially environmental goods – necessary for future people to meet their needs, rather than those goods necessary for meeting higher preferences that they may not even have. Further, meeting needs has more utility value, since their satisfaction is more fecund and is a prerequisite for meeting higher wants. This suggests a presumption against the destruction of a good that is important for meeting future needs, by conversion into a good (or money) typically used only for less necessary wants.

(6) **Where the good has a “public aspect” to its nature.**

One question to ask is: does the good have public effects on interests people hold, such that those people should have a say in decisions about it? Some goods admit of a natural internalisation of the benefits and harms, but others are public goods. The ideal market model assumes absence of
externalities. We are asked to envision two parties behind their non-permeable fences who come together only to contract. Yet this is the exception, not the rule. For some goods, externalities cannot be eliminated and they even dominate over intended effects internal to the parties. The higher the significance of negative externalities that destruction or wasteful use of the good would cause, the less the decision should rest solely with the owner.

I have said that, in this section, the final step of my argument would be to claim that many environmental goods have most and sometimes all of these features. In fact, environmental goods tend to exhibit such features paradigmatically. Where the good has intergenerational value (and other of the above features), the fact that destruction extinguishes future options yields a prima facie case for preservation (even though this can be overridden by definite evidence of utility). That is, it yields a case for not allowing the owner to be the sole decision-maker. The claim that full liberal rights will maximise utility in these goods fails. Any right to use in ways that destroy the goods for future purposes must be circumscribed very carefully. For some goods, a trusteeship conception of property is more appropriate.

6.5 Conclusions

In the discussion of the individual utility argument, we found that a successful argument of the type Becker gives can, with my revisions, yield a case for rights granting security in the use of objects. Yet the argument is incompatible with some regimes of property. Specifically, the argument gives support for none of the following views: that property rights must include the right to pollute; that they must include the right to destroy the nature of an environmentally sensitive region; or that environmental regulations which limit certain uses are at odds with property rights.

In the case of the efficiency argument, instigating an institution of private property rights may increase efficiency in most cases, but fail to do so in others. Further, even when an institution of private property rights increases efficiency, the specific form that achieves this result may be other than the full liberal form. The general intuition that property rights increase efficiency underdetermines the types of property rights to be recommended in each case. It is not possible to make a case that a specific regime will always be efficient and I have suggested cases where full liberal rights are unlikely to be the ones that maximize efficiency. Specifically, we should be wary of any assumption that they will be the appropriate form over environmentally significant goods. I suggested criteria under which less strong incidents, including preservationist duties, are more likely to protect long-term utility. These results will inform the final shape of the set of rights in environmentally significant resources that I develop in the remaining chapters.

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279 See Gillian Brock, “Just Deserts and Needs”, p 178
Chapter Seven
Toward a Theory of Environmental Property

7.1 Introduction

Do government regulations requiring a “duty of care” or “good husbandry” violate rights and represent a partial taking of property? Honore, Epstein, Narveson, and other defenders of strong property rights answer this question in the affirmative. It is the burden of this and the subsequent chapter (and indeed the thesis) to present and defend a negative answer.

I first compile the results of chapters 2-4 (Locke), 5 (Nozick), and 6 (utility) to show how each points away from the simple assignment of full liberal rights and toward a more complex approach to justifying property rights. From these results I develop an account that justifies only limited rights in environmental property. This is not so much a grand theory, as a coalition of evidences for why property rights in environmental resources must be seen in a certain way.

My strategy is to highlight features of the arguments already considered which indicate that, for certain key environmental resources (and for other property the use of which can negatively affect such environmental resources), a more limited set of property rights is the appropriate and justified set. These features of the arguments are also strands that will be woven together to develop and defend my conception. These strands are the following:

- Locke’s inability to ground full liberal rights from self ownership (from 2.5.2, 4.2)
- The non-labour input to the value of a product (from 2.5.6, 4.2.4)
- Some implications of the ‘enough and as good’ proviso (from 3.5, 4.3)
- The implications of the libertarian arguments (from chapter 5)
- Limits from the utility arguments (from chapter 6)
- The discussion of what I have termed “residual interests” (from 4.4)

This task I complete in sections 7.2 and 7.3. In sections 7.4 and 7.5 I coordinate these results to yield an account of how these factors sculpt the rights in question. Chapter 8 completes this undertaking by defining the rights and duties that constitute this conception of property.

7.2 Strands of Argument for a Limited Property Conception

Here I examine what we have learnt from chapters 2 through 6. I argue that the arguments considered do not imply the right to destroy and instead point away from the view that full liberal rights are the only morally acceptable rights assignment. Further, they suggest that, in some
circumstances, there are powerful reasons to include a strong set of limits to property rights over certain environmental goods. The first five strands I treat here and the sixth in section 7.3.

7.2.1 Locke’s Failure to Generate Strong Rights from Self-Ownership

In chapters 2 and 3, where I assessed interpretations and extensions of the Lockean argument, three conclusions stood out. First, as a strict self-ownership argument, the “labour mixing” argument fails. To rescue it requires much alteration, yielding little case for libertarian-style rights. We cannot easily justify property rights over parts of the world by an extension of self-ownership through labour.

Second, we found that forms of property other than full liberal ownership were compatible with Locke’s argument. The assumption that rights must be of the full liberal kind is not only unjustified, but is inconsistent with what is surely a more apt approach: to let the justification given in each case guide us toward the type of property rights applicable in that case, while paying attention to the type of property object. Limited rights can yield sufficient control of objects to be consistent with the values and freedoms that motivate the argument. To make the incidents of ownership determinate, two strategies are available: we either enter civil society or give supplementary reasons for a particular form, say, from utility or justice. Locke himself opts for the former, but if this is done the exact limitations are influenced by political factors and the public interest, rather than determined by natural right. In fact, both options point strongly to my approach of summing the vectors from multiple arguments.

Third, revisions to the Lockean account of the type I attempted in chapter 4 are necessary. It is hard to see how some rights, (such as, non-maintenance inheritance, gifts, and bequests) can be defended in strictly Lockean terms. Lockean property entails limits that make a case for full liberal rights hard to sustain and point us toward a more limited form.

7.2.2 Labour Value, Earth Value

In chapters 2 and 4, I considered the extent of entitlement over a product and showed how Lockean property is more limited than Locke admitted. These limits emerge from (among others) the fact that the appropriator justifiably acquires a substantial interest in the object upon which she has worked - proportionate to her labour - but not an interest that excludes all common rights of others. Commoners retain a “property” in the good and this must be embodied in the shape of rights inhering in each party. This suggestion is Lockean in that it is the appropriate conclusion of Locke’s argument – more appropriate than Locke’s own.

I argued that commoners’ rights over the non-labour component of production must be embodied in some way. I suggested that, rather than the (woefully inefficient) view that commoners’ views be
expressed in every decision, a regime could grant use decisions to the labourer-owner, but only within agreed limits on the type of use and overall use patterns, reflecting the community’s interest. (Outlawing environmental harms is a good example.) In conjunction, some recognition of income shares over the land could be implemented by a tax on income, transfers, gifts, and inheritance.

Regardless of these practicalities, one key conclusion is that labour-generated property rights are likely to be attenuated, especially those over goods with a high resource component. Another is that we should abandon using labour in Locke’s way in favour of an appeal to the rights and liberties that define one’s moral space and to the interests in the products generated by the expression, through labour, of those rights and liberties. As a result of these two findings, the labourer can stake only a strong *prima facie* claim for according special status to his interest among competing claims from other interests. Both the identity of the rights-holder and the shape of her powers can be determined by a function of the array of interests. The public retain some legitimate stake in the use of, and products crafted from, natural resources.

### 7.2.3 Enough and as Good: Implications

Central to Locke’s case is the idea that commoners lose nothing by exclusion. Becker has observed that “many disputes about the legitimacy of property can be understood as veiled disagreements about the interpretation of this”. The functional role of the proviso is to ensure that appropriations are not unfair to others who are yet to appropriate or who arrive too late on the scene to join the appropriative game. It embodies, at least, the right to the means of preservation, which entails some important use restrictions and gives a right that overall use patterns do not threaten access to important goods.

I have argued that a “no harm” proviso, rather than a “leave equal goods in-kind” proviso is the most promising account toward the twin goals of satisfying the demands of justice and allowing efficient allocation of productive resources in an exchange economy.

### 7.2.4 Nozick’s Theory

Chapter 5 addressed the claim that strong libertarian property rights are generated, due to the link between self-ownership and property. I argued, contrary to this, that Nozick’s theory justifies legislators in environmentally motivated undertakings, including limits on the use of property. The destruction of environmental sites and resources others care about may worsen their position by their subjective lights. When this occurs, they are dragged below the baseline in a way they do not regard as compensable, violating their Nozickian rights.

I reinforced this result with an argument that would bite in the event this first one failed. I showed that, even if Nozick’s theory were the correct general theory, it cannot help us in many
environmental cases, since the ubiquitous presence of externalities renders it inapplicable to environmental goods. Nozick could avoid the conclusion by weakening his conception of rights, but this would herd him toward a rights conception more like the one I hold, which allows environmental protection by a different route.

A less strong conception of rights could capture the intuitions behind many of the principles appealed to by Locke and Nozick. We should be drawn away from strictly deontological property rights conceptions and toward rights theories that permit the consequences of rights assignments to influence what powers are granted. The latter approach promises to repair many of the weaknesses of the former. A conception of property rights appropriate to environmental resources is unlikely to leave the shape of rights in the hands of a once-off acquisition process, but, instead, relies on notions of utility and justice to constrain that process. My approach gives room for this.

**7.2.5 Limits from Utility Arguments.**

In chapter 6, I argued that justifiable property regimes are limited to those that do not undermine other institutions, goods, or values that are necessary for happiness. The argument from individual utility fails to justify property regimes of certain sorts. I suggested that full liberal rights, in environmental cases, will often fall into this category. Further, my analysis reveals the danger of abstracting property from the totality of values a society holds; the traditional utilitarian justification of property appeals to one source of happiness while obscuring others. If we begin to correct for this, we may arrive at a very different set of property rights.

In the economic argument, the emphasis placed on efficiency and preference satisfaction leads to twin desires: to minimise externalities and to compensate for the asymmetric ability to express preferences. Each of these can be achieved only by more limited property rights in some cases.

Further, even if markets were to achieve Pareto-optima at every production period, this gives no reason to think that the succession of optima achieved will itself constitute a desirable and sustainable inter-temporal distribution. The unregulated market (and the full liberal rights that it assumes) cannot be trusted to ensure sustainability.

Finally, I argued that the nature of some environmental goods makes it unlikely that strong rights, including the right to destroy, will maximise utility. In the case of some environmental goods, the benefits and harms are peculiarly public, the good has intergenerational value, or the good is not easily replaced. Here, the fact that destruction extinguishes future options that the market struggles to track gives a *prima facie* case for preservation. That is, it furnishes us with a case for not allowing the owner to be the sole decision-maker. The right to destroy must be circumscribed very carefully. For some goods, a trusteeship conception of property is more appropriate.
7.3 The Effect of Residual Interests

7.3.1 The Nature of Residual Interests

I devote this section to one factor I introduced in chapter 4, that of residual interests. I argued there that, even if Locke solves the consent problem on the level of subsistence-style survival, it remains unsolved on another level. Locke sees the resources of the earth as a common pool to be drawn on for mutual advantage. Thus, he recognised the material need for sustenance from the earth. This need can be fulfilled under land privatisation, when constrained by the proviso. From the proviso that I accepted as the most promising, those who lose the chance to appropriate lose nothing so long as they retain access to the means of preservation and, since latecomers are often beneficiaries of the bounty accruing from earlier appropriation, losing the chance to appropriate should be morally insignificant. To the extent that the problems noted in chapter 4 (section 4.3) can be solved, Locke has circumvented the need for consent.

Yet has the appropriator obviated the need for consent to nullify all interests commoners held over the land he now encloses? The fact, if it is a fact, that commoners lose nothing by being excluded from a labourer’s product and from the ability to use the labourer’s land for their own production, does not entail they lose nothing by being excluded from all interests they held in the land.

I claimed that ‘common ownership’ in the state of nature, when properly understood, extends beyond the protection of the right to the means of preservation to the following “residual interests”. First, as each person has autonomy, each must respect all others’ equal right to decide for themselves what is in their own good and how to pursue it. To the extent that others’ decisions over land use threaten one’s autonomy, through certain important externalities, autonomy gives the right to participate in decisions on overall use. Second, each has a choice about whether or not to work the land. This entails that each had a say over whether some land would be left unappropriated by others, which in turn gives a say in overall use patterns. Third, each commoner in the state of nature has an interest in the environmental services of the land, which are not internalised to any patch of land in isolation. Over wetlands, for example, each has interests that its recycling capacity not be destroyed. Lastly, each has a liberty to access regional sites of scenic and spiritual value. In the case of a scenic highlight, many will have an interest in its beauty, symbolism, and spiritual experiences it may evoke. (This is a less basic good than the others, yet it is still one accessible by commoners and highly valued by many.) I do not claim that these exhaust the list of possible residual interests. Rather, these are the ones most essential to setting aside objections to the environmentally motivated property restrictions I want to argue for.

I noted that none of these interests manifest as claim rights over particular objects or sites. By implication, we cannot say these factors prevent others from appropriating. They are, instead, each person’s interest in what happens to resources that become another’s property and in the effects of
the use to which those resources are put. Residual interests are consistent with the privatisation of property provided we see appropriation as granting some rights but not others. For those irreducibly common features of goods, commoners cannot be fully excluded. A theory of justified initial enclosure will need to recognise the irreducibly public aspect of land and natural resources.

Property theorists and lawyers have, largely, learnt from Bentham’s point that property is what we have in things but not the things themselves. “Property” is the name given to a legally (because socially) approved set of powers in respect of socially valued assets. It should be clear that one could have certain rights over a thing, but lack other rights over the same thing. The claim that “this land is my land” may not translate to complete control over that land. Instead, the “my” in “my land” refers to “my set of rights over this land”. This is compatible with other rights over the same piece of land inhering in others and this is what my account exploits.

There are, then, Lockean grounds for asserting that the community has a right to decide overall use patterns, which gives at least partial control over the options taken by property holders. This is grounded on a richer account of what is lost derived from a broader appreciation of pre-appropriation common rights and a correspondingly more thorough vision of what “enough and as good” should protect.

7.3.2 Full Liberal Rights and Residual Interests

I show that, when natural resources fall under private property, residual interests are unjustly ignored if both the rights granted are understood as full liberal ownership and appropriation proceeds in a way bounded only by the proviso. A conception of property that allows these interests to have force in shaping the rights granted could make space for these residual interests, solving the consent problem on both levels. However, full liberal ownership, by its nature, cannot yield this.

Locke’s appropriator leaves substitutes for land taken as compensation for lost ownership opportunities and this satisfies the moral requirements for fairness and avoidance of harm, as far as the preservation of human life is concerned. Yet the appropriator left no substitute for the common residual interests that each had vested in the land as an entirety. This is true in the following ways:

First, while private appropriation, giving full liberal rights, respects one aspect of autonomy in granting each the right of free use of their labour and accrual of profit from such use, it violates the full autonomy each had, since it fails to respect the equal right of all others to decide for themselves what is in their own good and how to pursue it. To the extent that decisions of others threaten one’s autonomy, through important externalities, autonomy requires a voice in land use decisions. Appropriative outcomes, bounded only by the proviso and yielding full liberal ownership, fail to give this.
Second, if exhaustive appropriation proceeds without democratic mandate, commoners’ choice about whether or not to work the land would be compromised. This again directs us to rule out forms of ownership that deny a voice in whether some land would be left in common.

These two interests are not respected if decisions about overall use patterns admit of no democratic input. (By “decisions about overall use patterns”, I refer to decisions that cumulatively determine the overall pattern of use that land is subject to, not to decisions of individual users that respect such patterns.) Commoners would not consent to appropriation yielding full liberal rights if they knew that, as a consequence, they would lose control of overall land use patterns.

Third, to preserve the interest in environmental services of the land, an assurance that sufficiently functioning ecologies will remain must be embodied in any property regime. This is inconsistent with any conception of property that allows individual decisions on usage to override the requirement that externalities degrading these environmental services be controlled. (Note that, in the limiting case when environmental source and sink limits are approached, this point is strengthened, since the right to the means of preservation, protected by the shadow of the proviso is threatened too).

Last, the liberty to access regional sites of great scenic value is inconsistent with full rights over those areas. Only property regimes that either held such sites in public ownership or allowed private ownership, with access rights, would be justified. Full liberal rights, bound only by the proviso, violate these residual interests.

### 7.4 Constructing an Account of Environmental Property

#### 7.4.1 Locke Gutted and Re-Stitched.

I suggested in chapter 4 that Lockean property yields results that require us to abandon the attempt to base a stand-alone theory of property upon original acquisition. I am interested, therefore, in how the important and valid intuitions that Locke appealed to can be used to construct a pluralist theory of property in environmental resources, drawing on results from other arguments I considered.

**Theoretical Divergence from Locke**

The important difference between Locke and the view I want to construct lies in the justification most fundamentally appealed to. Locke himself was enamoured of the doctrine that individuals own themselves in a way similar to Honore’s “full liberal ownership”. Property rights are either natural or created by contract between individuals who are essentially proprietors.

