Liberty, Property, and the Foundations of the American Constitution

edited by
Ellen Frankel Paul and
Howard Dickman

State University of New York Press

Published by
State University of New York Press, Albany

For information, address State University of New York Press, State University Plaza, Albany, N.Y., 12246

Library of Congress Cataloging in Publication Data
Liberty, property, and the foundations of the American Constitution /
edited by Ellen Frankel Paul, Howard Dickman.
p. cm. — (SUNY series in the Constitution and economic rights)
Includes index.
ISBN 0-88706-914-2. ISBN 0-88706-915-0 (pbk.)
1. Right of property—United States—History. 2. United States—
Constitutional history. I. Paul, Ellen Frankel. II. Dickman, Howard. III. Series.
JC605.L53 1988
323.4'6—dc19

88-11614
CIP

10 9 8 7 6 5 4 3 2 1

The Great Fence to Liberty: The Right to Property in the American Founding

EDWARD J. ERLER

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property and the property in rights.[1]

James Madison

I. The Contemporary View of Property Rights

In a speech delivered on August 8, 1986, Justice William Brennan described the constitutional revolution which had been occasioned by the passage of the Fourteenth Amendment to the United States Constitution. From the point of view of practice, the Fourteenth Amendment is, the Justice noted, "perhaps our most important constitutional provision—not even second in significance to the original basic document itself."[2] The cause of Justice Brennan's hyperbole was not difficult to discern: in his view, the Fourteenth Amendment has "served as the legal instrument of the egalitarian revolution that transformed contemporary American Society."[3] At the heart of this egalitarian revolution, the Justice continued, was an "ever-growing concern for 'life and liberty' as the really basic rights which the Constitution was meant to safeguard. The earlier stress upon the protection of *property* rights against governmental violations of due process gave way to one which increasingly focused upon *personal* rights. Under the new approach, the Fourteenth Amendment would at last become (as its framers intended) the shield of individual liberties throughout the nation."[4] Attentive listeners no doubt quickly noted that the Justice had failed to mention that the Fourteenth Amendment's due process clause included—in addition to life and liberty—the right to property.

Justice Brennan did not explain why he did not consider the right to property a personal right, or why he considered the right to property incompatible with the existence of personal rights. Perhaps he didn't think it

was necessary to provide an explanation. After all, he was adhering to the most progressive opinion on the matter.[5] The contours of the argument are familiar. Property rights exist at the expense of human rights; human rights therefore can be protected only to the extent that the right to property is diminished or extinguished.

Under these circumstances it is necessary for the rights of the community to assume priority over individual rights. Although Brennan refers to life and liberty as "personal" rights, a serious question arises as to whether the community can assume priority over the right to property without at the same time assuming priority over life and liberty. As Brennan has remarked, "Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century...Now hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a *much modified view of the proper relationship of individual and state*."[6]

Brennan's critique of the right to property is at least as old as Jean Jacques Rousseau's *Discourse on the Origin of Inequality* (1755), and is best known to us today through the writings of Marx and his epigones. It almost goes without saying that this view of the right to property is wholly at odds with the view of the Framers of the Constitution. James Madison, for example, saw no inherent tension between the right to property and the rights to life and liberty. In Madison's view—a view that was almost universal in 1787—the security of the right to property was the great vehicle for securing life and liberty. Madison wrote in 1791, "That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated."[7] Madison, as did John Locke before him, viewed the right to property as the comprehensive right which, because of its comprehensiveness, assumed priority in the political community.

II. The Framers' View of Property Rights

In the Summer of 1787, the delegates to the Constitutional Convention met in Philadelphia to hammer out a constitution that was intended to put into motion those principles of constitutional government that had been enunciated in the Declaration of Independence. As Madison later wrote in the *Federalist*, the principles of the proposed Constitution were derived from "the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed."[8] Madison went on to

note that the principles of the Declaration required "strictly republican" government:

> It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government.[9]

A prominent contemporary historian, Leonard Levy, concurs, writing that the Constitution was the product of "the political philosophy of social compact, natural rights, and limited government that generated the Declaration of Independence."[10]

Many years later, Jefferson reflected on the purpose of the Declaration. "The object of the Declaration of Independence," he wrote, was:

> not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent... Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind... All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.[11]

Indeed the people were well acquainted with "the elementary books of public right," if not directly, then through conversation, a multitude of public documents, and—although not mentioned by Jefferson—above all through sermons.

A most remarkable example of a sermon extolling the social contract and natural law basis of civil society is John Tucker's "Election Sermon" delivered in 1771. In addition to Scriptural texts, Tucker quoted at length from John Locke. "Civil government," he declared, "is the dictate of nature:—It is the voice of reason, which may be said to be the voice of God." Tucker continued with an account of the origins of legitimate government that was drawn directly from Locke's *Second Treatise*, no doubt with some side (although not necessarily furtive) glances at Locke's *Reasonableness of Christianity* (1695).