Yet this is not the only possible starting point for a theory appealing to interests based on labour and in chapter 4 I rejected it. I build my account on the following alternative approach that pulls together Locke’s intuitions with a different harness: We deny the claim that property rights are natural rights.
and, instead, see ownership as an artefact dependent on possibly competing considerations. The shape of the property rights the law may grant to individuals is constrained by the rights they have prior to the law, but interests other than those generating natural rights may function in the design of those property rights. The exact contours of the rights granted is given by a function of the relevant interests and morally important concerns that operate in an original acquisition situation. These concerns include need, liberty, the interests in products of our making, and desert. Some will involve reference to rights. Further, we consult the findings of chapter 6 to mine the utilitarian voice.

A potentially diverse range of factors will enter and, while labour will be chief among them it will function differently. Without the appeal to natural rights, the moral weight of labour functions as a desert claim, not as an expression of a natural right. It helps to constrain the force of other arguments for property and will provide much shape to the final array of rights these property arguments point to. Yet the final account will not be bound to labour alone and we are free to design property rights that reflect the total set of arguments, which include important non-Lockean concerns.

My construction pulls together the results of the earlier thesis in roughly the following way: The results reported in sections 7.2.1 and 7.2.4 break the attraction of libertarian-style property rights over environmental resources and leave open the way for, as well as actually pointing to, a conception that draws on a broader set of values. Those sections, as well as 7.2.2, 7.2.3 and 7.3, show us the nature of the competing interests of labourer and commoner, individual and society. Section 7.2.5 can guide us on empirical issues that underlie economists’ concerns about property.

**The Basic Approach**

In chapter 4, I summarised the desert intuition, as used in an argument for property. Given that a labourer has the liberty to use her body in the way called for by the work, and given that she has no moral duty to work, she deserves property rights of some sort as an appropriate reward, at least in some cases, when she expends effort to produce what is objectively, or widely considered to be, of value. In what follows, I develop the desert argument to capture the intent behind the labour arguments, drawing on the results of previous chapters.

The act of useful labour is a clear candidate as a desert base. We bring potentially productive resources into use when we labour on them, so some reward is due. To assess the nature of those rewards, we must apply the conditions of proportionality and fittingness. In some cases, a uniquely appropriate reward for the production and improvement of useful items is some sort of property right over them – if only possession and use. Those cases are, typically, when such a right is desired by the labourer and is part of the goal of the labour. This idea gets moral support from the value of project-pursuit. It does so because the individual ownership of particular objects is intimately related
to the formation and application of a coherent set of projects that are the major parts of a self-shaped life.

The exertion of labour is a claim-generating fact alongside other claim-generating facts with respect to a distributive situation involving people and resources. In this situation, rights are granted when one of the claims remains undefeated by the strength of the others. Appropriation proceeds in a number of conceptual steps. First, the labourer stakes a claim over the resource. The next step is to determine whether the claim has a basis. For this the appropriator appeals to her labour input. To measure the strength of that claim, we consider the relative importance of the effort, ability and industriousness. So far, while the claim must be taken into moral account, it does not have the status of a right. It will be upgraded to a right (the final step) if no one has a defeating claim.

To legitimise desert-based property claims, we must specify the set of conditions that ensure the labourer’s act will yield property in a morally justifiable way and describe the content of the right of property that emerges from it. We must determine the incidents (use, transfer, duration etc) that are most appropriate to grant as a reward, and we must know what the competing claims are. Deserving something is merely a prima facie reason to have it granted. It does not exclude others having some (even desert) claims over it, on a non-labour basis. These are both issues that determine fittingness and proportionality. The fittingness of a reward for desert-garnering actions will depend on certain fairness-ensuring moral principles.

In chapter 4 (section 4.5), I divided the factors that determine fittingness and proportionality into three types: factors from the context of labour; factors from justice principles embodied in the proviso; and factors from justice principles not picked up by the proviso. I left undeveloped the details and implications of these factors at that stage. Now, I expand this to craft a determinate view of property in environmental resources.

**7.4.2 The Shape of Labour-Based Claims**

This section considers the shape of property claims that are granted as rewards for labour. I show how facts about labour and the context of such labour sculpt the claims. They will be further crafted by justice and utility, which I address in the next section.

We began with the assumption that, sometimes, property rights of some form will be the fitting reward for labour. In an overall account of fitting rewards based on labour, we need to lay the fittingness factors that arise from the value of the product alongside those sourced in the act of labouring. In chapter 4.5, contra Becker, I allowed transfer mechanisms such as the market, rather than normative measures such as a “just price”, to set the component of the reward that stems from the value of the product. This is juxtaposed by three factors stemming from the act of labouring.
First, we found (in a discussion summarised in Section 7.2.2), that labour-generated property claims are attenuated when the objects have a high resource component. The appropriator’s substantial interest in the object he has worked on does not exclude all interests of others in the commonly owned, non-labour component, residing in every product that contains natural resources. The non-labour component restricts the amount of benefit granted to the owner. The sum of interests suggests that a regime could grant use decisions to the labourer-owner, but with rental income shares reflecting community ownership of the non-labour component of production. This could be implemented by a tax on income, transfers, gifts, and inheritance. (Inheritance was an example of a right that could not be defended in pure Lockean terms.)

Second, a desire to gain property in order to use it for harmful purposes should not be rewarded. The right to destroy or to use in harmful ways is not part of the notion of reward and the rights given need to be crafted to exclude these uses.

Third, the context in which labour occurs also makes property rights, or a specific shape of them, more or less appropriate as a reward. Crucially, some people lack the ability to undertake desert-garnering actions through no fault of their own. The size of property rewards and punishments should not reflect merely the actions of labourers, but also (1) the (in)ability (through no choice of their own) of others to access the system of rewards and punishments and, (2) the effect on others of the system of rewards and punishments when it is accessed by others. As Brock puts it, if one is not to be penalised, “one must not be seriously disadvantaged with respect to one’s ability to perform the actions which are desert garnering” and so, one must “have access to opportunities to perform those activities which attract differential rewards”.  

Use rights emerge from this picture as the fitting reward for labour, but these will be constrained in the general case by prohibitions against harmful use and a commitment to distributing goods to meet certain types of needs, in order to correct for undeserved rewards and punishments that would otherwise obtain. Income and transfer rights would track the market in principle, subject to the constraints of these other factors. In the specific case - that of goods with a high natural resource component - labour-generated rights seem more constrained. It is an open question how to embody this; greater restriction on use rights is but one way.

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280 Brock, “Just Deserts and Needs”, p 178
281 It could be argued that this third consideration requires full equality of opportunity. I do not make this stronger claim, yet I recognise that, if it was successfully pushed, it would entail heavier restrictions on the market and more equal distributions of property than would the case I make. There is a danger that the stronger claim not only could but must be pressed as an entailment. Yet, in the case I am considering, that of distribution of natural resources, the most that could be implied is not equality of opportunity but only that the wealth flowing from natural resources should be distributed in the most effective way to promote equality of opportunity.
282 The market could be used to assign labour and productive resource inputs and taxation levied to implement the corrections.
7.4.3 The Impact of a Lockean Proviso on Labour-Based Claims

Our discussion of the proviso furnishes a result bolstering the one above. The proviso functions for Locke to ensure the moral respectability of unilaterally created exclusive property rights. In a desert argument, the same intuition translates into the following principle: The status and validity of current property claims depends upon the way the property regime is likely to influence the welfare of others. Competing claims, especially from need, will influence fittingness. (This point was made in chapter 4, section 4.5, and I discuss its implications here.) Property rights are granted when one of the claims remains undefeated, by the strength of the others. A Lockean proviso is a condition whereby the presumptive labour-based claim to property will become legitimate. Residual interests aside, competing claims will almost certainly be overridden if this condition is met and, in consequence, the proviso helps elevate the status of the claim to an undefeated one.

Since the ethos here is the prevention of harm, I follow Clark Wolf’s harm proviso: A’s appropriation of an unowned resource X constitutes a valid property claim iff no other person is harmed by A’s appropriation of X.\(^\text{283}\) Labouring on unowned land may give a *prima facie* claim to that land. This claim may be backed by, say, its benefits to others, but this is not necessary. What is necessary is that no present or future person is harmed. Wolf crafts an argument by way of three ‘desert islands’ to show in what circumstances appropriation of unowned resources will constitute harm. The first desert island is as follows:

Thomas and John are alone and entirely destitute on a barren island. A crate washes ashore … [containing] exactly enough food and supplies to keep both of them alive and comfortable over the entire course of their lives. … Thomas asserts a claim to 5/8th of the contents of the crate. Thomas is the stronger and is able to enforce his claim. John dies in miserable destitution.\(^\text{284}\)

Wolf concludes that Thomas cannot establish a legitimate claim to 5/8th of the resource, since it violates this harm proviso. Thomas’ claim, based on adventitious needs, is defeated by John’s claim from basic need. I omit the second desert island, but Wolf’s third one is closest to our own situation.

Thomas is alone and destitute on the same barren island… [H]e knows … that the moment he dies, John will arrive to live a lonely life on the same island and, after John, John-Jacques … ad infinitum. … Thomas is supplied with a given stock of a renewable resource. If he chooses to exploit this resource at a sustainable rate, he will be able to live a long and comfortable life and will leave the same opportunity for the island’s next

\(^{283}\) Wolf, “Contemporary Property Rights, Lockean Proviso’s, and the Interests of Future Generations”, p 804 
\(^{284}\) ibid, p 806
inhabitant. Alternatively, he can choose to exploit this resource at an unsustainable rate … but as a result, no subsequent inhabitant of the island will be able to survive.\textsuperscript{285}

If Thomas opts for the latter option, he again violates the rights of others. More generally, A’s appropriation of an unowned resource violates the rights of others if A’s \textit{prima facie} claim to appropriate is defeated by the relevant claims of others, but in spite of this, A appropriates the resource. Unless we can find some morally relevant difference between our situation and the one described, we must acknowledge our obligation to design property regimes to prevent such harm to current and future generations; specifically, to design regimes over resources of the earth that limit the right to use those resources in unsustainable ways.\textsuperscript{286}

The upshot is that justifiable rights over resources useful to future people are more like stewardship rights\textsuperscript{287} than full-blown liberal rights. Stewardship rights are limited property claims affording rights to use and consume the fruits of property but no right to damage or destroy its substance. They differ from full liberal ownership rights in that there is no right to destroy or to modify in ways that put the basic interests of others at risk. For example, it may be acceptable to clear and plough some land, but not to destroy it by concreting or by the use of toxins.

More specifically, to fill out the cases where A’s claim is defeated, no appropriation of unowned resources will be justified, at least where all of the following is true of it: the claim to appropriate is based on adventitious needs; the claims of others over it are justified by reference to basic needs; no other morally relevant claims on these resources exist. Interference with an owner’s use of property will then be justified in some cases. Even a libertarian should accept this, Wolf thinks, because interference is targeted only against harm-inducing uses and so it protects rights that libertarians hold dear. Current property rights will not always trump environmental legislation when we can expect the latter to defend basic interests.\textsuperscript{288}

Wolf, I believe, is on the right track. He appears to think that his account will be sufficiently wide ranging in scope. Yet, there are a couple of problems. The first is that he fails to consider cases where labour, rather than need, generates the claims pressed, and I consider this here. Second, as I argue in the following section, the harms we should be concerned with include threats to residual interests and these are not picked up by his discussion.

To the first problem: Wolf’s three conditions will be fulfilled together only in cases where need generates every moral claim being pressed. Yet it is rarely the case that goods come into the world so conveniently free of attendant claims. Production generates competing moral claims based on

\textsuperscript{285} ibid, p 809
\textsuperscript{286} ibid, pp 809-10
\textsuperscript{287} Wolf uses “usufructuary” rights, but I want to avoid this obscure, Jeffersonian term.
\textsuperscript{288} Wolf, “Contemporary Property Rights, Lockean Proviso’s, and the Interests of Future Generations”, p 817
precisely the ground we are discussing; labour, rather than need. If the third condition does not obtain, the appropriation for adventitious needs may be legitimate even if there are others with unmet basic needs. If a producer's claim is of sufficient moral weight to negate claims from basic need, Wolf's argument will be undermined and the desired protection of current and future people fails. It is ironic that, while using a variant of Locke's labour argument, Wolf has a theory of property that fails to apply as soon as an agent begins to labour. Whether claims from risk, ingenuity, and labour undertaken by entrepreneurs, researchers, and resource scouts outweigh basic need claims is a crucial question.

In this context, Brock argues that the unconditional right to use (or use up) all of the laboured-on resource is not the appropriate reward. Her key claim is that, while "labour does indeed defensibly deserve some sort of reward, the exact form of that reward cannot be such that it negates the claims of others". Satisfying some condition of fairness is a necessary condition for us to claim defensible full-blown property rights from labour. Brock grants that labour, risk, and expertise of a resource scout (in oil or water, for example) can be a desert base, but denies that complete control over the resource is always the appropriate reward. The size of a reward for labour will depend on a number of factors, including the scarcity of various resources necessary to meet the basic needs of those who require them. Full ownership is not the appropriate reward, at least in cases where what others are excluded from is necessary to meet their basic needs.

In consequence, in each case of labour-generated claims, we must ask how the proposed appropriation or use of property will affect others' ability to meet their needs. Brock's argument supplements Wolf's in that it takes labour seriously as a generator of strong moral claims, but shows how such claims do not cancel out need claims. The conclusion, that the nature of rights to certain resources is sensitive to others' need, can be maintained.

7.4.4 The Impact of Residual Interests on Labour-Based Claims

The functional role of the proviso is to ensure that appropriations are not unfair to others yet to or too late to appropriate. It embodies the right to secure the means of preservation, which entails that some important use restrictions spring from within the justification of property. Yet, even the best interpretations of the proviso have missed "residual interests", which I introduced in chapter 4 and in section 7.3. I argued that, if a proviso recognises the full range of interests people have, it will generate even more restricted rights over natural resources than would emerge from a proviso designed only to ensure their access to the means of preservation.

In this section, I argue that the community's stake in overall use patterns introduces new conditions on property as a fitting reward. The claim staked by a labourer can be fulfilled by granting property

289 Brock, “Future Generations, Natural Resources, and Property Rights”, p 124
rights yet these will be crafted within limits that embody non-owners’ claims. Residual interests will require a sense of public-ness to remain over private land, implemented by certain restrictions.

Two questions arise here. The first, addressed in section 7.3, concerns the nature of these inequalities that arise through neglected residual interests. The second, the one I take up here, is the question of what these neglected interests entail about the shape of justified property regimes.

**One View of Communal Participation Rejected**

I first discuss and reject a suggestion, perhaps closest to my own, made by James Grunebaum who attempts to design a form of justified property based on what he identifies as the weaknesses in Locke.

Grunebaum promotes an “autonomy principle” that is propagated by the tradition of which Locke is a member. The principle is that “every one ought to act so as to respect each person’s equal right to decide for himself what his own good is, how to pursue it, and to … never violate each other’s fundamental well-being”.\(^{290}\) He argues that original appropriation theories assume – overtly in the case of Nozick, but tacitly in the case of Locke – that first appropriation operates in a rights vacuum, forgetting the pre-existing application of common property ownership. Grunebaum believes that common ownership cannot be so simply overridden and this precludes any private ownership without consent.

From this, Grunebaum concludes that the principle of autonomy, operating in this environment, forbids any ownership rules for land (and other resources having little or no labour content) that do not permit each to participate equally in decisions about how that land and those resources are used; all land use is a matter for communal democratic decision-making. Autonomy requires that all can participate in every decision. Included in these common rights are the right to manage (from the “equal right to decide for himself” clause) and the right to income (from the “well-being” clause).\(^{291}\)

While I am in common cause with his belief that ownership regimes must afford some democratic control, I reject both Grunebaum’s argument for why this is the case and his rather stringent method for implementation. I reject his argument, since, so long as the consent problem has a solution, appropriation can proceed in a way that does not violate commoners’ rights. The consent problem is solved – on the level Locke and Grunebaum understand it – since private rights do not deprive commoners of any of the rights and interests they had.\(^{292}\) Grunebaum assumes that common ownership rules out the encroachment of private ownership without consent. As we saw in chapter

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\(^{290}\) Grunebaum, p 143
\(^{291}\) Ibid, p 169-70
\(^{292}\) Here, I do not press my complaint that it fails to be solved on a different level to the one Locke and Grunebaum dispute.
2, this is a mistake since it would imply that each has claim rights over each patch of land — a position we found good cause to reject.

Grunbaum further assumes that the implementation of the necessary level of participation must take a particular form. His idea seems to be that autonomy is only satisfied in a property regime if everyone participates in every decision over each patch; the right to decide one's own good and the right of non-violation of necessary wellbeing entails a voice in all decisions about land and natural resources. Yet there seems no reason for thinking that enjoying private control over one's own piece of land, coupled with democratic control over public land and overall use patterns, cannot give sufficient autonomy.