> All men are naturally in a state of freedom, and have an equal claim to liberty. No one, by nature, nor by any special grant from the great Lord of all, has any authority over another. All right therefore in any to rule over others, must originate from those they rule over, and be granted by them. Hence, all government, consistent with that natural freedom, to which all have an equal claim, is founded in compact, or agreement between the parties,—between Rulers and their Subjects, and can be no otherwise. Because Rulers, receiving

> their authority originally and solely from the people, can be rightfully possessed of no more, than these have consented to, and conveyed to them.[12]

The influence of such sermons on the sentiments and opinions of the people cannot be overestimated. As the constitutional historian Andrew McLaughlin wrote, "During the Revolution and in the process of setting up new governments, the preachers played a conspicuous role. The philosophy of the seventeenth century was repeated over and over again by New England divines, who preached about a law of reason and a law of God, the sacredness of covenant and the divine character of government."[13] Hyneman and Lutz note that "to men in the 1770s there seemed to be no essential conflict between what Locke and the Bible were telling them, [although] their synthesis of the two was in fact an American accomplishment, not a logical necessity."[14]

The Declaration of Independence is undoubtedly the most succinct account that has ever been written of the social contract as the legitimate foundation of civil society. Its central principle is the "self-evident truth" derived from the "laws of nature and nature's God" that "all men are created equal." This truth, immediately evident through experience, is the ground of the political morality of the Declaration and of the American Founding. The evident truth of human equality is apparent because, unlike every other species, the human species has no natural rulers. The God of nature distinguished man—not by instinct—but by reason. In this regard, the human species is unique. Every other species has its form of rule imposed upon it by nature, i.e., instinct.

Human beings seemingly have no such instinct for social life. The human mind is not determined in the same way that instinct determines all other beings. Human beings are capable of individual self-consciousness and, although members of a species, can see themselves as individuals within the species. It is this possibility of self-consciousness or reason, the proof that the human mind is not determined, that is the ground of human liberty. Without equality, i.e., without the absence of natural rulers, there would be no human liberty; liberty is the inexpugnable concomitant of equality. Human beings seem to have been left to their own devices, having reason and the potential to choose their form of government, but having no guides immediately from nature to inform the choice. As Locke explains it:

> there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection, unless the Lord and Master of them all, should by any manifest Declaration of his Will set one above another, and confer on him by an evident and clear appointment an undoubted Right to Dominion and Sovereignty.[15]

But Locke had abundantly demonstrated in the *First Treatise* that no such

manifest declaration of will could reasonably be said to exist. And in the very last letter of his life, Jefferson echoed Locke's analysis when he wrote, employing one of the most frequently used republican metaphors, that the Declaration embodied the "palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."[16] If some men were born with saddles and others with boots then nature's intention (and the will of God) would be manifest.

The necessary inference from the absence of natural rulers is that by nature, i.e., in a state of nature, every human being is naturally his own ruler, having sole proprietorship over his own life, liberty, and property. Since the individual right to life, liberty, and property is derivative from natural human equality, these rights were known to the social contract philosophers as "natural rights"—the dictates of the "laws of nature and nature's God." It was the change from historical prescription to natural rights that represents the radical core of the American Revolution and the American Founding. It was not the rights of Englishmen, as we are so often told,[17] that was the subject of the Declaration, but the rights of man derived, not indeed from any particular constitution or positve law, but from nature. Historical prescription is ultimately traceable to accident; the existence of natural rights can be demonstrated as a "self-evident truth" from the laws of nature and nature's God, the first principle of which is the natural equality of all human beings. Jefferson, comparing the American Revolution to the Glorious Revolution, remarked that "Our Revolution commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts."[18] It was thus the laws of nature and nature's God that set the standards and bounds of civil society, and made possible not only a government derived from the principles of human nature, but a form of government that could honor human nature.[19] Governments founded on historical prescription are the products of "accident and force," not of "reflection and choice."[20]

III. The Completion of the Founding

Justice Brennan, in the speech quoted above, noted that the "progenitor" of the Fourteenth Amendment was not, as we might have expected, the principles of the Declaration, but Magna Charta.[21] Yet the debates surrounding the framing and adoption of the Fourteenth Amendment make it abundantly clear that the express purpose of its framers was to complete the regime of the Founding by extending civil rights to the newly freed slaves. The regime of the Founding had been incomplete because the Constitution tolerated the

continued existence of slavery. It is true that the Framers resorted to political expedience in the matter of slavery; but without that expediency the Constitution would never have come into existence. The more thoughtful of the Framers knew that without a Constitution based on the Declaration's principles, the likelihood that slavery could ever be extirpated from the polity was remote.

But no matter how much the Framers may have looked forward to the eventual demise of slavery, its countenancing in the Constitution stood in opposition to the Declaration's principle that all legitimate government must be derived from the consent of the governed.* After all, no slave ever—or could have ever—consented to become a slave. The completion of the regime of the Founding awaited the Civil War and the passage of the Reconstruction Amendments (Thirteenth through Fifteenth). And it was clearly the self-conscious purpose of the framers of the Thirteenth and Fourteenth Amendments to bring the Constitution into harmony with the principles of the Declaration. Speaking of the original Constitution's acquiescence to the maintenance of slavery, Thaddeus Stevens, the leader of the Radical Republicans in the House of Representatives and one of the principal architects of the Fourteenth Amendment, remarked in May 1866 that: "Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be now."[22] References to the Declaration of Independence