These mistakes lead Grunbaum to assume that equal participation in decisions over all such land and resources is necessary for autonomy. This should be rejected, as it misunderstands the nature of common community and gives too stringent a criterion for preserving autonomy through a property regime (to say nothing of the fact that it also risks the inefficiencies of widespread common control that we encountered within utility arguments in chapter 6).

As can be seen, my account of Locke's oversight (developed in chapter 4 and in section 7.3 of the current chapter) is more subtle. I share the belief that autonomy, equality, and residual interests require public control and participation in a way that render absolute control by an individual unjustified, however I neither need an appeal to the strong premise that private ownership begs the justificatory question against common ownership nor require complete communal decision-making. I now develop my own account. I show how property restrictions follow if we include my account of residual interests in (properly) solving the consent problem.

**Implications for the Design of Property Regimes**

I have suggested that commoners have interests that have been ignored both by Locke and by subsequent first appropriation scholarship. I argued that, apart from the right to subsistence from the land, prior to first appropriation commoners enjoyed opportunities with respect to their significant interests that they no longer have after it has proceeded. While Locke may have solved the consent problem on one level, it remains unsolved on another. The justified exclusion from land possession holds only as far as the sustenance/productive aspects of the land are concerned. For those features of goods irreducibly common, or in which all have an interest, commoners cannot be fully excluded. Aspects of land are part of the commons even if the land passes into private hands. To solve the consent problem at this new level, we need to account for the interests missed. Here and in 7.5, I show how this can be done, by representing those neglected interests in the design of a property regime.
We found that commoners need the following interests preserved. Firstly, a democratic voice in overall use patterns, to represent, in civil society, their state of nature control over autonomy-limiting activities of others. Secondly, protection of their interests in environmental services and scenic sites. Neither of these interests manifest as claim rights over particular objects or sites, preventing others appropriating (contra Grunebaum). They are, instead, each person’s interest in what happens to, and the effects of, resources that become another’s property.

In section 7.5 I suggest how to distribute rights between appropriator and commoner to include all the results from this chapter. Here, I only show what full consideration of residual interest suggests. The appropriator would acquire the dominant interest in the object, extending to rights of use, possession, exclusion from trespass and theft, transfer, and a large share in the income. Others in the community gain a democratically expressed voice on legal limits to property use and especially the power to prohibit use patterns that threaten the viability of ecological services in an area; for example, through pollutants degrading those services.

7.5 Property in Environmental Resources: The Overall Result

In this section, I show how the forgoing discussions, especially of the three fittingness factors in sections 7.4.2 though 7.4.4, come together.

In moving from a state of common ownership to a state typified by private ownership, Locke seeks to protect rights initially held by all, while justifying the creation of new ones, specifically in property. Property rights are motivated by the desire to protect key interests in external items by assigning powers to use objects and, typically, to exclude others from their use. The interests generated in an object through labour may justify vesting certain rights in that labourer, overriding some interests in that object others have, if fairness criteria are observed. This we learn straightforwardly from Locke. The interest from labour, however, may not always override the interests of those others. Further, the interests in labour could conceivably be met without removing all the rights of others. For example, some cluster of rights for one person over an object could be compatible with vesting other rights for others in the same object.

In view of this when designing property regimes we need to ask four questions. What are the key interests? How can we represent these interests? In what ways do we need (and in what ways do we not need) to exclude others to protect those interests? How do those exclusions and non-exclusions shape the regime of property?

The interests have emerged throughout section 7.4 (constituting an answer to the first question). They include the interest of the labourer, the interest of commoners who may be harmed by being denied the means to preservation, the interests in justice of those for whom desert-garnering actions
are more difficult to achieve, the interests of all from utility and efficiency, and the “residual interests” I identified. These are used below to answer the remaining questions.

Firstly, the appropriator’s interest in autonomy and the personal utility of securing control can be represented by granting her the most substantial interest in the object she has worked on. Her interests are in producing without undue interference and in having a dominant share in the income from the produce guaranteed to her. These interests can be protected by granting rights of use, possession, transfer, income, and exclusion of others’ use. This set of rights is consistent with others holding different rights over the same resource.

Secondly, the interests of commoners who may be harmed by losing the means to preservation are represented by utilising the results from 7.4.3, the discussion of the proviso. While labour deserves some reward, the form of that reward is crafted to avoid ignoring the claims of others. In each type of labour-generated claim, we ask how the proposed appropriation or use of property will affect others’ ability to meet their needs. The fact that others have interests that can be honoured only by preventing or curbing certain uses of resources means that justified property rights are less powerful than full liberal rights. For example, if our interests in a protective ozone layer can only be respected by limits on overall chloro-fluorocarbon use, then prohibitions or taxes on production that limit some property rights are justified. In these cases, producers should not be at full liberty with respect to appropriation, transfer, and use. The imperative not to cause harm covers not only appropriative acts but also resultant distributions. This mandates land use planning, inspection, monitoring, and other activities characteristic of maintaining patterns of use that ensure no harm. These restrictions must be defined in a way that does not diminish incentives below levels indicated by utility arguments.

Justice considerations surrounding the (sometimes extreme) differential abilities to participate in desert-garnering actions have an extra bite. Guaranteed minimums of goods must be available to such people if the differential rewards in the market are to retain their moral appeal. This indicates that some share in the income derived from labouring on unowned goods should be redistributed accordingly. (This is supported by one of the intuitions that seem to underlie Locke’s proviso and similar constraints; that people should have equal opportunity to enjoy the fruits of natural assets, insofar as the equality of opportunity can be secured by a redistribution of the wealth flowing from the natural assets.)

293 In the case of important environmental resources, there is clear differential access by people and nations according to their prior wealth and expertise. My account of property lends support to an idea from Thomas Pogge of a transfer of the wealth that stems from such resources from those more able to exploit these sources to those less able. See Thomas Pogge, “Eradicating Systemic Poverty: Brief for a Global Resources Dividend”, Journal of Human Development 2(1) (2001): 59-77

294 Note again that this does not imply equality or even equality of opportunity but only that the wealth flowing from natural resources should be distributed in the most effective way to promote equality of opportunity. See Peter Brown, “Food as Natural Property” in Food Policy. eds. Peter Brown and Henry Shue (New York: The Free Press, 1977), p 74
Thirdly, we come to residual interests. The non-appropriating commoner has two interests not captured by the proviso. The first is in not having decisions of others threaten his autonomy. This can be represented by a democratically expressed say on legal limits to property use, reflecting the community’s interest. To the extent that others’ decisions over land use threaten one’s autonomy, through certain important externalities, autonomy gives the right to participate in decisions on overall use. In civil society this can be implemented by a public voice in decisions about the sustainability of overall resource use. In a democratic process concerning environmental quality, prohibitions on specific uses in certain geographical areas and taxes on income from harmful uses are likely to emerge. In most cases individual decisions about use - so long as that use respects democratically decided overall use patterns - would vest with the owner, and so a strong form of property will still be possible. It would differ from its full liberal cousin only in that some uses in certain localities would be controlled in ways democratically decided.

The other interest held by the commoner is the interest in environmental services and scenic sites. The former of these would shape property rights to prohibit use patterns that threaten the viability of those services in an area, for example, through externalities degrading these environmental services. The latter, while weaker (since it appeals to a less basic good threatened by appropriators), would guarantee liberty to access regional sites of great scenic value and so would require either public ownership of these sites or private ownership with access rights. These act differently from the first interest in that they do not vest a democratic voice in overall use patterns, but instead function as a direct duty attaching to owners, with respect to the property they possess. This effectively gives those in an affected locality, collective rights to certain values: environmental rights.

All of these interests are consistent with property appropriation, provided we see appropriation as granting some rights but not others. In land and natural resources, an object you own continues to carry the flag of common interests. It contains a value of so great importance to the community that this value effectively remains common.

Fourth, the results from utility and efficiency play a number of roles. The interests of all in overall utility are represented by closely approximating the market, whenever this is both efficient and consistent with the justice and desert considerations that act as constraints. Meanwhile, maintenance of the incentive to labour, acts as a limit on the more distributive elements of the above interests. In chapter 6, I discussed when limits to property and correction to the market are likely to add to utility. Some examples are: when much of the value of the good lies in its perpetually operating according to its ‘natural’ features; when the good is not easily replaced, or is non-renewable; when the good is significant for the meeting of needs; and when individual owners are less able than is usual to judge accurately the best overall use of the good.
The diverse nature of particular areas of land and the range of other natural resources mean the balance is struck in differing ways. At the extreme, for particularly important areas and resources, owners’ rights would appear more like trusteeship than private property, because of the significant interests other people have over it. The claim that “this land is my land” may not translate to complete control over that land. Instead, the “my” in “my land” refers to “my set of rights over this land”. This is compatible with other rights over the same piece of land inhering in others and my account exploits this fact.

7.6 Conclusions

In sections 7.2 and 7.3, I introduced the components (from previous chapters) that would appear in the construction. In the section 7.4, I developed the elements of that construction. In 7.4.1, I indicated the general shape and its difference from Locke. In 7.4.2, I used a desert account to show how labour functions to ground a *prima facie* claim. I then outlined how the social context shapes the claim pressed from labour. This context includes need, the ability of others to perform desert-garnering actions, and the natural component of any final product. I showed in 7.4.3 how to use the proviso and teased out what is needed to ensure appropriation does no harm. This included a detailed analysis of how to balance the claims of labour and need. Section 7.4.4 examined how ‘residual interests’ missed by the proviso can be accommodated into the design of property regimes.

In 7.5, exploiting the fact that the owners’ interests from labour could be met without removing all the interests of others in property, I built a conception of property that has the following features:

- An appropriator’s interest is fulfilled by granting rights of use, possession, transfer, some forms of trespass, and a large share in the income.
- Yet property regimes must ensure that no harm results from appropriative acts and also from resultant distributions. This mandates land use planning, inspection, monitoring, and other activities characteristic of maintaining patterns of use that ensure no harm.
- Some share in the income derived from labouring on unowned goods should be redistributed to those less able to undertake that desert-garnering action.
- The public must retain a democratically expressed say on legal limits to property use, reflecting the community’s interest. Implementation could occur through prohibitions on certain uses in particular geographical areas or taxes on income from some uses.
- Property rights must be shaped to prohibit use patterns that threaten the viability of environmental services.
- The public effectively possesses collective rights to certain values: environmental rights.
- These restrictions must be defined in a way that does not diminish incentives beneath levels indicated by utility arguments. This suggests allowing operation of the market whenever this is both efficient and consistent with the justice and desert considerations that act as constraints.
The account of the *set of actions* understood to result in the appropriation of specific objects featured labour in a dominant role. The *set of conditions* that ensure acts of labour yield property in a morally justifiable way focussed on the fittingness and proportionality of rewards for desert-garnering actions.

In chapter 8, I define the features of this form of property, spell out its consequences and advantages, and uncover precedents that lend it weight.
Chapter Eight
The Shape of Property in Environmental Resources

8.1 Introduction
This chapter describes the features of my conception of property rights in environmental resources. Having shown, in previous chapters, what use can be made of the central intuitions of traditional arguments for property rights, I define the new conception in section 8.2 and highlight some features and strengths in section 8.3. In section 8.4, I turn to a pair of challenges for the account – ones that tend to be pressed against any account that does not allow the fullest set of rights to reside with the owner. In section 8.5, I argue that the view I advocate still describes a form of private property. The chapter rounds off with a discussion of implications for governance.

8.2 Defining the Conception
The upshot of the argument in chapter 7 is to rule out absolute forms of ownership. In the case of natural resources, more than for most objects of property, only an attenuated set of rights to property seems justified. This will be incompatible with full liberal, private ownership and, in fact, with any system that does not allow space for communal decision making over use patterns and other protections. In this section, I outline five salient features of this conception of property. These are: an essentially private nature; a stewardship element; a set of restrictions; a set of environmental rights; and a natural resource dividend.

8.2.1 The Element of Private Ownership and Market Transfer
Under my conception of property, most decision-making power is vested in the owner. The appropriator's interest is fulfilled by granting rights of use, possession, transfer, exclusion from trespass and theft, and a large share in the income. The crafting of these rights will be sensitive to non-owners' interests and so, use rights will be less expansive than those of full liberal ownership.

The concern not to diminish incentives below levels indicated by efficiency arguments for private control is upheld by this conception through a policy of defining restrictions in a way least disruptive to market efficiency. This supports the right of transfer, suggesting we allow operation of the market whenever this is both efficient and consistent with the justice and desert considerations that act as constraints. So long as the rewards for labour approximate market valued marginal productivity, many systems of rights would suffice, not merely private full liberal ownership over land and the means of production.

295 This is in keeping with Alan Ryan’s observation that rights are to be proportional to purposes they serve rather than to take on a life of their own. See Alan Ryan, “Self-Ownership, Autonomy, and Property Rights”, p 243
The combination of private control within limits and a presumption in favour of market exchange yields a less far-reaching set of rights than strong forms of ownership and yet is still manifestly private. Individual titles would continue to be the most common form, as has been true of most Western economies. Rather than a form of communal property, it is a private form that carves out a larger space for the public interest and public decision-making than is available in full liberal ownership.

In Section 8.4.1 (addressing the “incentive to production” aspect of property rights) and Section 8.4.2 (addressing when the limits to private decisions over property do and do not apply), I explain in more detail the way in which my view differs in nature from full liberal rights, even when the specific rights are similar.

### 8.2.2 The Element of Stewardship

A community interest in property, where title is vested in a private owner, grounds non-exclusion from key decisions. In the previous chapter, we found that non-owners need a voice in overall use patterns to protect their interest in autonomy and environmental services and scenic sites. This does not function as a proviso to bar ownership per se. Instead, it arrests complete exclusion from certain interests still held in common. The interest of the public will require that a sense of publicness remain over private land, with this implemented by certain land use restrictions. This conception will recognise an “equitable property” for individuals in the quality and conservation of the natural world that will limit rights of owners, in many cases, and (re-)introduce responsibilities of stewardship to the traditional emphasis on rights.

This form of ownership has elements of stewardship and usufruct, since it is a more limited property right, affording rights to use and consume the fruits of property but no right to damage or destroy its substance. My own form of property is not usufruct in the sense of prohibiting alienation by gift, bequest and exchange. Instead, it prohibits another form of alienation; destruction of the intergenerationally important environmental features of that property. Property regimes must ensure that no harm results from appropriative acts and also from resultant distributions. Certain features of the land will be required to be left in a state that can be passed on to be used similarly by future people.

The stewardship aspect is sourced in principles such as fairness to others, the importance of basic needs, and interests in features of commoners’ relationship to the land that must be respected in a transition to exhaustive appropriation. These shape and restrain the content of the resultant right to property.

For land and other environmental resources, full liberal rights are unlikely to be defensible. Where a proposed set of uses violates democratically decided overall patterns, limitations on use will be
required by this account. Ownership of vital and depletable resources may need to be restricted to rights of income, transfer, and part-management, with a management voice reserved for the public. At the extreme, for particularly important areas and resources, owners’ rights would appear more like a trust than private property. This view diverges from those of Locke and Nozick, as those theorists both think the intuition behind a labour argument will straightforwardly justify stronger private ownership.

8.2.3 A Set of Legal Restrictions

The stewardship conception would be implemented by a set of legal restrictions on property use. Many of these curbs act as duties attaching to owners over property they possess. The exact combination will be a function of the justifications of the interests and rights that need to be protected and economic and policy analysis of efficient ways of protecting those interests and rights.

A set of tools will be required to embody the restrictions. These could include: prohibitions on some uses in particular geographical areas; taxes on income from polluting uses; duties on owners of important sites (for example, wetlands or forests) to keep their environmental or scenic features in a functioning state; land use planning, inspection, monitoring, and other activities characteristic of maintaining patterns of use that ensure continued access and the prevention of harm.

In general, use restrictions, rather than transfer restrictions, allow us to realise the goals and respect the interests and rights that a community cares about (for example, public participation and sustainability) in a manner that clashes least with efficiency and the liberty of owners. Yet some restrictions on transfer and the duration of rights may be included, insofar as these are necessary to ensure the combined powers of property to not exceed the limits justified by the theory. The natural diversity exhibited by areas of land and other natural resources will require the balance to be struck in differing ways.

Particular duties likely to emerge include duties on businesses, such as: the duty to refrain from activities that generate unacceptable levels of environmental risk, for example pouring chemicals into rivers; the duty to maintain a low-emissions vehicle fleet; and the duty to compensate victims of violations of these duties.

8.2.4 A Set of Environmental Rights

An implication of a number of the elements in chapter 7 is that, in land and natural resources, a privately owned object continues to carry the flag of common interests. Certain resources confer such intrinsic public utility that their benefits must be retained within some form of the commons. Exclusion from those benefits is ruled out because of their irreplaceable moral or social character. The interests of the public and the restrictions on property I have argued for sum to a set of environmental rights. Individuals have a sufficiently strong claim to the protection of the environment
and the benefits in question. This claim is unlikely to be adequately respected unless we grant rights, rather than weaker forms of protection.\textsuperscript{296}

Environmental rights are essentially participatory or democratic rights of purposeful access that are asserted against and trump claims of destructive consumption. Environmental rights are no different from other rights in that, while sculpting them, we need to ask how they fit into the values underlying all other basic rights. Some critics of environmental rights claim there is a profound difference between standard human rights and proposed environmental ones in that most human rights are rights that ensure individual freedoms, often against state interference, whereas environmental rights would require government interference.\textsuperscript{297} However this distinction is overwrought. Most human rights are like these environmental rights in that they require systematic government action to limit arbitrary interference (from both individuals and governments) over aspects of life we significantly value.

According to my arguments, environmental rights vested in the public will include the right to the means of preservation, the right not to be subject to health threats (and others harms) from use of property, the right of orderly administration of overall use patterns, and the right to preservation of the integrity of significant environments. It will include rights to clean air, water and soil. These are negative rights in that they require others to refrain from interfering with another’s clean air, water, and soil, unless there is clear overriding justification. Pollution of these environments by individual or corporate property owners would violate these environmental rights. This mandates effective government activation of environmental regulation for many processes and systems. Implementation methods could include incentives, penalties, and the power to sue for damage.

\subsection*{8.2.5 A Natural Resource Dividend}

A natural resource dividend stems from the (chapter 7) discussion of the justice of rewards for desert.\textsuperscript{298} To ensure that property rewards are fair, those hampered in the performance of desert-garnering actions over natural resources must be assured of some share of the produce. Hence, some of the income derived from labouring on unowned goods should be redistributed to those markedly less able to participate.\textsuperscript{299} I note that this does not imply full equality of opportunity in markets generally. In the case I am considering - distribution of natural resources and environments - the most that could be implied is only that the wealth flowing from natural resources should be distributed in the most effective way to promote equality of opportunity. This operates not only on the small-societal and national levels but also internationally. Some nations are shut out of natural resource appropriation due to technological and financial disadvantage.

\textsuperscript{296} This would not be the case if large numbers of people were to embrace a ‘deep’ environmental ethic, as the resulting voluntary behaviour change may be sufficient to make the formulation of environmental rights unnecessary.

\textsuperscript{297} For an example of this view, see Shari Collins-Chobanian, “Beyond Sax and Welfare Interests: A Case for Environmental Rights”, \textit{Environmental Ethics} 22 (2000): 133-48, p 135

\textsuperscript{298} The utility arguments in chapter 6 could provide further support, but that is an empirical matter.

\textsuperscript{299} This share, I believe, will be small enough to maintain the lion’s share as the right of the owner.
8.3 Features and Strengths

8.3.1 Property as the Mirror of Natural Resources

The significance of land is not limited to its use as a productive resource; it doubles as our environment. Appropriation, while isolating and vesting rights in a particular person, does not physically isolate the land; we must consider the externalities. Externalities imply we are neither totally free from a moral point of view to act in our own boundaries nor totally constrained by others’ boundaries. To assign full liberal exclusive rights - for example, a right to develop one’s land as one pleases by filling in ecologically significant marshland - ignores or distorts an obvious relationship between such activity and interests of the public. My arguments show that the appropriation process does not justifiably exclude those interests. Because of this, the assignment of full liberal rights is too strong.

The above result is a consequence of the admission that there is an environmental context to our property rights. Individuals are not set apart by property-like boundaries, affecting each other only when they intend to. Arguments that assume a model of social life that sees people engaged mainly in self-affecting actions, except when the results of interactions are mutually consented to, is most patently false in the environmental case.

My conception more accurately tracks and mirrors the features of natural resources that suggest rights over those goods should be both less strong generally and of a strength that varies with the features of that resource. Methodologically, it does what libertarian theories fail to do; namely, pay sufficient attention to the social and environmental context with respect to externalities, the interconnectedness of environment, and the background of human society in which an appropriator is embedded.

8.3.2 Honouring Labour and Production while Curbing Destructiveness

We now have a view of property acquisition and the rights of use that take labour seriously without saddling us with Locke’s limitations. Further, it includes the intuitions behind the provisos needed to solve the consent problem. One way to describe a key difference is to say that, under my conception, the Lockean proviso is widened to cover aesthetic and ecological resources that belong as organic parts (or emergent properties) to larger systems and that may be destroyed if land is removed from its natural condition. When a resource (perhaps including those whose most significant feature is natural beauty) becomes critically scarce, society may rule against further appropriations or destructive uses.\footnote{Mark Sagoff, “Takings, Just Compensation and the Environment”, Upstream/Downstream: Issues in Environmental Ethics. ed. D. Scherer, (Chicago: Chicago University Press, 1990), p 373}
This conception of property respects autonomy understood as law-governed freedom within constraints that include sustainability, rather than as pure human will. It honours labour as a desert-garnering action by vesting most decision-making power in the labourer. Further, it upholds the right of alienation and the policy of defining restrictions in a way least disruptive to market efficiency, through a presumption in favour of market exchange. This respects the incentive to produce for trade and the resultant efficiencies.

The account of property I advocate avoids the failings of its more extreme competitors. Much concern to stop the overuse of resources and over-production of emissions manifests in a temptation - one too often taken - for environmentalists and those concerned with global inequalities to dismiss private property (in an idealistic, woolly kind of way) in favour of socialist or collective property. “The land belongs to no one” is a common refrain. Such views continually display a lack of understanding of both motivational and efficiency issues (such as, the tragedy of the commons and incentives to production), and moral issues (such as, protecting the interest a worker has in the fruits of her labour). They tend to increase individual frustration and discourage even useful, environmentally benign, development. They simply fail to account for the strength of private property.

At the other extreme, with full liberal rights we are without legislative defence against those who control and sometimes abuse such goods. An appeal to such rights has been a common strategy for many who oppose environmental protection law. The private rights justified by my conception allow, and in fact demand, limitations in the public interest and public control over cumulative use patterns. They allow the fruit of private decision-making and gain, but retain the ecological insights that there is more at stake in the world than the liberty of the few with significant economic resources; that the integrity of the ecosystem matters; that we all, by common humanity, have a stake in both the fruits of development and the preservation of beauty and wholeness.

8.3.3 Pluralism in Justificatory Principles

One weakness in both Locke’s and Nozick’s accounts of property is that the singular principles they use are inflexible. A corresponding strength of mine is sensitivity to a range of justificatory principles. Unlike Locke’s account, my conception of property does not attempt to answer too many questions with too few tools by overworking labour. Although labour is a strong feature in the desert account, many other factors also feature. While a labour argument makes sense in principle, it seems impossible to construct limits derived entirely from the nature of labour that are applicable in modern societies. As Munzer notes, pluralistic theories are not “second class citizens, temporary truces or weary compromises whose interest stems entirely from their components. Rather they are often the only way to deal honestly with the complexity and uncertainty of moral and political life.”

301 Munzer, p 293
8.3.4 Flexibility within a Property Regime

Good moral principles may guide us to divergent forms of ownership for different conditions. Yet my theory gives flexibility not only in the principles appealed to but also in the content of rights granted. This alleviates much of the pain caused by the labour theory through lack of alignment between the force of the argument and the overly strong rights it claims to generate. When the all-encompassing nature of property rights are not simply taken for granted it is impossible to find arguments that point consistently to rights of one particular strength, rather than to the variable strength account that I advocate. While my account retains the feature that rights cannot easily be overridden, I allow for variation in the scope of specific rights granted, according to the balance of arguments in each group of cases.

This illuminates why strong rights seem so inappropriate in many cases, especially in environmental cases. A strong rights theorist will have trouble in aligning desert to property rights. Desert is a scalar magnitude, varying in strength, but the favoured rights of a strong rights theorist are point-like; one is granted either strong rights giving sweeping powers over property or very little. A desert theorist who argues that full liberal rights are standard must explain why actions of greater or lesser worth should not yield a property structure granting correspondingly greater or lesser rights, liberties, and powers. In fact, I doubt any productive effort is so titanic as to deserve rights that are fully exclusive, permanent, bequeathable, and insensitive to others needs and interests. (I use desert here, but the same problem besets ‘labour mixing’ accounts more generally. Acts of mixing, making, and constructing vary in both the amount and skill of labour and ingenuity they involve; that is, they are scalar and do not fit well, as justificatory acts, with a regime that rewards them all with equal, point-like rights.)

The supposition that the form of rights must be full liberal is not only unjustified, it is inconsistent with the practice of looking, in each case, to the justification given and the variation in the type of property objects, to guide us to the appropriate rights form. Limited property gives sufficient control to be consistent with the values and freedoms that motivate the arguments for property.

8.3.5 Protection from Within the Conception of Property

The last advantage goes beyond academic debates over argument form. While some may try to restrict appropriation for the protection of non-owners and future generations this is an inadequate way for an environmental protector to proceed. Environmental threats often have their genesis not in too much appropriation, but in too strong a conception of rights gained once appropriation has occurred. Here I argue that a harm proviso reflects this point and provides a basis for land use restrictions, in principle from within the concept of property itself rather than merely as an external restriction that is justified (if at all) from other considerations.

302 Wenar, p 812
Locke’s proviso, taken as a genuine condition, gives protection against an appropriator inflicting resource scarcity on others by her ownership. But a proviso that asks one merely to leave enough and as good does not restrict polluting uses, provided one left enough land unappropriated. One can imagine each appropriator labouring on land only the size of the greatest universalizable share. This satisfies the Lockean conditions for property under any reasonable interpretation we encountered in chapter 3. Yet these same appropriators may then engage in pollution-generating activities causing harm to each other and future generations.\(^{303}\) There is no protection against future harms that are not a result of the resource being made scarce.

This is not to say that Locke’s project, taken as a whole, will allow using property to harm others. Restrictions overriding the rights a property theory would grant could be generated from other principles of justice. This however, would be a factor external to property acting to limit property, not a restriction from within the justification of property. Locke’s proviso fails directly to prohibit the pollution from within the resources of the concept of property. Yet the account I gave, building on Wolf’s ‘no harm’ proviso, eliminates the pollution case and yields a conception of property more able to prohibit harmful use by directly excluding it from the shape of property rights granted to owners. The conditions on fittingness I have developed not only shape property rights by demarcating the set of justified acts of appropriation but also by demanding certain patterns of results. If we are interested to see how far down the road of use restrictions the concept of property itself can take us, there is a clear advantage here over Locke’s own proviso. Interestingly, such harnessing of Lockean intuitions to argue for environmental protection is in sharp contrast to Locke’s usual employment by those keen to show that such protection violates owners’ rights.

### 8.4 Determining Specific Rights: Some Problems

#### 8.4.1 Limited Rights Forms and Incentives

In the account given (in chapters 4 and 7), a claim to ownership constitutes a property right only if it is undefeated. We must assess the relative weights of different interests and the claims arising from them and decide when claims are rebutted by others. Yet one may object that an argument to show the sensitivity of labour-based property claims to such factors as need and residual interests risks entailing too stringent criteria on when rights will be justified. If guaranteeing access to needed resources, for example, is a necessary condition for a labourer to deserve property rights, whoever needs a resource has a stronger claim to it than its producer. Will those in need of grain have a stronger property right than the one who toiled to grow it? Will AIDS sufferers have a claim that defeats the intellectual property claim of the cure creator? This will soon fall foul of the incentive problem for all the reasons discussed in chapter 6. We give resource scouts, inventors, and

\(^{303}\) Of course, there are ways to destroy land and create pollution that will not leave “enough and as good” and Locke’s proviso will rule these out. If those polluting industries destroy the land that was left or render human life impossible within its boundaries, then there possibly will not be enough and certainly will not be as good. But for many other cases of harm (for example, particulates that cause foetal deformities), the harm does not stem from the appropriation itself. An “enough and as good” proviso fails to rule out these activities.
producers more full-blown rights precisely to encourage them to engage in vital research on goods to which we otherwise may not have access. Yet, if those needs must be met before property rights can be granted, then there is little incentive to research.\textsuperscript{304} In the case of AIDS, all sufferers require the cure to meet their basic needs and so all sufferers - the entire market - must have the cure before property rights are granted!

This objection rests on a misunderstanding of the relationship between needs, residual interests, and other counter claims on one hand and labour on the other, in the assignment of property rights. It does so by conflating the question of “What property rights are appropriate to grant to the producer, all things considered?” with the question of “What rights are generated by a labour-based desert claim?” If we separate these out we see that the claim about the sensitivity of labour to needs (etc) is an answer to the second question not the first. Full liberal property rights are never the appropriate reward stemming directly from discovery, creation, or labour. Yet this leaves open the possibility that, all things considered, property rights may be justified, even if a labour-based desert claim alone would not suffice to justify it. Granting such rights can be the appropriate response of a legal system to the competing claims surrounding the resource in question. We consider the value of the institution of property and determine what arrangement of property rights is likely to result in the desired outcome (the production of the grain, the invention of the drug, the needs being met, or the environment preserved and enhanced). If standard economic incentive arguments are sound, some protected property rights scheme may be best. We could grant those property rights with certain conditions attached if it better serves those other ends.

It is not the case that granting property rights in those resources is ruled out by the counter claims of others; only that such rights are not justified by the labour argument in isolation. The argument from labour grounds a presumptive claim, yet the significance of needs and residual interests (etc) shows property rights are not necessarily the appropriate reward for labour. This result does not prevent us from assigning, all things considered, some type of property right to the labourer.

At this point one may ask: how are rights over resources still limited rights if the appropriator or developer of the resource has been granted all-things-considered ownership? The answer emerges when we examine the nature of the rights assigned. We should not assume that, since the outcome of the competing claims (from labour, basic need, residual interests, and utility) yields a case for granting property rights, these rights are then full liberal rights. In fact, the process of justifying these rights in resources where need is a competing claim will yield some extra conditions or limits not inherent in other, more full rights.

\textsuperscript{304} The incentive argument should not be overstated. I doubt it is the case that, without huge profits, the research will not be carried out. Scientists are not entirely mercenary in their research interests. Much research is also funded by governments according to national health priorities.
In cases where there is no competing need claim, the interest of the property owner protected by the property right is the main significant interest on offer and so a maximally unrestricted use right, typical of full liberal rights, suggests itself as most appropriate. However, in the cases with which we are concerned, the interests of others are operative in a more significant way and the arguments for and against the property claim of the appropriator are more precariously balanced. This suggests that such maximally unrestricted rights are less appropriate. Others’ interests in the use of that property are not so easily overwhelmed in the justificatory process. Consequently, the property right takes a form less like a labour-generated, inviolable right that excludes all claims of others and more like a carefully defined right with duties attached to protect the interests of others that were appealed to in the justificatory process. Such a right will be shaped both by the requirement that it protects those with legitimate need (etc) claims from wanton uses of the resource and by the practical requirement that the incentive to labour on the resource is preserved.

The upshot is that, when others can be harmed by certain uses of property, not only are property claims over found resources limited (the result of Wolf’s argument), but property claims over produced resources are similarly limited. The fact that others have needs and legitimate interests that can be met only by preventing certain uses of the resource means the property rights granted are less than full liberal rights.

With this result in mind we can ask: What restrictions or duties suggest themselves in the shaping of the specific form of property right? Recall that first, interests from needs pointed away from granting the rights, while residual interests and the harm proviso suggested they be granted in a limited way. Second, even though some type of property right was justified, all things considered, a demonstration of the utility of such a right was required to produce this result. Attaching property rights in these cases is done at least partially in order to facilitate needs being met and public interests enhanced, not in spite of the claim that they should be met and enhanced. The rights are granted, at least partially, with a social end in mind, which is directed at such need satisfaction and interest protection. This suggests restrictions on granting any powers that are likely to count against the interests considered in the justificatory process. In particular, uses and powers that count against meeting these needs and enhancing these interests will be less defensible. Those uses and powers are in conflict with the justification of the rights and so, it will no longer provide support for them.

This will apply in different ways to the various objects of property. Rights to natural resources would be prime candidates for restrictions on appropriation and use when these resources are required for the basic needs of future people. Destruction and harmful uses, in some cases, would be excluded from the incidents of property. This includes those uses where harm is caused by multiple agents contributing to a cumulative outcome. In the different, non-environmental case of researched cures, a prohibitively expensive pricing structure that prevents the state from socially supporting
distribution to the needy would be indefensible.\textsuperscript{305} A system of economic rules that fails to forbid harms in these and other cases effectively grants a property right the strength of which defeats the purpose of granting it in the first place. Property laws permit people to profit from their economic activity - and rightly so for the sake of utility, desert, and the freedom to pursue projects. But on this account, the property rights that law-makers grant must contribute to, not threaten the availability of needed resources to those who would be harmed otherwise.

So, full liberal rights in these resources are neither the appropriate reward for labour (and so are not justified by the labour-desert argument that first generated the \textit{prima facie} claim) nor justified by the utility/incentive argument, which was needed to promote the claim to a right. In these cases, producers and risk-takers should not be at full liberty with respect to appropriation, transfer, and use. They hold a set of rights more attenuated than full liberal ownership.

\textbf{8.4.2 Determining Applicability}

Suppose we had agreement from all parties that resources needed for future generations are limited in this sense. An important problem would remain. The account so far does not make sufficiently clear the connection between current uses of particular pieces of land and harm to future generations’ ability to meet their basic needs. Which goods fall within the stewardship gamut? Which pieces of land need to be set aside? Which future needs are affected by developing the land? Unless these questions have clear answers, few particular developments could be justifiably prevented. Clark Wolf suggests we may prevent the draining of wetlands and the building of resorts in the mountains, but his account is insufficiently fine-grained to explain why we can prevent these developments and not others.\textsuperscript{306} How can we say that a landowner cannot clear fell this forested lifestyle block when other blocks have been concreted over in the past? This is a serious problem not so much for the conceptual success of the argument itself but for its application.