*The Constitution adverts to slavery in three places: (1) Article I, Section 3:

> Representatives and direct Taxes shall be apportioned among the several states which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound for Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

(2) Article I, Section 9, clause 1:

> The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each Person.

and (3) Article IV, Section 2, Clause 3:

> No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

as "organic law" were so frequent throughout the Reconstruction debates that it can hardly be doubted that the framers of the Civil War Amendments were attempting to complete the regime of the Founding by restoring the Declaration of Independence to its rightful place as the authoritative source of our political morality.[23]

Magna Charta, of course, was the product of unique British history, and consequently was not a natural right document. We must wonder, therefore, about its applicability to America. The language of Magna Charta is not the language of natural law; it is couched in the terms of a particular struggle between King and nobles, not the universal rights of man. A.E. Dick Howard has recently written that:

> The charter to which John agreed is an intensely practical document. Rather than being a philosophical tract redolent with lofty generalities, the charter was drafted to provide concrete remedies for specific abuses. Moreover, although the barons were rebelling against the abuse of royal power they were not seeking to remake the fabric of feudal society. They sought instead to restore *customary* limits on the power of the Crown.[24]

It is true that many commentators have traced the Fourteenth Amendment's "due process" clause back to Article 39 of Magna Charta, which accords to every "free man" a guarantee of judgments made according to "the law of the land." But this derivation is only a partial explanation. Since Magna Charta clearly does not rest on natural law grounds, it bears only a superficial resemblance to the Declaration of Independence, and therefore, by extension, to the Fourteenth Amendment. The preface to Magna Charta contains this expression: "We have also granted to all the free men of Our kingdom, for Us and Our heirs forever, all the liberties underwritten..." The Declaration of Independence, in contrast, views the *natural rights* of "all men" as derivative—not indeed from the will of a king ("We have. . .granted")—but from the "laws of nature and nature's God." To say nothing of other consideration which are not less important, this difference is decisive.[25]

Is it credible to say that the American people in 1776 were merely asking for their rights as Englishmen at the same time that they were declaring themselves no longer Englishmen? Or that the Fourteenth Amendment, designed to extend citizenship and civil rights to blacks was derived from their original rights as Englishmen?[26] The assertion that the Fourteenth Amendment finds its roots in Magna Charta stretches credulity beyond all possible limits. Yet Justice Brennan somehow realizes that it is necessary for his ideological stance—and the prospect of constitutional reform—to pretend that the Fourteenth Amendment (and the Bill of Rights) represents a radical break from the original Constitution and the principles that animated it.

In Brennan's analysis, the original Constitution is principally concerned with the arrangement of governmental power, while the Bill of Rights and the Civil War amendments deal with personal liberties. The simplistic view that

governmental power is always at odds with personal liberty is at the heart of Brennan's jurisprudence.[27] The extent to which the contemporary egalitarian revolution has taken place is, in Brennan's view, a function of the vitiation of the Fourteenth Amendment's guarantee of the right to property in favor of the "personal" rights of life and liberty. Brennan prefers to see the ground of this revolution in Magna Charta, because somehow he realizes—or divines—that Magna Charta represents positive law whereas the American Constitution is grounded in natural law or natural right. Thus, supporters of the radical welfare state have come to realize that reform is much easier to promote if all notions of right are positive. When all notions of right are positive, there are no limits to what can be demanded in the name of welfare, especially when it is recalled that the modern welfare state looks forward to the total relief of the human estate, a relief that necessarily entails a denial that nature can provide standards or bounds to the human political condition.[28]

IV. Locke in the American Founding

In the Declaration, Jefferson did not speak of the right to life, liberty, and property (Locke's trinity), but of "life, liberty, and the pursuit of happiness." This change has occasioned much speculation as to Jefferson's intention in this choice of words. It is possible to argue that the change of phraseology indicates that the Declaration is not simply Lockean, but it would be absurd to maintain, as some have, that the change indicates that Jefferson was rejecting Locke's "bourgeois" philosophy.[29] The phrase "pursuit of happiness" does occur in Locke, but nowhere in the political *Treatises*. In *An Essay Concerning Human Understanding* (1690) Locke stated that:

> As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty. The stronger ties we have to an unalterable pursuit of happiness in general, which is our greatest good. . .the more are we free from any necessary determination of our will to any particular action."[30]

In *The Reasonableness of Christianity*, Locke argues that "Mankind" "must be allowed to pursue their happiness—nay, cannot be hindered" from doing so. He also calls the pursuit of happiness "the chief end" of mankind and more than intimates that it consists of the "enjoyments of this life."[31] It is clear that, for Locke, the "pursuit of happiness" is intimately connected with the right to property. This is indicated by the fact the Locke included "Lives, Liberties and Estates" under the general term "property." (II* 123)*

---

*All citations in the text in this form refer to Locke's *Second Treatise*, e.g., II*23 means paragraph number 123. Likewise, I*23 refers to paragraph 23 of the *First Treatise*.