There are two issues here. The first is in what ways if any we could harm future people. The second is in knowing to which tokens of property the more limited rights should apply. The former has received considerable attention, so I will restrict my focus to the latter.\textsuperscript{307} Here I identify two conditions, which if met, would render this conception of property applicable. First, it must be possible to identify the \textit{types} of resources over which limited property is the appropriate form of ownership. Second, assessment criteria of environmental value in the above resources must be found. This is required in order to show under what conditions increasing limits to use rights over the resource will be justified. I deal with these in turn.

\textsuperscript{305} This suggests that an appropriate restriction is to attenuate the ‘right to profit’. In the case of researched cures, this would be better implemented by general taxation rather than by targeting profits from production of the needed resource, as the latter approach may re-introduce the incentive problem. Researchers would funnel funds to projects subject to lower taxation. I will not pursue this as my focus is on natural resources.

\textsuperscript{306} Wolf, “Contemporary Property Rights, Lockean Proviso’s, and the Interests of Future Generations”, p 812

\textsuperscript{307} See chapter 1 for my reasons for not discussing the moral status of future generations in this thesis.
The task here is to circumscribe a set of environmental resources, the use of which typically has intergenerational implications. To identify the resource types that qualify we can investigate what features of an object of property make it more likely that its misuse will render future people unable to meet their needs.\textsuperscript{308} One key result from chapter 6 was the identification of cases where limits to property and corrections to the market are likely to prevent disutility and long-term degradation. These conditions include: when much of the long term value of the good lies in it perpetually operating according to its natural features; when the good is not easily replaced, or is non-renewable; when the good is significant for the meeting of needs; and when individual owners are less able than is usual to judge accurately the best overall use of the good. I suggest these features point to the following two classes of goods:

First, \textit{non-fungible resources essential for basic needs}. Destruction of a good holds severe risks for the future when the resource is essential to multiple generations and significant for meeting basic needs. Economic arguments surrounding sustainability often distinguish between natural resources that allow substitutes and those that do not. Future generations may not require us to leave vast stores of, for example, copper if we develop technologies that fulfil its functional role. Leaving superior technology, so your successors can make more effective use of the diminished stocks that remain is also a worthy substitute. Conversely, certain irreplaceable goods that are of great significance seem particularly strong contenders for being subject to stewardship limits such as preservationist duties and development restrictions. Some goods are such that we need sufficient quantities of them to remain operating according to their natural functions in order to ensure the means of preservation to future generations.\textsuperscript{309} Land, forests, and ecosystems are examples of this. The list of essential non-fungible resources will include not only non-renewables but also some renewables. In the latter case appropriate stewardship duties will not require preservation but use within their rate of replenishment.

Second, \textit{fungible resources whose functional role cannot yet be filled by substitutes}. Not all the needed goods are non-fungible. At any time-slice, some resources that are fungible may be included in the stewardship class if substitutes cannot be developed speedily and in sufficient quantities. Julian Simon and others argue that we will never leave future generations with real scarcity of fungible resources, since shortages lead to price rises that prompt both development of new resources and techniques for finding more of the old ones.\textsuperscript{310} This assumes we will always

\textsuperscript{308} Almost any object of property could be used in harmful ways. We must restrict attention to uses that, were it not for the threat of environmental disaster, would normally be regarded as innocent.

\textsuperscript{309} Further, if we think it important to preserve values and opportunities for future generations beyond their mere survival, then the definition of this class will depend not merely upon our technical ability to replace goods but also upon whether doing so is consistent with those values we wish to preserve. We could imagine an artificial respirator as a substitute for trees acting as a carbon sink and oxygen source, yet we may value forests for other reasons. In this case, the class of “non-fungible resources” will include some technically fungible resources that are nevertheless deemed to be non-fungible with respect to higher values. While this could be pressed, it goes beyond preservation for basic needs.

have sufficient lead-time to develop new resources; that exhaustion will not take us by surprise. Where this assumption is questionable it would be wise to include some possibly fungible, but not yet technically fungible, goods in the class of resources carrying extra duties. The appropriate duty on owners would be, firstly, to exhaust those goods at a rate sufficient to allow development of alternatives that fulfil the same function, and secondly, to contribute to that development through research and investment in those alternatives. Simon’s argument does not point decisively away from legislated limits to resource use and may even point toward them. Given the fact that some shortages may be severe before we have developed substitutes, we can employ Simon’s own point. If necessity is the mother of invention we can incentivise the needed development by imposing use restrictions and taxes, because they function to create an artificial form of scarcity, prompting the invention it engenders. In this way we can achieve the innovation Simon envisions without the same (high) level of risk.

**Assessment Criteria in Environmental Value**

The second of the two conditions is to determine when the type of resource is threatened to an extent that stewardship-style limitations apply to tokens of it. When deciding if rights over a particular piece of land, for example, should be limited, the need of future generations with respect to the land must in some way be assessed. Will certain uses of the resource mean it is too scarce in future? Will certain uses undermine its importance?  

Such an assessment, I suggest, is possible. When the remaining quantities of, say, forest and fertile land in food production well exceeds the minimum needed by future people, developments that would ruin some areas for these uses would not be of concern. Full rights could apply. However, following extensive chopping, clearing, and concreting, if these minimums are approached and ecosystems become critically fragile, then sensitivity to future needs would be invoked. Specific rights in these resources become curtailed.  

A “protection indicator” emerges from this account. Among its parameters would be: scarcity, renewability, importance of the resource, and the seriousness and reversibility of potential harm. The protection indicator value of, say, carbon sinks will be inversely proportional to their existing

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311 There are questions about what we should count here: Is it irreplaceability or necessary minimums? If strict irreplaceability, then with any destruction of a natural area (say, strip-mining a valley), insofar as what was valuable about it was its naturalness, there is nothing we can do to produce a substitute to replace what we destroyed. My focus here is on necessary minimums, which do not work by picking out particular tokens of goods that must be preserved or replaced. As a systems approach rather than an individual approach, this avoids the above problem that besets the irreplaceable goods approach. For more, see Robert Goodin, “The Ethics of Destroying Irreplaceable Assets”, *International Journal of Environmental Studies* 21 (1983): 55-66

312 On the surface, this suggests a market model of valuation. The market is sensitive to resource scarcity, tracking the importance people place on goods. Those goods most scarce will become expensive, alerting legislative bodies to their need for protection. This approach can take us some way, yet it would be foolish to rely upon it exclusively. Among other weaknesses, the market may fail to pick up scarcities when the needs affected by such scarcities are those of future generations and when the market records willingness to pay (a function of wants) and ability to pay (a function of wealth) rather than needs. Current preferences are doubly blind to future needs. As current they register what is currently valued, not what will be valued in future; as preferences they register wants, not needs.
quantity and proportional to human population. (The details would be left to ecologists and economists.) This provides a means of assessing the value of resources for future people and gives at least the bones of an answer to the question: why this piece of land? This analysis does not yield an objective standard whereby a particular piece of land must always have only stewardship rights over it. Instead we have an historical and contingent standard sensitive to scarcity, future need, and current use options.

Importantly, the act of identifying resources over which limited rights are the maximum justifiable rights applies more broadly than simply attaching duties to owners of the valued resource. In the case of polluting emissions, the resources that must be preserved are degraded not by any use they are put to by their owners but by spill-over effects from the use of other property. The requirement that such important resources be preserved kicks back to justify limitations on the use of other resources. This second class of resources, while not sufficiently important themselves to ground stewardship limitations, have uses that typically result in degradation of those resources that are important. Limits apply here too, for example, in the form of restrictions on industrial and transport emissions.

One implication mentioned in 8.3.2 and 8.4.1 should be plain from the current discussion. Since the account is sensitive to a number of justifying principles and a range of object types, it justifies a continuum of specific property incidents. The varying nature of particular areas of land and the diversity of non-land natural resources will mean the balance is struck in differing ways. This is not a requirement of ‘justice in the abstract’ but of justice under the specific conditions imposed by scarcity and the threat of great harm.

8.5 Is this Conception a Private Conception?

I will argue that my conception of property, though more limited than full liberal rights, is still a form of private property.

8.5.1 The Incidents of Property

Loren Lomasky says that rights of the class I argue for are not property rights at all. Yet, while the limitations on these rights, including the need to conform to land use patterns, mean this conception is not at the core of the private property rights concept, it is still within this category. The concept of rights I propose contains the core elements of use, excludability, and transfer, even if the exact content of these is attenuated. First, take the case of transfer. Transfer is not lost; there is no return to feudalism. There may be some restrictions on who one can transfer to - for example, to those

313 For a useful starting point on conditions under which preservation may be efficient if the interests of future generations are taken into account, see Richard Norgaard and Richard Howarth, "Environmental Valuation under Sustainability", *American Economic Review* 82(2) (1990): 473-77
314 Lomasky, pp 129-35
who would destroy the object. However, the use-restrictions would apply to the transferee, so, in fact, even this would not be a restriction on transfer.

Second, in the case of excludability, most instances of exclusion (such as, trespass, prevention of legitimate use by an owner, etc) are still intact. Only some non-owner interests (previously discussed) and the consequences thereof are not excluded. But as we have seen, these are not interests that allow individuals willy-nilly access to another’s property. They allow an institutional access and participation that is clearly defined and limited.

Lastly, nor is the right to use removed. One may argue that restrictions on use cut away the core of property rights, so that the remaining rights do not sum to ownership. But the fact there are use restrictions does not itself pose a problem. I cannot excuse murder by claiming I used my gun with my bullets while standing on my land. Unrestricted use has never been a necessary condition for property rights. The rights I argue for are more restrictive than full liberal ones, but it is not the fact that they restrict that disqualifies them. To be disqualified, they would need to restrict use in a way that truly cuts against the core of property rights, and it is not at all clear that they do. Restrictions on use generated by the stewardship nature of the right still leave many non-destructive uses open.

There is no unitary conception of property type or even of private property type. ‘Property’ in any resource is best represented by a continuum along which rights of different strengths shade into one another. As early as the nineteenth century, Blackstone distinguished “absolute” from “qualified” property. The American Law Institute likewise differentiates “complete property” from lesser configurations. The strength of property one may claim in a resource varies. To add another parameter, the standard incidents of property are capable of distribution to a potentially vast range of persons. At that level, the concept “ownership” dissolves into differently constituted aggregations or bundles of exercisable powers. The designation “owner” functions to indicate where the predominant strength of interests lies. I can have “property” in assets owned by others.

Yet, if one were to insist on defining private property rights more narrowly so that my set of rights are excluded from the designation “private property”, then there is another strategy available to us. We can concede the technical point, but say that the arguments advanced in the preceding chapters show that this narrow “private property” concept is just not the appropriate rights set to hold over these key resources; a stewardship conception, like the one I develop is more fitting.

316 American Law Institute, *Restatement of the Law of Property* (St Paul: ALI, 1936), vol. 1, p 11, section 5, comment e
8.5.2 Precursors and Precedents

This form of property is not without precedent. I refer here not to non-Western concepts of property, though there are indeed precedents to be found there, but to forms of property within the Western tradition. In Western law, we find the concept of “equitable property” which has always acted to preserve access, not exclusion. There are a clutch of non-environmental examples of this in law that show synergistic movement toward the kind of property I envision.

The first is “quasi-public places” - for example, railway stations and shopping centres – that, while privately owned, exist specifically to be public and are characterised by rights of access. These spaces are not designed to exclude others and so, neither are the rights designed to prevent access.\(^\text{318}\) Shopping centres allow the public not only to buy and sell but to loiter, sit, meet and browse. Eviction is legally possible, but owners must abide by a ‘principle of reasonableness’ to decide when someone can be excluded.

The second is the “new property” in welfare, franchises, licences, and subsidies from the state advocated by Charles Reich.\(^\text{319}\) Since people need to be protected from arbitrary deprivation of these goods in the same way as they do in the case of property, these have grown to be like property, but were not recognised as such. Reich argues they should be so recognised.

Finally, native title rights of access have increasingly been granted by Western courts. In Australia, traditional Aboriginal ‘walkabout’ rights were not judged to be property rights, as they entailed no excludability or transfer. Aboriginal rights were subsequently extinguished by modern property, which turned the indigenous people into trespassers. In the 1970s and 1980s, a popular and legal consciousness concerning this injustice began to emerge. Since the 1980s and especially since the Mabo decision, much has been made of a trust relationship of the state toward Aboriginal Australians.\(^\text{320}\) This is the terminology of equitable property rights. Customary claims came to be seen as a legitimate burden on the crown’s title, and equitable property interests were recognised, expanding the common law classifications.

There are moves toward the broadening of property in environmental law as well. Legal regimes have begun to recognise an equitable property for individuals in the quality and conservation of the natural world. Christopher Stone has argued that natural objects can be defended by someone of concern with a meaningful relationship to them, and this has begun to influence US court

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318 Ibid, p 174
320 See Mabo v. Queensland (No2) CLR 175 (1992). Moves of this type have since been halted in Australia.
proceedings. As with Aboriginal claims, an intimate relationship with the land was seen to create beneficiary status. Habitual use was seen as generating its own form of title.

In New Zealand, a public beneficial element restricting property rights exists in an environmental “covenant” system on land populated by significant native bush, whereby present and future owners are bound to rules of preservation. Here the public are beneficiaries of a covenant on another's land and so have been given some 'property' – some of the rights of property in that land - through a central agency.

In all these cases, private and public interests influence the shape of property rights. My idea shares some of these features. It recognises an equitable property for individuals in the quality and conservation of the natural world that will limit the use rights of owners in certain cases and (re-)introduce responsibilities to the traditional rights emphasis. I mention these not because my form is identical to them - indeed, they are importantly different - but because they are akin and illustrate the diversity of forms of property.

8.5.3 The Myth of Full Liberal Property

My conception differs from full liberal rights not in that mine mandates, while full liberal ownership forbids, restrictions; all forms of property involve some restrictions. It differs in the limits justified within its terms. There is nothing quite so misleading in property rights discourse as to begin with the naturalness of a particular rights form, since any subsequent contraction of its scope - however justified - inevitably appears as an unfair deprivation. In many ways, this situation currently obtains. Legal curbs on private autonomy in the control and exploitation of resources are often viewed as a communist perversion. There is, accordingly, a need for the constant reminder that the operation of property law is distributive, rather than redistributive. That is to say, a justified law change recovers a latent human entitlement that has been submerged by previous allocations of formal title.

Goodin observes that property rights “have historically been the refuge of scoundrels. At one time, cruel parents used to appeal to the fact that, after all, they owned their children to licence their cruelty. We no longer accept such excuses.” Neither, increasingly, do we accept that the owners of a wetland, just because they are the owners, can drain and concrete it to build a new residential subdivision. Under my conception of property rights in environmental resources, we need not deny

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321 See Sierra Club v. Morton, 405 U.S. 727 (1972), especially the judgement of Justice Douglas (dissenting) who endorsed Christopher Stone’s view that the environment should have legal standing (see Christopher Stone, “Should Trees Have Standing? Toward Legal Rights for Natural Objects”, California Law Review 45 (1972): 450-87). Although the Club was ultimately successful in blocking the Disney Corporation's efforts to build a ski resort (in an area now part of Sequoia National Park), it was allowed to intervene only because its members hiked in that area. The valley itself - its trees, streams, and wildlife - was denied standing. (The Sierra Club Legal Defence Fund did include an endangered Hawaiian bird, the palila, as a plaintiff in a lawsuit several years ago, but was careful to include humans as well.)

322 The agency is the Queen Elizabeth II Trust, licenced by the crown. See http://www.qe2.org.nz. The system is voluntary for a registering owner but mandatory for subsequent owners.

323 For example, while shopping centres do not exclude access they do exclude decision-making by the public.

that these folk have property rights in the wetland altogether (as we did the notion that parents owned their children) in order to underwrite this sentiment.

Something like my version of ownership is already at work in the environmental law of many countries, though neither it nor its philosophical underpinnings are often recognised. This leads to the assumption that environmental legislation is an ad hoc concession from full private property rights. But in fact this conception and those like it make better sense of many of the property policies I have mentioned. Let us take zoning as an example. Under my conception, it is morally permissible for members of a community to enact zoning ordinances and resource management law that restrict uses owners may make of their land, since members have a right to participate in decisions about how land and resources are used.

Against my conception, it cannot be objected that property rights mean in essence that the public voice should not be heard. This would be circular. We want to decide what are the important voices and interests to protect and then design our property institutions to hold those. Property regimes must be assessed by that goal. We do not start from private property rights but generate them. I have preserved, for owner and non-owner both, the most important “property” in any resource; the right to a voice in the selective exploitation or prioritisation of its various forms of value.

Full liberal ownership in urban areas no longer exists; most land is zoned in some way. While the moral rightness or wrongness of this specific policy fact can be debated, its pervasiveness highlights an important point about the nature of all accounts of property. There is of necessity a constant imposition of moral limits on the scope of property. This entails that “private” property can never be truly private. It has always been one of the fundamental features of a civilised society that exclusionary claims of property stop where the infringement of more basic human freedoms begins. My discussion of the justification of property throughout this thesis should make this clear.

8.6 Implications for Governance

In the view I am developing, an ingredient of stewardship has replaced the popular idea of ownership as the right to do what you like with your property. This will impress on land tenure a range of social obligations that creates a public beneficial entitlement with respect to ecologically critical assets. Governance of the distribution of rights in property is required. In this case, it falls to legislators to define the rights that best embody the theory, including respect of the range of interests I have argued are to be protected in the assignment of property rights and obligations.

In determining the specific property rules, legislators have a variety of tools and will be likely to use a mix of prohibitions, taxes, consents, monitoring, levies on particular uses, and market instruments. Policy makers are, however, guided by the justifications given: those of utility, the harm proviso, and
residual interests, among others. For particularly important resources, public control may be the best or perhaps the only way to protect the relevant interests. This may be the case for some depleting resources or sites of rare scenic beauty. In other cases, rights would take on a decidedly stewardship feel, appearing more like a trust than full private property because of the significant interests of the public. In many cases, however, a form of property that resembles full liberal rights – in the specific rights granted if not in the justification – will best instantiate the conception. This will occur when the environmental or other public interest or risk is at a minimum. Further, some restrictions on behaviour may be era-specific to give fair treatment to current and future generations.

I note that government regulation of property is consistent with Locke’s views. Locke believed that the post-appropriation indeterminacy of property is a reason to enter civil society, after which time a government is granted the right to regulate. (II 59) The belief that the law of nature can provide a basis for government regulation of property is quite consistent with another feature of the Two Treatises; namely, Locke’s attempt to limit the power of the sovereign over people’s property. Yet I also note that a conception of property that lends itself to reining in the power that large resource owners have over the environmental quality others experience is also Lockean in spirit. If Locke believed the government ought to be subject to the dictates of natural law in this way, so as to protect the welfare of the people, it would seem to follow that others – say, private owners of large tracts of land or corporate owners of a string of factories - should also be subject to the dictum that they not injure the life, liberty, health or possessions of others. Natural law should work to counter the economic and political power of persons, as well as of legislators.

In practice, my conception of property will include the following political features:

- It guarantees a public say in overall resource use.
- It mandates government activation of environmental regulation of many resource developments, processes, and systems.
- It is likely to reduce exploitation of land and resources because of the aspect of community control.
- It allows individual initiative since, once the rules are known, expectations of the results of one’s economic activities are stable.
- The property rights it gives in environmental resources are consistent with neither pure capitalism nor socialism.
- It would not create equality of income.
- It presupposes democratic political institutions, but it should also strengthen them, since it requires participation and lessens political alienation.
8.7 Conclusions

In this chapter I have described a view of property in environmental resources that is broadly Lockean and takes labour seriously, without saddling us with Locke’s limitations. The conception is a form of private ownership, with market transfer, but also with an element of stewardship. The last feature is implemented by a set of legal restrictions on property use. I have argued that this conception better captures both the reasons given to justify property and the impact of the variety found in the objects of property than does a full liberal conception. Since the account is sensitive to a number of justifying principles and a range of object types, it justifies a continuum of specific property incidents. It gives flexibility within a property regime and is pluralist in its justificatory principles. In common with any view of property akin to Locke’s, it rewards labour and productivity while curbing the more destructive potential of unrestricted rights.

The more attenuated rights to property argued for here are incompatible with full liberal private ownership and other systems that allow insufficient space for communal decision making over use patterns and other protections. Certain resources confer such intrinsic public utility that their benefits must be retained within some form of the commons: they are ultimately non-excludible because of their irreplaceable moral or social character.

Under this account of property, rights to natural resources would be prime candidates for restrictions on appropriation and use when these resources are required to meet the basic needs of future people. Destruction and harmful uses would be excluded from the incidents of property, in some cases. This includes those uses where harm is caused by multiple agents subtly contributing to an accumulating harm. In these cases, producers and risk-takers should not be at full liberty with respect to appropriation, transfer, and use. They hold a set of rights more attenuated than full liberal ownership. Rights over environmental resources are more like stewardship rights than full-blown liberal rights.
Chapter Nine

Seeking Fair Weather: The Case of Climate Change

9.1 Introduction

I have addressed the immediate implications of my account of property in chapter 8. These include land use restrictions, public access, and environmental rights. Broader applications attach to issues in international and national regulatory practice. I now address one problem in global environmental justice: climate change.

This is not intended as a full answer to the question of how to fairly distribute the burdens needed to halt or mitigate climate change. That would require an analysis of principles of international justice beyond property and outside the scope of this thesis. My focus is the relevance of property institutions (as our chief mechanism for the allocation of productive resources) in implementing proposals. Decisions about the exercise of ownership rights will create greater or fewer greenhouse gas emissions. Legal curbs that implement measures to halt climate change constitute constrictive alterations to the more generous property rights that may otherwise exist.

I outline the threat of global warming and its nature as a collective action problem in 9.2 and 9.3. I then turn to international policy responses in 9.4 and 9.5. I end by considering the property institutions necessary to address this urgent global issue.

I suggest an approach to policy combining fairness and sensitivity to historical cause and show how under my conception, but not under full liberal rights, the better candidates for fair distribution are consistent with rights to property. My account of property yields the set of restrictions on property necessary to implement an effective climate protecting strategy. Much of what I say is applicable to other global environmental threats requiring international action, such as damage to the ozone layer and over-fishing.

9.2 Anthropogenic Climatic Change

Are harmful climatic changes predicted for future people? The scientific literature suggests an affirmative answer. In 1995, the Intergovernmental Panel on Climate Change (IPCC), in a scientific near-consensus, claimed that anthropogenic emissions of greenhouse gases will cause devastating climatic variations. These changes include flooding, hurricanes, disruption in rain patterns, depletion of fresh-water sources, and a reduction in arable land. Less directly, it could cause the spread of
pathogens, such as cholera and malaria, to new areas and adversely affect agricultural yields. The impact will be far from geographically uniform, with one-fifth of Bangladesh expected to be inundated within 20 years. The IPCC speculated in 2001 that global temperatures would rise between 1.4°C and 5.8°C between 1990 and 2100. In May 2001, a panel of reviewers from the USA National Academy of Sciences - convened by President Bush and not noted for haste to support such conclusions - endorsed the soundness of the last IPCC findings and predictions.

Since then the news has worsened further. The huge ice expanse of western Siberia is thawing for the first time since its formation, 11,000 years ago. This area, which is the size of France and Germany combined, contains billions of tonnes of methane, most of which has been trapped in permafrost and deeper ice-like structures called clathrates. This methane will soon be released into the atmosphere. “This will ramp up temperatures even more than our emissions are doing, causing global warming to snowball” says researcher Sergei Kirpotin, of Tomsk State University.

Meanwhile, over the oceans, scientists fear that the Arctic has reached a “tipping point” beyond which nothing can reverse the continual loss of polar sea ice that has helped to keep the climate stable for thousands of years. In tandem, the massive glaciers of Greenland have begun to melt, which will raise sea levels dramatically. Arctic specialists who have documented the gradual loss of polar sea ice since 1978 believe that a more dramatic melt began around 2001. Sea ice is the northern hemisphere’s major “heat sink” that moderates climatic extremes. As more sea ice is lost, greater expanses of ocean are exposed to the sun, increasing the rate at which heat is absorbed in the Arctic region. Sea ice reflects up to 80 per cent of incident sunlight, but this “albedo effect” is mostly lost when the sea is uncovered. As the sea ice melts a positive feedback is created, according to Professor Peter Wadhams, an Arctic ice specialist at Cambridge University. “If anything, we may be underestimating the dangers.” The IPCC 2001 projections considered only warming sparked by known greenhouse gas emissions. These twin ecological landslides were unknown at that time.

It is widely admitted that claims positing an anthropogenic cause are harder to prove than claims predicting harmful changes. Yet it is believed that the sum of emissions from human energy use is the main suspect. CO₂, humanity’s main contribution to climate instability, is a long-lived gas whose effects in the atmosphere are measured in tens and hundreds of years. The full cumulative effects, therefore, are not due to visit us until the twenty-second century.

327 Independent (London) 16 September 2005
We can usefully follow Shue in distinguishing “subsistence emissions”, which are excusably maleficent because they cannot be avoided by emitters without severe harm to themselves or their contemporaries, from “luxury emissions”, which are avoidable and inexcusably damaging. Yet it is likely that the vast majority of the world’s greenhouse gas emissions are luxury ones. It is even more likely that, without this latter class, the former ones would not pose a danger to future generations. Subsistence emissions would cause neither climate change nor other forms of harm, such as acid rain, particulate build-up, and smog. Hence, much of the literature on the ethics of global warming inevitably turns to the responsibility of industrialised nations, both in terms of their contribution to the problem and for devising ways to alleviate it. Over one half of greenhouse gas emissions originate within the borders of these nations; much of that from inessential, sometimes frivolous, activity.

9.3 Game Theory and the Structure of the Climate Problem

Assuming the truth of the growing consensus that global climate change is caused mainly by emissions, we strike another feature of the problem that helps illuminate its structure as a collective action problem. The effects of emissions suffer an important time lag of up to one hundred years. Yet the lion’s share of the benefit of the consumption of fossil fuels accrues to the current generation. Assuming self-interested motivations, there is an incentive for this generation to pollute. Effective international co-operation is unlikely to emerge.

In view of this, we can identify two types of problem. One concerns the cooperation among agents within the current generation; the other, cooperation between the generations. Inter-generationally, the situation is tragic but is not a tragedy of the commons in Hardin’s sense, contrary to common views. In fact, it is worse. Unlike a repeated prisoners’ dilemma where each participant must think of what the other may do, future generations in principle have no control over the actions of current ones, since future people cannot presently represent their own interests. Worse, even if their interests could be expounded they have no bargaining power for they cannot commit or forebear any action that could affect the present generation in exchange for co-operation.

Stephen Gardiner persuasively suggests that:

[A] sub-optimal outcome may eventuate even if collectively all generations would agree that it would be better if the atmosphere were not so exploited. For this agreement would be based on what is better for the human race as a whole, or better for each generation bar the first if all others do the same. But this qualification about the first generation is extremely important…. For restricting pollution is not better for the first generation.330

Non-compliance is a benefit to the present generation. Since each subsequent generation effectively takes its place as the first generation, we have a sequential motive for non-cooperation and over-pollution.

Not only is this state of affairs worse than a prisoners’ dilemma, it is also more resistant to possible solutions. The appeal to broad self-interest in a situation of repeated interaction is not possible. Fairness-based appeals to reciprocity are similarly unavailable, since future generations cannot reciprocate and interactions are not repeated. For a prisoners’ dilemma, most of the solutions rely on rearranging the payoffs to provide some guarantee of others’ behaviour when one co-operates. In the intergenerational problem, this is not possible.

Countries must engage in repeated interactions with each other on a multitude of issues, including trade and security. Were the intergenerational problem a prisoners’ dilemma, we would expect a comprehensive global agreement on greenhouse gases, involving strong links to these other co-operative issues, including punitive clauses affecting trade.\textsuperscript{331} The fact that this has not emerged is further evidence that the problem runs more deeply than a prisoners’ dilemma and that we should be less than sanguine about the prospects for voluntary solutions.

Further, even if the intergenerational problem can be solved (so that all nations agree they have a reason not to pollute) a collective action problem exists intra-generationally. At the level of individuals and individual firms, a tragedy of the commons structure from a prisoners’ dilemma (or similar) seems to exist. At the level of nations however, the news is somewhat better, as the public good in question may be achievable without the co-operation of all.\textsuperscript{332}

\textbf{9.4 Prospects for Collective Action}

In 1992, the developed countries agreed to the Framework Convention on Climate Change that set a voluntary reduction target for greenhouse gas emissions at 1990 levels to be achieved by 2000. This target was not met. The major proposal for concerted action is the Protocol to the United Nations Framework Convention on Climate Change, signed in Kyoto, Japan in December 1997. Known as the ‘Kyoto Protocol’, this calls for developed countries to reduce their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008 to 2012.\textsuperscript{333}


\textsuperscript{332} Gardiner discusses whether the intra-generational problem is a prisoners’ dilemma or a battle of the sexes. Under a battle of the sexes, there is a situation where a minimum number of players must co-operate if some universally bad situation is to be avoided and where all reason that they are individually better off enjoying the benefits of co-operation and paying their share of the cost than they would be if not enough people co-operate. This is not a prisoners’ dilemma. Gardiner remains undecided about the structure of the problem, but suggests there are practical reasons for treating it as a prisoners’ dilemma.

\textsuperscript{333} Kyoto Protocol (1997), Article 3
Over ninety nations have signed the Kyoto Protocol. Yet in most countries, including the signatories, greenhouse gas emissions have continued to grow. Further, the agreement will require little deliberate change in the emissions behaviour of the major signatories. Russia is currently below its 1990 levels, but only because of temporary economic collapse. Japan intends to buy carbon credits from Russia. The EU has made gains in the 1990’s for unrelated economic, rather than environmental, reasons in the UK and Germany, while also banking on its eastward expansion to inflate the relative size of its 1990 emissions benchmark. Canada is set to gain through tradable concessions for its large forests. Serious commitment to restrictions, motivated by environmental protection for future generations, seems to be missing.

The key objective is to reduce global emissions to acceptable levels. This raises the question: how much cooperation is needed? With current world population at 6.5 billion, and estimates of total global emissions of CO₂ from energy consumption in 1991 at 26.4 billion tons, we have an annual emissions rate of 4.4 tons per capita. Yet in the same year, the rate for the USA stood at 20.5 tons per capita and that country plans a 30% expansion in coming decades. Even a concerted effort by the 6 billion people outside the USA to cut emissions by 5% (1.3 billion tons) could be undermined by the USA’s increase, since 30% of USA emissions amounts to 2.0 billion tons.

Entailed in the tragic nature of the problem is the fact that it is possible for non-co-operators to undermine the collective good produced by the Kyoto-abiding subgroup. Given that the USA has not signed and China and India are exempt, that result is very likely. Any group of nations formed to combat the problem could not enforce a ceiling without absorbing astronomical costs. The task requires full cooperation of all countries of significant size. Gardiner considers this to be unlikely, believing that current agreements, such as the Kyoto Protocol, will be both ineffective and self-deceptive. The world rests in the mistaken belief that an adequate solution is in place, while harmful chemicals accumulate unabated.

I argue that the pessimism exhibited by Gardiner and others is not entirely warranted. There are previous examples of environmental agreements that have a similar structure and yet have proven effective. They, too, start with small steps that seem inconsequential, yet set up an institutional and scientific process resulting in more significant cooperation. Gardiner defines self-interest narrowly, yet there is evidence that decision-makers calculate less simply. Take for example, the strong agreements to protect the ozone layer. These have come about in the face of the enduring presence of ozone-depleting chemicals from the 1950s and the fact that the ozone hole affects countries differentially. The international agreements to protect the ozone layer are in the same format as the Kyoto protocol. These include the Vienna Convention for the Protection of the Ozone Layer (1985) and the Montreal Protocol on Substances that Deplete the Ozone Layer (1987). In the

335 I take these figures from ibid, p 27
latter, developing nations were given an extra ten years to meet any obligations. Notably, in twenty
years these covenants have been amended four times, each time in the direction of increased
strictness.\textsuperscript{336} The costs, which seemed impossibly high, became less so as industries implemented
the restrictions and found new technologies. This tendency of industry to adapt more quickly than
anticipated is found in a number of similar issues, including acid rain and particulate air pollution.\textsuperscript{337}
It is unlikely that this trait would have emerged if actors focused solely on current harms and
benefits. In situations where the likely harms are so pervasive, the structure of commons, where all
actors are harmed by collective inaction, provides precisely the required incentive.

Further, in Gardiner’s analysis there is no account of the effect of political and moral pressure
brought to bear on dissenters by a majority. Sustained international pressure has an encouragingly
effective history in generating policy change within recalcitrant national governments. In
international environmental law, particularly on complicated commons problems that involve
unfairness and uncertainty, small steps are the only way to begin. I note that one effect of a property
theory such as mine would be to show that the necessary kinds of protections are ethically justified.
This removes a moral leg - the violation of property rights - upon which the reluctant party may be
standing.

However, a precautionary approach still seems wise. The tragic structure exists and there is no
guarantee that co-operation will follow the examples I gave. Further, it is widely accepted that the
emissions target, 5% below 1990 levels, is an insufficient measure to prevent climate change and its
harms. Climatologists often maintain that an emission reduction of 50-80% is needed to retain
current climate stability.\textsuperscript{338} Some coercive measures in international law, including property law, will
be necessary to enforce emissions limits.