Leo Strauss highlighted the connection between 'property' and 'pursuit of happiness' when he described "the relation of the right of self-preservation to the right to the pursuit of happiness":

> The former is the right to 'subsist' and implies the right to what is necessary to man's being; the second is the right to 'enjoy the conveniences of life' or to 'comfortable preservation' and implies, therefore, also the right to what is useful to man's being without being necessary for it."[32]

Being derivative from the right to life, both the right to property and the right to the pursuit of happiness must be accorded the status of natural rights. For Locke, the 'pursuit of happiness,' because it implies a right to possess beyond what is necessary for mere life, is the ground of individual liberty—it is also the ground of political liberty. The desire to pursue "true and solid happiness" as the "greatest good," is proof for Locke that the human mind is not determined and that human beings are free to choose the means—reason—of securing their happiness.[33]

In the political context, this natural freedom means that "consent of the governed" is the necessary requisite for legitimate government. The "pursuit of happiness"—the manifest expression of human freedom—thus becomes the object of civil society and the public good. This means that civil society must, above all, provide the security for the external goods—in Lockean terms "properties"—necessary for the "pursuit of happiness." I believe this is the precise sense in which Americans understood the matter in 1776. It was certainly the way James Wilson understood it when, in 1774, he wrote:

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is grounded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government.[34]

Similar statements can be found in the Virginia Bill of Rights (1776) and the Massachusetts Bill of Right (1780). The latter document gives a perfectly Lockean account in Article I:

> All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[35]

Thus, we see that the phrase "safety and happiness" is another phrase ("in fine") for the protection of life, liberty, and property. This, I believe, is the way in which Americans generally understood the phrase 'pursuit of happiness.'

In the *Second Treatise* Locke was under considerable pains to find a justification for the right of private property and to insure that property would always be in the service of political ends, i.e., would serve as a "fence" to liberty and thereby as a "fence" to life (II* 17).[36] As one prominent scholar has stated it, "Lockean economics served Lockean politics. . .Locke's political philosophy is the foundation, not the scaffolding or superstructure, of political economy."[37] The principal problem Locke faced in establishing the political character of property was how to overcome the variety of religious proscriptions against many of the measures he deemed essential in securing the right to property and in making that right a strong fence to political liberty. For Locke, it is the "rational and industrious" accumulators of property who are the benefactors of mankind, not those who adhere to the Christian virtues of brotherly love, faith, and charity. As Locke—and the other founders of modern liberalism—surely knew, the claims of religion would have to be attenuated in order to establish what came to be known as capitalism. In addition to a number of other considerations (not the least of them the religious proscription against usury), the emancipation of the desire to accumulate property would be looked upon as covetousness or greed. As one acute observer has noted, Locke attempted "to exorcise the still lingering phantom of theology in economic matters and in particular. . .the prejudice against the taking of interest."[38] Locke's ultimate purpose, however, can be summarized in this manner: "civil society must provide for the institutionalization of the right to property in such a way as to make *nature*, not theological teachings, the guide to action."[39] In other words, the political must take precedence over the theological. But as Locke well knew, the religious question is the political question *par excellence*. Accordingly, he notes that the "law of morality Jesus Christ hath given us in the New Testament. . . by revelation" is "a full and sufficient rule for our direction, and conformable to that of reason."[40] This statement is made intelligible by the fact that "[t]he greatest part cannot *know*, and therefore they must *believe*."[41]

V. Locke's Account of the Right to Property

Locke begins his account of the origin of the right to property in the *Second Treatise* by remarking that both natural reason and revelation agree that God has given the earth to mankind in common. How, then, can anyone acquire an exclusive right to any part of it? Locke solves this problem handily.

> 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 joyned to it something that is his own, and thereby makes it his *Property*. . . . 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)

Everything of value derives from man's labor, that is, his transformation of nature. The right to property is ultimately grounded in each individual's original "*Property* in his own person" (II* 27,* 44). Labor is merely an extension of that original property.

The assertion that men have a property in their own person would seem to contradict an earlier statement of Locke's that "Men being all the Workmanship of one Omnipotent, and infinitely wise Maker... they are his Property, whose Workmanship they are." (II* 6) This statement is more in accordance with the orthodox religious view. If men are the property of God, then, of course, there would seem to be no right to property in the sense just described by Locke. But God (who might plausibly be described as "No body"), in creating man, endowed him both with the instinct for self-preservation and with rationality. Accordingly, one could conclude that the use of reason in the service of self-preservation is the fulfillment of the will of the "infinitely wise Maker," (II* 6) In the *First Treatise* Locke gives this remarkable explanation.

> God, I say, having made Man and the World thus, spoke to him, (that is) directed him by his Senses and Reason, as he did the inferior Animals by their Sense, and Instinct, which he had placed in them to that purpose, to the use of those things, which were serviceable for his Subsistence, and given him as means of his *Preservation*.... For the desire, strong desire of Preserving his Life and Being having been Planted in him, as a Principle of Action by God himself, Reason, *which was the Voice of God in him*, could not but teach him and assure him, that pursuing that natural Inclination he had to preserve his Being, he followed the Will of his Maker....(I* 86)

If God made men for their own preservation (and the preservation of the image of God [I* 30 and II* 11]), then they are perfectly pious in regarding themselves as their own property, and the creation of property through labor becomes a sacred obligation.[42] As Locke notes, "God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational" (II* 34).