Regardless of the soundness of his analysis, one of Garrett Hardin’s conclusions may prove correct:
strong regimes of regulation may be needed to arrest over-pollution. However his recommendation
with respect to population growth – coercion of the poor and self protection by the rich – is
misplaced in the case of climate change, as it is rich nations that will need to implement the most
severe cutbacks. This “locates the problem not in the deep nature of human beings and their germ
lines but in ways of life to which some of us, though deeply attached, could, and should, live
without”.\textsuperscript{339}

\textsuperscript{337} Elizabeth De Sombre, “Global Warming: More Common than Tragic”, \textit{Ethics and International Affairs} 18 (2004): 41-46, p 45
\textsuperscript{339} Gardiner, “The Real Tragedy of the Commons”, p 415
9.5 Evaluating Proposals for International Co-operation

9.5.1 Taxonomy of Distributive Principles

As discussed earlier, the difficulty in forming international conventions is partially a feature of the public good nature of the atmosphere and of the consequent tragedy of the commons. However, it is also a result of the complexity of responsibility attribution.\textsuperscript{340} USA and Australia have refused to sign the Kyoto Protocol in its current form, citing a perceived injustice in the exceptions made to China and India.\textsuperscript{341} There have been calls for voluntary reductions in the output of the latter two countries, but these have been resisted. In 2002, at the Conference of the Parties to the Climate Change Convention, developing countries reaffirmed their opposition to reduction. Indian Prime Minister Vajpayee pointed out that per capita emissions from his country are an order of magnitude below those of developed countries.

Conventions need to satisfy two conditions. They must be sufficiently robust to limit emissions beneath levels that trigger climate change and they must appear acceptably fair in order to engender widespread political support. What form should conventions take?

A first question is whether future normative responsibilities should be determined by past causal responsibility. Accordingly, we can divide proposals into backward-looking ones - those which predominantly enquire as to cause and suggest rectification - and forward-looking ones - those that predominantly look forward to the promotion of well-being and the fair division of chores to achieve this. Although neither the division nor the designation is an exact fit, they are analytically useful.\textsuperscript{342} Morally speaking, principles of forward-looking chore division are intuitively more suited in cases where each has an equally strong \textit{prima facie} obligation to contribute. An example of this is disaster relief.\textsuperscript{343} But such principles are intuitively less well suited to collective obligations that stem from past violation of other duties. In these cases, assigning at least some of the duties according to who has contributed to the problem – that is, a backward-looking proposal – seems recommended. Climate change is one of these cases. However, even if nations’ obligations should ideally be divided in such a way, there are good practical reasons for incorporating a forward-looking division that emerge from the structure of the problem.

\textsuperscript{340} There are two types of costs to be allocated. “Mitigation costs” are the opportunity costs of not engaging in high emission activities, in order to avoid climate change. These include the costs of non-use of fossil fuels in transport and electricity generation and costs of developing new technologies. “Adaptation costs” are the costs of coping with predicted climate change, should mitigation fail. These may include sickness, medicinal purchases, relocations, and trauma. The size of the latter will depend on how successful our strategies are concerning the former. I will focus on mitigation costs, though one can see how the principles of fair cost distribution are the same for both. If the question of adaptation costs turns out to raise other issues, I doubt they will affect the analysis that I direct toward mitigation issues here.

\textsuperscript{341} In the month of writing (December 2005) the USA made new concessions, the implications of which are not yet clear.

\textsuperscript{342} Traxler gives the alternative designation of “just” and “fair” proposals. This begs too many questions about the nature and separability of these terms. Martino Traxler, “Fair Chore Division for Climate Change”, \textit{Social Theory and Practice} 28(1) (2002): 101-34, p 114

\textsuperscript{343} At least, where the disaster was natural and not made more likely or severe by the action of one party.
I itemise three proposals that fit under the backward-looking heading followed by three that are forward-looking.

**Backward-looking:**

1. The Polluter Pays Principle (PPP): Each party contributes in proportion to the level of greenhouse gases emitted.
2. The Beneficiary Pays Principle (BPP): Each party contributes in proportion to the benefits received from greenhouse gas emissions. Those who have been made better off by a policy pursued by others, where that policy has contributed to the imposition of harm on third parties, should stop pursuing the policy and address the adverse affects.
3. Unjust Takings Principle: Each party contributes in proportion to their unjust taking of the planet’s greenhouse gas absorption capacity.

**Forward-looking:**

4. Ability to Pay Principle: Each party contributes according to its ability to pay.
5. Equal Per-Capita Principle: Each party contributes on an equal per-capita basis.
6. Equal Burdensomeness Principle: Each party contributes according to equal burdensomeness (equal opportunity cost) of the contribution.

**9.5.2 Assessment of Backward-Looking Principles**

The first three proposals are all morally plausible, since they are ways of assigning burdens due to past injustice, according to benefits derived from or contribution to the injustice. I begin with the first. The PPP, which would require an assessment of total historical emissions, is affirmed in some international agreements. Henry Shue and Eric Neumayer have both recently defended a version of it. The idea that those who cause harm should pay for that harm is a standard moral principle. This is sensitive to the idea that climate change should not be allowed to worsen inequalities. I briefly raise one objection and tarry longer over a second.

First, the PPP is insensitive to the fact that some - I am thinking here of East Europeans - have contributed massive emissions, but have either not thereby developed or have lately lost their wealth. A PPP is not sensitive to ability to pay, asking too much of the poor. It needs a caveat to reflect this: some principle of discounted contribution reflecting their inability to pay. This justice consideration must take precedence. Such a proviso modifies any justified PPP without forcing us to abandon it.

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More worrying is the fact that, without supplement, the PPP is vulnerable to an inter-generational objection: past generations were not *culpably* negligent. The PPP violates the principle that we cannot be held responsible for what we were excusably ignorant of.\(^\text{345}\) If past polluters had known that costs would accrue both to others and to them, they may well have acted differently. Further, those who have shuffled off their mortal coils cannot now be made to pay.

I note that this objection does not challenge the PPP per se, but queries its applicability, since most of the damage hitherto has been caused by earlier generations. Yet the principle that those causally responsible for a problem have greater moral duty in its rectification is too intuitively plausible to give up so easily. It could be adapted to limit the historical component to say, 1990, a time when polluters were aware of the risks of anthropogenic climate change. A PPP can be applied to polluters from that point, without the stated injustice.

How do we respond to the intergenerational objection in the case of *past* pollution? One option is to make no one pay for past emissions. Yet those emissions cause harm, so to do nothing is to distribute the harms where they happen to (unequally) fall. This is clearly unjust. Another possibility - though similarly unjust - is to add burdens for the past onto costs given to today’s polluters, so that the polluter pays double. Another is to distribute burdens of the past equally. Yet these options are all forward-looking and assume that there is no responsibility on current people for the wrongs of the past. Yet this is exactly what a BPP principle denies and we must address this first.

The BPP is a cousin of the PPP, but there is a crucial difference: to benefit from an act is not to cause it. The principle that beneficiaries of an unjust act should pay for that act is less acceptable than a PPP. It is vulnerable to similar objections to those that beset “tacit consent” theories of political obligation. In a recent paper, Simon Caney levels two objections at the BPP as a response to intergenerational emissions.\(^\text{346}\) One is that the BPP is an abandonment of the PPP (and so loses moral plausibility), as the former is not a penalty on the person who caused the harm. The other is that it is vulnerable to the non-identity problem.

Caney’s points weaken the BPP, but not to the extent he believes. Regarding his first claim, the BPP for historical emissions is not as dissimilar to the PPP as he imagines. If one both accepts the benefits and *endorses the reasons why past actors acted*, one puts oneself in a similar moral position to the original actor. The inter-generational case is not so disanalogous to the cause-benefit relationship within one generation.\(^\text{347}\) If I buy a TV the manufacture of which produces high waste and emissions, I am not the polluter, but the beneficiary. Yet here we are only moving along the direct-indirect cause continuum. TVs are produced on my behalf. If I am held responsible only for

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346 ibid, pp 10-12
347 Tim Hayward, “Climate Justice and the Differentiation of Common Responsibilities”, (unpublished), p 4
my direct emissions then I am off the hook for most emissions that I intuitively should feel culpable for. (Consider, as a second analogy, the link between the demand for beef and the cruelty of intensive farming methods.)

The responsibility of a beneficiary is not as strong as that of polluter, yet neither is it absent. The main difference lies in choice; I have a choice about what emissions to cause and to benefit from when the emissions are current, but no choice over the past. Yet if I disagree with past means used to benefit me, this should only reinforce, not undermine, my reason for contributing to restoration.

The second of Caney’s worries has its genesis in Parfit’s non-identity problem. Currently existing people are better off than other people would have been, had only emissions-free developments occurred. Yet they are not better off than they themselves would have been, because they would not exist, had that other future been actualised. Now I think this point has moral force for the cases Parfit identifies, but not, contra Caney, in the case at issue. Parfit is concerned with harms; it is irrational for current people to claim they were harmed by past population choices, since they would not be alive otherwise. Life itself is a benefit and they cannot insist on reparation for being left in a state worse than “the other crowd” would have been, without wishing a world where the other crowd, rather than themselves were born. Yet in the case Caney applies this to, the affected parties received benefits not harms, relative to the other crowd. They are twice blessed: they both exist and, through the benefits of pollution, exist in a more advantageous position than “the other crowd” would be without this pollution. Further, we need to be wary of the assumption that the advantages current people possess are rightful or natural allotments and, in consequence, that their removal is unjust.

While a BPP has less appeal than a PPP, if liabilities for past pollution are to fall somewhere then the principle that the liabilities should fall mainly on those who inherited and accepted the assets is still plausible.

It is sometimes thought that a BPP is unnecessary, as responsibility should be individuated only to countries not to persons, and so, the PPP is still applicable to past emissions. Neumayer and Axel Gossseries would make a country pay for all occasions where its past inhabitants polluted more than their per capita share.

This position is vulnerable to a couple of objections. First, some people within the first world did not benefit very much from past emissions. To make the country pay without enquiring as to the benefit structure within the country violates the principle of assigning moral responsibility chiefly to individuals. Second, it seems unfair, on the basis that their country was the polluter, to make current

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individuals pay for costs incurred by previous generations when they did not choose and may well have objected to the emissions.\footnote{350}

Individuals, corporations, states, and international regimes all contribute to the emissions problem. The answer to the question “who is the polluter?” will reference all these kinds of actor.\footnote{351} To choose countries from among these as the first port of call is inadequate. I think the real moral force of the “same country” or collectivist approach is not that a country is the same actor through history, but that current individuals in developed countries enjoy the commodious lifestyles that they do because they are beneficiaries of past economic activity that generated emissions. But then we must level responsibility at those individuals. In practice, I believe that assigning burdens to states, which the state then assigns to relevant individuals, is the practical way to implement any policy. Yet this is only a state level method for assigning burdens differentially to individuals.

The third proposal, namely, an unjust takings principle requires comment. If the earth’s atmosphere has the capacity to absorb some greenhouse gases, then insofar as the pre-global warming climate is a public good and a natural intergenerational commons, we can view gas emissions as appropriation of shares of this absorption capacity.\footnote{352} Hence, conditions of appropriation - that Locke argued for and I have added to - apply. Yet the generations of the present and recent past have clearly violated this and so their appropriation is unjust. The third principle is then a compensatory principle. Its burdens also fall unequally on members of developed world countries.

I note that this proposal dovetails with one of the elements of my conception of property, namely, the natural resource dividend. This element holds that to ensure that property rewards are fair, those hampered in the performance of property acquiring actions over natural resources must be assured of some share of the produce. It suggests proportionally more responsibility on the developed world, since other nations have indeed been shut out of natural resource appropriation. In this case, they have missed out on appropriation of atmospheric absorption capacity that has brought riches at the cost of emissions.

In practice, the unjust taking proposal yields a similar policy result to the PPP. This should not surprise, since, with respect to atmospheric quality, instances of “polluting” and instances of “unjustly taking” strongly overlap. This proposal is not successful in rectifying the weaknesses inherent in the PPP. It suffers from the same intergenerational problem and the problem of inability of members of some polluting countries to pay. Nor is it sufficiently different from the PPP to yield useful policy not already recommended by that principle.

\footnote{350} Caney, p 14. The reply to this kind of objection that I employed earlier, namely that acceptance of current benefits carries us some way toward assigning moral responsibility, supports a BPP not a straightforward PPP and hence, is not a reply here.

\footnote{351} ibid, pp 8-9

\footnote{352} Traxlor, p 116
The three backward-looking proposals share a pragmatic weakness. They penalise carefully controlled, indispensable, but small emissions that yield a large benefit. Correspondingly, they fail to target wasteful, thoughtless, gratuitous emissions that give only a marginal benefit. There is no incentive to emit efficiently. They are not sensitive to the relative indispensability of the emissions.

So, to sum up, the PPP is inadequate because earlier generations cannot pay, the excusably ignorant should not be expected to pay, and it cannot (alone) cope with what happens when some do not submit to do their duty. Without supplement, the PPP does not tell us who should pay for the harms caused by the old and the dead; it suffers from incompleteness. It requires a background theory of justice both for adducing principles, such as the moral relevance of impoverishment and to give a view of each person’s emissions entitlements.

It is easier to insist on the PPP for post-1900 polluters and this should be its main role. The BPP, contrary to Caney’s belief, is acceptable in a weakened form, for pre-1990 emissions. I will incorporate these results into my own proposal.

9.5.3 Assessment of Forward-Looking Principles

Do forward-looking proposals fare any better? By definition, all of them lack a response to the question of past injustices, which weakens their plausibility. In addition, the ability to pay principle (APP) suffers from applications of the usual problems with progressive taxation schemes: in this case, it gives incentives to avoid development and to squander natural resources. It also fails to reward wealth produced through careful development of non-polluting energy sources. I suggest its main applicability is in allocating responsibility to pick up the cost incurred (1) in cases when a country fails to comply with its obligations and (2) in establishing the monitoring, advice giving, governance and coercive muscle needed to implement whatever proposal is chosen.

Another proposal is that each contributes on an equal per-capita basis. This proposal is intuitively appealing with respect to fairness, since each person is granted an equal emissions entitlement. The problem, discussed earlier, of blindness to the indispensability of emissions recurs here. Further, given vast differences in current emissions between nations, the developed world would be forced into a drastic lifestyle change, while inhabitants of poor countries would gain entitlements they can never use.

There is another, moral drawback. Note that this proposal achieves fairness in the sense of ‘giving the same to each’, but this sense may not be what we most care about when we intend to create a fair division of chores. More likely, we care about fairness in the sense of chores affecting each in the same way. That is, we care that the contributions asked from each party are equally

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353 Ibid, p 122
burdensome, rather than equal in terms of emissions level. Duties burden us because they require time and effort we could employ elsewhere. Fairness suggests that it is these opportunity costs we should attach equally. When (or if) world wealth is spread more evenly, equal opportunity cost will begin to approximate per-capita shares, but this is not true in the interim.

Traxlor suggests a further forward-looking proposal which the above considerations support: contribute according to equal burdensomeness (equal opportunity cost). An equally burdensome chore division is one where each contributor (or nation) shoulders chores with the same opportunity costs to her (or it) as the opportunity costs for others of the chores allotted to them.\textsuperscript{354}

Equal burdensomeness of chore share also possesses appealing practical features. First, it is not bothered by the indispensability problem that dogged other proposals. Less dispensable emissions will be more burdensome to forgo (having least opportunity cost) and therefore further down the list of ones left unchanged, whereas emissions for frivolous uses, having the least beneficial returns (more opportunity costs), will be first against the wall. A tax structure supporting subsistence emissions (such as, food production) and discouraging luxury ones (such as, most air travel) could help implement this.

Since tax on more dispensable emissions changes the incentive structure, the activities forgone in reducing emissions change over time in the direction of convergence and contraction. The over-polluting rich give up high-emitting luxuries while the poor give up proportionally less if the two groups are changing their behaviour according to equal burdensomeness (not equal emissions).

While I am attracted to an equally burdensome approach and considered it as a stand alone principle, it suffers, in common with other forward-looking proposals, from a failure to consider the causes of the problem and the unequally distributed risks of failure. An otherwise equally burdensome contribution to the solution will be experienced as unfair – and hence not equally burdensome, since carrying such an unaddressed grievance is itself a burden – unless it pays due consideration to the unequal contribution to the cause of the problem and the unequally distributed risks of failure.\textsuperscript{355}

Much empirical data would be needed to help us decide what distribution counts as equally burdensome (although similar quantities of data are needed to ascertain who pollutes, who benefits and to what degree – data needed to decide burdens under other suggested principles we have considered).

\textsuperscript{354} Ibid.
\textsuperscript{355} Here, I think of the (well named) post-apartheid “Truth and Reconciliation Commission” in South Africa. The title acknowledges that reconciliation will inevitably be shallow, false, and disingenuous if it is not preceded by the search for the truth about injustices.
9.5.4 A Proposal for Division of the Burdens of Climate Change Mitigation

The context for the development of a greenhouse gas emissions proposal includes two salient facts. First, the most intuitively appealing proposal, a PPP, fails to account for the following: the relative indispensability of emissions; that earlier generations cannot be made to pay; the excusably ignorant should not be expected to pay; impoverished polluters cannot pay; and some polluters will fail to submit to their duty. Second, to achieve the least coercive system we need to create conditions under which nations are most likely to contribute. In chapter 8, I have been guided by a principle seeking to minimise the attenuation of liberty within the moral implications of my property theory. A similar principle should apply here.