The greatest part of all value is created by labor. God may have given the earth in common to all mankind, but "Nature and the Earth furnished only the almost worthless Materials, as in themselves." (II* 43) "I think," Locke remarks:

> it will be but a very modest Computation to say, that of the *Products* of the Earth useful to the Life of Man 9/10 are the *effects of labour*; nay, if we will rightly estimate things as they come to our use, and cast up the several Expenses

> about them, what in them is purely owing to *Nature*, and what to *labour*, we shall find, that in most of them 99/100 are wholly to be put on the account of *labour*. (II* 40)

Locke does not argue in terms of an absolute right to property. Rather, private appropriation is justified in terms of the common good. Private appropriation "does not lessen but increase the common stock of mankind." (II* 37) In Locke's calculation, the appropriation of one acre for private cultivation would return 999 acres back to mankind because the return or usefulness of that acre has been increased almost a thousand fold. Uncultivated nature is, as we have seen, "almost worthless." It is labor and therefore the establishment of private property that makes the things of nature useful to men. Private appropriation, although a completely self-regarding activity,[43] is thus in the service of mankind, and private property is the foundation of the common good and public happiness.

There is, however, a natural limit to the amount of property that can be accumulated. The state of nature, as we are told, "has a Law of Nature to govern it." Locke describes the Law of Nature as "reason" (II* 6), the "common Equity, which is that measure God has set to the actions of Men." (II* 8) Since the state of nature is ultimately a state of "penury," there are natural limits to how much a man may acquire. The law of nature creates a kind of utilitarian limit to property. An individual may appropriate only as much from the common stock of mankind as he can make use of, either for his own needs or in trade for other goods. Thus, the natural law limitations are directed, not against the covetous, but against the "waster," i.e., those who are not "Industrious and Rational." Appropriation beyond that is a robbery committed against mankind. (II* 46) If the state of nature were a state of plenty there would be no necessity of limits. Civil society is instituted not so much to preserve property as to facilitate its acquisition and to produce plenty—the necessary preconditions of peace and prosperity.

"The unquestionable right of the Labourer" to accumulate private property is also limited by the requirement that "there is enough, and as good left in common for others." (II* 28) This prohibition, however, seems to have no practical effect. If the state of nature is one of plenty, then there will always be "good enough left in common for others." If the state of nature is one of "penury," then the right to preservation—which takes precedence over the right to property—would dictate that one appropriate the necessary property without regard to the preservation of mankind.[44] Indeed, under conditions of dire necessity one would be justified in appropriating property by force (i.e., by means other than labor) to ensure survival. It would seem that under conditions of extreme penury, labor is not the only legitimate title to property since the right to property is obviously subordinate to the right to life.

In any case, what nature limits is emancipated by the "Fancy or Agreement" which created money as the medium of exchange. Now,

accumulation could be limitless because money, having no intrinsic use value itself, could be accumulated limitlessly without decreasing the common stock of the goods necessary to the preservation and convenience of life. As Locke explains, an individual "might heap up as much of these durable things as he pleases; the *exceeding of the bounds of his just Property* not lying in the largeness of his Possession, but the perishing of any thing uselessly in it." (II* 46) And in a statement that was echoed by Madison in the *Federalist* No. 10, Locke notes that "as different degrees of Industry were apt to give Men Possessions in different Proportions, so this *Invention of Money* gave them the opportunity to continue to enlarge them." (II* 48) The right to property antedates civil society; civil society exists to protect those rights that it does not create. It is true that society creates new kinds of property, and provides a completely new ground for its protection in positive law, but the measure of any society is the extent to which it protects the natural right to property. The "emancipation of acquisitiveness" which is made possible by the advent of civil society, with its protections for property, will replace the scarcity of nature with the plenty of civilization. Thus the private right to property, nurtured and protected by civil society, will be the foundation of the common good, as every act of private accumulation becomes simultaneously an act of public-spiritied devotion to the public interest. As Leo Strauss remarked, "Far from being straitened by the emancipation of acquisitiveness, the poor are enriched by it. For the emancipation of acquisitiveness is not merely compatible with general plenty but is the cause of it. Unlimited appropriation without concern for the need of others is true charity."[45]

C.B. Macpherson has written that "Locke's astonishing achievement was to base the property right on natural right and natural law, and then remove all the natural law limits from the property right,"[46] Nature, as we have seen, sets a utilitarian limit to the amount of property one can appropriate in the state of nature. It is the convention of money (which antedates civil society, as does the right to property) that allows unlimited accumulation without regard to its consequences for others. But Locke insists that "The Obligations of the Law of Nature, cease not in Society but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to inforce their observation." (II* 135) That there is a natural law that governs the state of nature, Locke declares "is certain." And that law is "as intelligible and plain to a rational Creature, and a Studier of that Law, as the positive Laws of Commonwealths, nay possibly plainer." (II* 12) But in the course of the argument, we learn that "in the state of Nature there are many things wanting," among them:

> an *establish'd*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biassed by their Interest, as

> well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases. (II* 124)

Thus, positive law is necessary to make the natural law effective. Only "studiers" can know the natural law, and the "inconveniences" of the state of nature are not conducive to the study of natural law, among other things. Those who are not "studiers" need the sanction of positive law. In short, civil society is necessary to make the natural law effective. By the law of nature, "*Mankind are one Community*," but "the corruption, and vitiousness of degenerate Men" make it necessary "that Men should separate from this great and natural Community, and by positive agreements combine into smaller and divided associations." (II* 128) Positive agreements have one end—to draw natural law closer in civil society.

The inequality among the "studiers" and "non-studiers" does not establish a claim to rule on the part of the "studiers." Rather, it gives to them only an inequality of possessions. And the way in which civil society protects property will be the litmus test of its adherence to natural law principles. The civil protection for unequal accumulation of property is a reflection of the natural human condition on the level of civil society—it is thus a reflection of natural law in a way that makes natural law effective in civil society. For Locke is clear that it is natural law principles—the natural rights to life, liberty, and property which are the irrefragable dictates of individual human equality—that set the bounds and limits to civil society. The right to property serves as the litmus test because it is the right which is derivative from life and liberty. As Harvery Mansfield explains:

> this does not mean that property (in the narrow sense) is more valuable than life or liberty; it means that property is the convention that best protects them. For when life and liberty are at stake, they are already in jeopardy. Locke's reasoning, one may assume, is that it is better to elevate a lesser good, and to pay the price of an increased love of gain and a somewhat arbitrary status for property and the propertied than to endanger the greater goods by endeavoring to protect them directly.[47]

In a sense, the right to property serves as a kind of "early warning system" to invasions of life and liberty. As M. Seliger rightly notes, "Locke's emphasis on the right of property seems to stem from his awareness that life and liberty may mainly be jeopardized through the violation of property rights—because men clash with each other on this ground most often and most violently, and because the government's demands on the citizens bear most immediately and visibly on their property."[48] It is prudent to make property the test because property can be regained while liberty, once lost, is rarely regained. Thus, Locke considered the private right to property to be in the ultimate service of political ends:

> the increase of lands and the right imploying of them is the great art of government. And that Prince who shall be so wise and godlike as by established laws of liberty to secure protection and encouragement to the honest industry of Mankind against the oppression of power and narrowness of Party will quickly be too hard for his neighbours. (II* 42)

VI. Property and Consent

Madison undoubtedly expressed the settled sense of the Constitutional Convention when, early in the proceedings, he made the perfectly Lockean assertion that "the primary objects of civil society are the security of property and public safety."[49] Madison was to write later in his defense of the Constitution that "the first object of government" is the protection of "the diversity in the faculties of men from which the rights of property originate." Madison continued that:

> [f]rom the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties."[50]

As a practical matter, the different and unequal individual abilities that exist in civil society are expressed most dramatically in terms of the right to property.

Everyone has an equal right to possess property, but all have different—even unique—faculties for its acquisition. In fact, without this diversity of faculties, property would be homogeneous and the right to property as an *exclusive* appropriation would be nonexistent. It is the individual diversity of faculties that makes property itself individual, that is, private. All property carries the mark of the unique ability or labor of the one who creates the property. If the faculties for acquiring property were homogeneous, everyone would be entitled to equal property, but no one would have an exclusive or private right to any particular property since no property would bear the stamp of creativity that was the exclusive possession of any single individual. Without human individuality, the natural right to property which is shared equally by all because of their participation in the human species could not be translated into a civil right. And without civil protection for the right to property, the right to property would be a nullity, for in the state of nature there would be no occasion for an individual to distinguish himself by labor or otherwise. The natural right to property, understood in this manner, provides both the principle of identity and difference. And this is true of the natural right to life and liberty as well. It is not so much one's equal participation in the species—or one's "species beingness" as it has been called—but one's individuation within the species that is uniquely human.

In Madison, as in Locke, the protection of natural talents—most manifest in the differing faculties for acquiring property—is the most practical manner of implementing natural law standards in civil society. The protection of the natural diversity for acquiring property is at one and the same time an affirmation of the equality of the right to property and a legitimation of the possession of different kinds and amounts of property. Strictly speaking, equality is incompatible with civil society. Without distinction ("different degrees and kinds") there would be no private rights. But also, the equal and undifferentiated possession of property would hinder the "pursuit of happiness" by removing the impetus for acquiring property beyond the barest necessities. "Theoretic politicians," Madison wrote, "have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions."[51]

Madison, of course, understood the right to property in its full political sense—as a fence to life and liberty. And, in its political meaning, property was understood as the comprehensive right: "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[52] Madison did not, any more than Locke, posit an absolute right to property; the right to property was justified in purely political terms, i.e., in terms of the common good. As he remarked in *The Federalist*, "the regulation of the various and interfering interests form the principal task of modern legislation."[53] This means that property can be regulated from the point of view of maintaining a free economy as a fence to liberty.