My proposal, in outline, is that we employ a PPP for post-1990 emissions, with two exception clauses, and a modified BPP for previous ones. The modification moves in the direction of attaching chores that are equally burdensome. I draw on Caney’s proposal, but mine is different in important ways.\(^{356}\) It has the following three elements:

\(1)\) A **PPP for post-1990 emissions.** Each actor has a duty not to emit greenhouse gases in excess of per-capita shares. Operationally, carbon credit trading (using realistic prices in tune with scientific reality, unlike most current costing regimes) would be permissible. Those who exceed their limit (having taken trading into account) have a duty to compensate others through paying the costs of mitigation or adaptation. Combined with a sinking cap on emissions, this would yield “contraction and convergence” of harmful outputs.\(^{357}\) If the rich nations want to continue to pollute, they must buy the rights from poor nations.

The following exceptions would apply. First, small indispensable emissions with large benefits would be exempt. This would be best achieved through tax breaks. Second, there would be a lessened duty on the poor; inability to pay is grounds for attenuation in duty when post-1990 emissions fail to yield significant benefits. To ensure that this does not license emissions in a way that undermines the goal of climate change mitigation, a proportion of prices paid for tradeable emissions must go toward funding clean energy technology transfer from developed countries. This compensates for the opportunity costs of restricting the emissions of those in the developing world.

\(2)\) A **BPP for pre-1990 emissions.** The BPP says that the most benefited have a duty to reduce their greenhouse gas emissions in proportion to the harm resulting from past emissions that they benefit from. Those who have been made better off by a policy pursued by others, where that policy

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\(^{356}\) Caney’s proposal has four principles:
- (a) All are under a duty not to emit greenhouse gases in excess of their quota.
- (b) Those that exceed this (since 1990) have a duty to compensate others, through mitigation or adaptation.
- (c) The most advantaged have a duty either to reduce their greenhouse gas emissions in proportion to the harm resulting from past emissions and others’ failure to pay or to pay costs of adaptation that accrue from these harms.
- (d) The most advantaged have a duty to construct institutions that discourage future non-compliance.

has contributed to the imposition of harm on third parties, should stop pursuing the policy and address the adverse affects.

Yet in 9.5.2 we uncovered reasons for diminished responsibility (such as, ignorance of harms and the lesser moral power of the principle). To reflect this, the principle is modified in a way that makes use of the practical and moral advantages of the equally burdensome approach.

For pre-1990 emissions, chores are first calculated according to equal burdensomeness and then adjusted in favour of those who have benefited least from or were harmed by past emissions. This does not place all the cost of paying for past emissions onto beneficiaries of those emissions, but it does reflect the (attenuated) moral force of the BPP by skewing costs toward those people.

While this incorporates a forward-looking principle, much of its moral plausibility derives from our awareness that current ability to pay is not ahistorical. Developed nations have greater ability to pay due to their history of development, which includes emissions that rendered benefits to themselves while externalising harmful emissions.

This modification has the advantage of helping with a practical weakness of the BPP: huge and unsettling changes would be required to implement the BPP, given vast differences in past emissions between nations. The wealth transfers would be enormous and politically unacceptable. Ratification of any protocol based on this would not be forthcoming from developed nations. Modification toward the equal burdensomeness approach improves the political acceptability of burden distribution.

3) An extra duty on the rich for institution building. The most advantaged have a duty to (1) pay the costs incurred when others fail in their duty to pay their allocated costs, (2) construct institutions that discourage future non-compliance and (3) establish the monitoring, advice giving, governance and coercive muscle needed to implement the proposal. This third element is directed at cases where the first two principles do not cover the harms caused. It gives extra duties to the most advantaged that do not appeal, by way of justification, to cause or benefit. It is entirely forward-looking. This is in line with my discussion of the ability to pay principle in 9.5.3.

There is some unfairness in this, but alternatives are morally worse, especially given that the affects of climate change will hit the poor disproportionately. There is no truly fair solution that does not involve penalising the dead and the very old. We can only decide how to distribute the unfairness: to distribute burdens in the least unfair way.

One advantage of this proposal is that, rather than seeing the global commons tragically (as we would with no proposal) or seeing others contribute unfairly more burden (as we would with a pure
PPP or BPP proposal), each actor sees the others contributing an amount more similarly burdensome than would be the case under a pure PPP or BPP proposal. The largest obstacle to international co-operation is arguably the problem of allocation: how to divide among nations the costs and chores of climate change mitigation. Only under these conditions will no nation be perceived to have better prudential reasons to defect from its fair share.

In tandem with those practical benefits are moral advantages. The forgoing shows that an account of environmental duties should be informed by broader theories of economic justice. The PPP and the BPP are incomplete on their own. They must be grounded in a theory of justice and rights.

I note that the obligations set out in the Kyoto Protocol are clearly inadequate to implement the PPP, the BPP, or this revised account. Developed countries succeeded in basing the Kyoto Protocol on a “grandfathering principle”, pegging future emissions to recent practice; the more polluting you were, the more you can continue to be! Not only does this discount past responsibility for emissions, it treats those emissions as the basis for a higher future entitlement, hugely favouring the developed nations. This is morally bizarre. (Imagine making entitlements to other examples of unjust takings, say, future theft or fraud, proportional to past infringements.) This grandfathering principle cannot be justified.

9.6 Climate Change and Property

9.6.1 Property Rights as a Burden-Distributing Instrument

Climate is a public good. We cannot link “pieces” of climate change to particular emissions from particular actors; we need to assign costs at a macro level. Obligations to reach targets can practically attach, in the first instance, only to countries. Yet, given the unequal causes of and benefits from pollution within countries, differential obligations for behaviour change can only fairly be levelled at individuals. Those who polluted or benefited appreciably less should not shoulder equal costs with those who contributed and gained more. For example, it would be unfair to tax all people equally within a country, as this punishes push-bikers and walkers as much as SUV drivers and air travellers. We need, then, a mechanism for bringing collective, country-wide targets down to the level of individual actors. A regime of property is the tool by which we allocate the use of productive resources. Decisions about the exercise of ownership rights, both industrial and private, will create greater or lesser greenhouse gas emissions.

The Kyoto Protocol created two mechanisms a country can employ to help meet its targets that do not require attenuated emissions. One is to create carbon sink capacity, usually by planting forests to offset emissions. The other involves buying credits from other countries to increase allowable emissions. Yet for a nation to make a true cutback, it must direct economic activity away from goods needing high polluting processes. Market-based incentives, such as tax breaks for clean energy
funded by tax penalties on its dirty counterpart, is one such way. While these make a contribution, legal restrictions on the level of emissions that certain activities can create are also needed. Such legal measures force industry and private users to find ways to curb their production of greenhouse gases. They constitute constrictive alterations to the more generous property rights that may otherwise exist.

Note that even market-based approaches require the government to adjust the set of rights that contributors hold. Government interference, such as standards that increase the cost of production or vehicular emissions limits that increase the price of maintaining a car, attenuate both use and transfer rights, at least marginally. Even this is inconsistent with regimes featuring rights at the stronger end of the property spectrum.

Restrictive interventions affect property rights more than merely at the margins. These include: emissions caps for industrial processes, the rezoning of city sectors, and the blocking of some industrial processes, such as, the manufacture of particulates. While these methods vary, almost all would violate property rights of the full liberal form and many will entail significant restrictions to the allowable exercise of use rights.

9.6.2 Full Liberal or Stewardship Rights?
Full liberal rights imply a laissez faire approach to emissions. If they are morally justified, they would be pitted against the moral concerns that motivate climate change policy. Those advocating the restrictions necessary to halt or slow global warming would face an uphill battle. If the tragic nature argued for earlier is correct, we cannot rely on this regime to protect the environment; in fact, it possesses the very features that would accelerate ecological destruction. To run it the other way, those committed to full liberal rights must resist any theoretical commitment to obligations toward future generations or, in fact, to any obligations for environmental preservation. For those who hold to these obligations, this provides yet another reason to reject full liberal rights.

What is needed is a conception of property rights with the power to limit use in a way that promotes the preservation of natural resources and environments. I show why my account does this. I also spell out the kind and strength of restrictions my account requires.

In 9.5, we found that the options for assigning duties that combine effectiveness with the preservation of justice and fairness were few. Most suffered from moral and practical weaknesses that necessitated their modification. Yet the solutions most approximating that combination can be operationalised by the theory of property developed in this thesis. Specifically, my own proposal for assigning burdens is able to be implemented by my account of property in environmental resources.
In this thesis, I have argued that a better analysis of property rights shows them to have the flexibility to allow for their adjustment as a result of wider concerns. The specific rights of property are relative to circumstances. Throughout my account, appeal has been made not only to interests and rights non-owners have that must make their way into the generation of the rights, but also to the weaknesses in arguments that yield stronger rights for owners. Methodologically, inclusion of such interests makes it easier to represent cumulative harms in the construction of the complex set of rights that are required. Considerations of utility were used to identify when the interests of all in clean environments (etc) begin to entail restrictions on owners.

My conception applies principally to natural resources and products with a high natural resource component. However, as I concluded in chapter 8, it acts more broadly than simply attaching duties to owners of the valued resource. In the case of polluting emissions, the resources that must be preserved - atmospheric balance, including carbon dioxide, methane and ozone levels - are degraded, not by any use they are put to by their owners (indeed, largely they are not owned), but by spill-over effects from the use of other property. Crucially, some goods for which no substitutes are possible must be left intact. A liveable climate, for example, cannot be substituted for. The requirement that such important resources be preserved kicks back to justify limitations on the use of other resources.

Private ownership and market transfer are retained in general, but both use and transfer rights can be restricted. The balance of interests that craft the rights grounds non-exclusion from a safe environment and a stable climate. Property rights will not include a right to alter harmfully, damage, or destroy the substance of important features of the atmosphere; these must be left in a state that can be passed on to be enjoyed by future people. My account, which is sensitive to the interconnectedness of the world, sees distributive justice as including not only distribution of wealth, resources, and opportunities, but also the fair distribution of new impacts as well.

In line with this, a set of legal restrictions is justified, in order to implement climate stabilisation goals. Uses that have high negative externalities and produce cumulative harms will be restricted. The combination of tools used will be a function of the justifications of the interests that need to be protected and of economic and policy analysis of efficient ways of protecting them. These could include: taxes on income from polluting uses, duties on owners of important sites (for example, wetlands or forests) to keep their environmental features in a functioning state (the importance of this is highlighted in current fears about the Siberian thaw, potentially releasing millions of tons of methane), land use planning, monitoring, prohibitions, and other activities characteristic of maintaining patterns of use that ensure no harm. Regulated market instruments are also to be recommended and I made use of them in my proposal in 9.5.4. Some restrictions of behaviour may be era-specific, to give fair treatment to current and future generations. This is consistent with the
attempts to find global agreements to limit emissions, since the rapidity of future technological development of clean fuels may mean limits are required only for one or two generations.

In chapter 8 I wrote of the need for assessment criteria of environmental value to clarify the conditions under which limits to use rights apply. Among the parameters of this scale would be scarcity, renewability, importance of the resource, and the seriousness and reversibility of potential harm. The phenomenon of global warming demonstrates that concentrations of greenhouse gases have approached critical levels where the use limitations – in this case on industrial and transport emissions – that are a feature of stewarding rights become effective. The arguments that helped generate my conception justify modifying prior rights by increasing property limitations.

9.6.3 The Scope of Restrictions

How severe are the limitations implied by my account? Goods for which no substitutes are possible must be left intact. A reasonable standard of clean air and water, for example, cannot be substituted for. In the case under consideration, our interests in a stable climate circumscribe the limits to emissions. This requires us to leave the climate anthropogenically unaffected, to the extent that this is possible without inflicting greater harms on the present generation. The limitations are as severe as required to preserve environmental quality of air, fresh water, functioning coasts, and environmental services. I note, however, that it does not require effort to prevent natural changes (though broader principles of justice and ethics may do so).

For a property regime to implement polices that will effectively mitigate climate change, it must generate rights that track the minimum restrictions necessary to ensure this. This is clearly more restrictive than property limits suggested by the Kyoto Protocol. The global cap must be tighter, lowering over time. My proposal, in common with the PPP and the BPP, would necessitate a re-orientation of research priorities toward clean energy sources. Immediate and significant lifestyle change, directing activities away from frivolous high-emission activities, will be unavoidable.

Global governance of property regimes to monitor compliance may be required. International agreements should tie both policy and compliance to other global issues and include all countries, while treating them differentially. Take the example of transport policy. The predominance of transport-related pollutants in anthropogenic emissions entails heavy increases in petrol taxes, stringent emissions caps on vehicles, and strong incentivisation of renewable fuels. These would radically alter the incentive structure of the means of travel.

9.7 Conclusion

For effective action to prevent climate change, we need a proposal that combines fairness to current actors and sensitivity to historical cause. We also need to show the moral rightness of limiting the
right to use property in polluting ways, including constrictive alteration to property rights that may otherwise exist.

My analysis of property rights shows that they have the flexibility to allow for restrictions on action necessary to implement an effective climate protecting strategy. It shows that restrictions are justified when a crucial resource becomes scarce or is threatened. Global warming demonstrates that concentrations of greenhouse gases have approached critical levels where stewarding rights apply. The limitations to property rights are crafted to track the minimum restriction necessary to ensure this, and these restrictions may be severe, if this is required to preserve environmental quality; clearly more restrictive than property restrictions suggested by the Kyoto Protocol.

The attention I paid in my property theory to balancing interests is in line with the proposal I developed in this chapter. It gives sufficient weight to historical factors while being sensitive to the burdensomeness of the chores of mitigation. This approach, I argued, is morally and practically superior to others on offer.
Afterword

I make two last points: one by way of summary and the other an observation.

In summary, because so much property law is based on Locke’s thought, one can provide powerful reasons for environmentally motivated restrictions if one can show that defensible Lockean accounts of property entail those restrictions. I have shown how intuitions Locke appealed to can be used to construct a theory of property in environmental resources. In this account, the public retain a voice on legal limits to property use, reflecting the community’s interest. Prohibitions on certain uses in some geographical areas or taxes on income from harmful uses could embody this. Property rights must be limited to prohibit use patterns that threaten the viability of environmental services. Under certain conditions, rights over environmental resources are more like stewardship rights than full liberal rights.

The conception of property that arises is a form of private ownership, with market transfer along with an element of stewardship. The last feature is implemented by legal restrictions on property use. I argue that this conception better captures both the reasons given to justify property and the impact of the variety in the objects of property, than does a full liberal conception. The account is sensitive to a plurality of justifying principles and a range of object types, giving flexibility within a property regime. It rewards labour and productivity while curbing the more destructive potential of unrestricted rights.

The environmental law that follows from my view of property arrests some uses. Yet it is clear that many of these should never have been allowable practice; we previously thought owners had the moral authority to use property in certain ways, but we were wrong. In other cases, under a previous situation, the rights were justified, but in the environmentally perilous situation that now obtains they are no longer. Many restrictions within environmental law do not strip landowners of rights they can morally justify. When you pollute our waterways and atmosphere we can mobilise the symbolic and emotive power of ownership by asserting that you are taking away ‘property’ that we have rights over.

By way of observation: While private property has contributed many benefits over the last few centuries, the quest to protect its privileges against all intruders in an unholy one. The survival of the human and biotic community must be the paramount interest. The future of property requires that there be ready public access to the dispersed benefits of the earth’s resources. A conception of property that took seriously the duties I propose would exert influence on the process of participatory decision-making that is increasingly needed with respect to environmental impacts.
There is nothing inevitable about the tragedy of the commons; what is more certain is that we shall continue to play out our own tragedy if we choose to remain desensitised to the aggressive materialism and lack of ecological thinking that ignores the interpenetration of social obligations and individual rights. In a civilised society, exclusionary claims of property stop where the infringement of more basic human freedom begins. The law of property has always said much more than is commonly supposed about the subject of human rights.

A significant challenge is to integrate our ideas about property with our responsibility to the future community. The environment can no longer be seen as an unlimited resource that each is free to exploit with impunity. Once we recognise that our community extends to future people, we come to see ourselves as temporary users and trustees of a resource that will be used by others. It is my hope that increased recognition of the interdependent character of property relations will mean that the claims of stewardship will begin to rival and outweigh the importance of previous property forms over environmental goods.
Bibliography


Ernst and Young. *Case Study Assessment of the Impact of the R.M.A. on Business.* Wellington: Ernst and Young, 1997


Hayward, Tim. “Climate Justice and the Differentiation of Common Responsibilities.” (unpublished)


Shue, Henry. “Global Environment and International Inequality.” International Affairs 75(3) (1999): 531-45
Legal Cases

Griswold v Connecticut, 381 US 479 (1965) (USA)

Lucas vs. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) (USA)

Mabo v. Queensland (No2), CLR 175 (1992). (Australia)

Sierra Club v. Morton, 405 U.S. 727 (1972), [Justice Douglas (dissenting)] (USA)

Websites

BBC:

Queen Elizabeth II Trust:


WorldWatch:

Policy Documents


The Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC: 1997), Article 3

Newspapers

Independent (London) 16 September 2005