The connection between property rights and human rights is often contemptuously dismissed. But Locke and the American Founders saw the connection in a clear and precise light. Locke notes that one of the "Bounds" put on the legislative power "by the Society, and the Law of God and Nature" was that the legislature "must *not raise taxes* on the Property of the People, *without the Consent of the People*, given by themselves, or their Deputies." (II' 142) This idea was repeated in unequivocal terms in the Declaration of Independence. As many have pointed out, the taxes imposed upon the Colonies by the British Parliament were not particularly onerous or burdensome. In a time of relative economic prosperity they could hardly have been judged tyrannical. But they were taken as evidence of a "design to reduce [the Colonies] under absolute despotism." Under these circumstances, the Declaration continues, it is the right of the people, "it is their duty to throw off such government and to provide new guards for their future security." If property can be taken (or taxes imposed) without the consent of the people, then the requirement of the consent of the governed is in jeopardy because "the right to property [is] the visible, formal protection of the right to consent."[54] This is the indefeasible connection between the right to property, understood as the comprehensive political right, and human rights. The right to property is the great fence to liberty, because it is the fence to consent.

Notes

1. *Property*, published anonymously in the National Gazette, March 29, 1792, in 14 THE PAPERS OF JAMES MADISON 268 (R. Rutland, *et al.*, eds. 1978-).

2. Brennan, *The Fourteenth Amendment*, Address to the Section on Individual Rights and Responsibilities, American Bar Association, New York University Law School, August 8, 1986 (quoting B. Schwartz, *The Amendment in Operation: A Historial Overview*, in THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 29 (B. Schwartz ed. 1970).

3. Brennan, *id.*

4. *Id.* (emphasis in original).

5. Justice Brennan expressed his attachment to the most progressive opinions on the subject of distributive justice when he remarked that "the demands of human dignity will never cease to evolve." *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985.

6. *Id.* (emphasis added).

7. 14 Rutland, *supra* note 1, at 267.

8. THE FEDERALIST No. 43, at 279 (C. Rossiter ed. 1961).

9. *Id.* No. 39, at 240. *See also* M. Meyers, *Revolution and Founding: On Publius-Madison and the American Genesis*, 37 QUARTERLY JOURNAL OF THE LIBRARY OF CONGRESS 197 (1980): "[T]he revolutionary language of the Declaration returned to justify another act of necessity. The Higher Law from which all human rights and obligations flow defines the ends of political institutions and sets limits to their special binding rules." And *see* H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 76 (1978): "...the innermost meaning of the American Revolution, and of the American political tradition which it established" depends upon an understanding of the "inner relationship" between the Declaration and the Constitution; and *see* at 110*ff*.

10. L. Levy, *Constitutional History, 1776-1789*, in THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 376 (L. Levy, K. Karst, D. Mahoney eds. 1986). The importance of a literal understanding of social contract theory for the founding generation can be clearly seen in Madison's speech to the House of Representatives on May 22, 1789, in Rutland, *supra* note 1, at 178-182.

11. Letter to Henry Lee, May 8, 1825, in JEFFERSON: WRITINGS 1501 (M. Peterson ed. 1984).

12. 1 Tucker, *An Election Sermon*, in AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805 161-162 (C. Hyneman & D. Lutz eds. 1983).

13. A. MCLAUGHLIN, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 71 (1st ed. 1932, 1961); *see also* 72, 74-76.

14. Tucker, *supra* note 12, at 158. Most contemporary commentators, however, do not understand the primacy of "the theological-political question" as clearly as Locke and the colonial divines. Walter Berns, for example, has written that "the very idea of natural right is incompatible with Christian doctrine and, by its formulators, was understood to be incompatible"; Berns, *Comment* [A reply to Norman, *Christians, Politics and the Modern State*], 7 THIS WORLD 98 (1983).

15. J. LOCKE, TWO TREATISES OF GOVERNMENT II" 4 (P. Laslett ed. 1963).

16. Letter to Roger Weightman, June 24, 1826, in Peterson, *supra* note 11, at 1517.

17. *See infra*, note 28; *compare* D. BOORSTEIN, THE GENIUS OF AMERICAN POLITICS 82*ff.* (1953), with H. JAFFA, EQUALITY AND LIBERTY 120*ff.* (1965).

18. Letter to John Cartwright, June 5, 1824, in Peterson, *supra* note 11, at 1491. In 1775, Alexander Hamilton used a similar image: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power." *Farmer Refuted*, in 1 THE PAPERS OF ALEXANDER HAMILTON 122 (H. Syrett ed. 1961-).

19. *See* THE FEDERALIST No. 36, at 217, 224.

20. *Id.* No. 1, at 33.

21. Brennan, *supra* note 2.

22. CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., 2459 (1866).

23. *See* D. Farber & J. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONSTITUTIONAL COMMENTARY 235-237, 239, 241, 245, 246, 249, 259, 272 (1984); and Erler, *Natural Right in the American Founding*, in THE AMERICAN FOUNDING 195 (L. Levy, J. Barlow, & K. Masugi eds. 1988).

24. Howard, *Magna Carta*, in 3 THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 10, at 1195 (emphasis added); *see also* Erler, *The Constitution and the Separation of Powers*, in THE CONSTITUTION: A HISTORY OF ITS FRAMING AND RATIFICATION 156-157 (L. Levy & D. Mahoney eds. 1987).

25. G. M. Trevelyan wrote that Magna Charta was "a document so technical [and]...so deficient in the generalizations with which the Declaration of Independence abounds" that it was "totally ignorant of the 'rights of man'." 1 HISTORY OF ENGLAND 230 (1st ed. 1926, 1953).

26. *See* Lincoln's "Springfield Speech," June 26, 1857, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 406-407 (R. Basler ed. 1953).

27. *See especially* Brennan, *supra* note 5.

28. A rather unconvincing attempt to deny the natural right origins of the founding is John Philip Reid's *The Irrelevance of the Declaration*, in LAW AND THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 46-49 (H. Hartog ed. 1981). Reid argues that despite the many statements contained in public documents, newspaper editorials, sermons, and innumerable speeches, the idea of natural law or natural rights played only a minor role in the pre-Revolutionary period, including the Declaration. Reid—a lawyer—insists that historians have romanticized the Declaration and the Revolution, surrounding them with a myth born more of the historians' imagination than of reality. "Far from being a statement of abstract, natural principles, the Declaration is a document of peculiarly English constitutional dogmas" (at 88). "The Declaration was not, and was never intended to be, either a statement of philosophy or political theory. It was, pure and simple, a legal document, claiming and executing a constitutional right." (at 82) When the Americans exercised the right to revolution (a right they thought derived from the "laws of nature and nature's God"), they were in reality merely exercising a constitutional right created by the English common law or English constitutionalism. That is, English constitutionalism, as a matter of positive law contains the right of revolution—the means of its own dissolution! Whatever this may say about Reid's acuity, it certainly is not the self-understanding of those who participated in the American Revolution nor, I dare say, a fair reading of the historical materials. Reid and others may dislike talk about natural rights, but this is

hardly a warrant to reconstruct history. Joseph Priestley stated the matter succinctly when, in an essay published in 1768 and widely read in America, he wrote "Lawyers, who are governed by rules and precedents, are very apt to fall into mistakes, in determining what is right and lawful." AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 26 (1768). What Priestley understood—something that was also well understood by Jefferson and the American Revolutionaries—was that the identification of the legal and the just (the argument from fact to right) is the ground of political tyranny because at bottom it rests on the assertion that "justice is the interest of the stronger."

29. *See, e.g.*, G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 250-251, 255 (1978), and *infra* note 32. *See also* 1 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 350 (1st ed. 1927, 1954):

> The substitution of 'pursuit of happiness' for 'property' marks a *complete break* with the Whiggish doctrine of property rights that Locke had bequeathed to the English middle class, and the substitution of a broader sociological conception; and it was this substitution that gave to the document the note of idealism which was to make its appeal so perennially human and vital. (emphasis added)

30. 2 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, Ch. XXI, 52 (A. Frasner ed. 1959).

31. J. LOCKE, THE REASONABLENESS OF CHRISTIANITY," 245.

32. L. STRAUSS, NATURAL RIGHT AND HISTORY 228 n.92 (1953).

33. Lest we too quickly conclude that the quoted passage bears the distinct imprint of Aristotle, Locke adds within a few paragraphs that:

> I think that the philosophers of old did in vain inquire, whether *summum bonum* consisted in riches, or bodily delights, or virtue, or contemplation: and they might have as reasonably disputed, whether the best relish were to be found in apples, plums, or nuts, and have divided themselves into sects upon it. (Locke, *supra* note 30, at 56.)

The reference is clearly to Aristotle. *See* ARISTOTLE, ETHICS 1095b15*ff*., 1173a13*ff*. In Locke, the pursuit of happiness remains essentially a private activity. In the SECOND TREATISE, the public good consists in securing the "peace and safety" necessary to the private pursuit of happiness.

34. *Considerations On the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 THE WORKS OF JAMES WILSON 723 (R. McCloskey ed. 1967). Garry Wills, in his INVENTING AMERICA (*supra* note 29, at 240*ff*), unsuccessfully attempts to use this passage to prove the *non-Lockean* origins of Wilson's thought. The use of the word "happiness" here, Wills asserts, was derived from Hutcheson's "moral sense" philosophy rather than from Locke. In Wills' account, Hutcheson was the proponent of "communitarianism," whereas Lockeanism rests on an individualistic natural rights philosophy that is destructive of community. Since Wills' ideological liberalism rests upon the priority of the community to the individual, he

attempts to reinterpret the American Founding in terms of the moral sense philosophers who are, at least on the surface, more amenable to this interpretation. Needless to say, Wills' attempt utterly fails. For a devastating critique of Wills, *see* Jaffa, *Inventing the Past: Garry Wills's Inventing America and the Pathology of Ideological Scholarship*, in AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 76-109, especially 101-108 (1984).

35. 1 DOCUMENTS OF AMERICAN HISTORY 107 (H. Commager ed. 1968). The Virginia Bill of Rights states that "all men are by nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." *Id.* at 103.

36. Locke employs the metaphor of a "fence" throughout the SECOND TREATISE: *see*" 17 (freedom as fence to preservation);" 93 ("what Security, what Fence");" 136 ("determine the Rights, and fence the Properties";" 222 ("The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set as Guards and Fences to the Properties of all the Members of the Society");" 222 ("For the People having reserved to themselves the Choice of their *Representatives*, as the Fence to their Properties");" 226 ("*the best fence against Rebellion*"). Nathan Tarcov (*Locke's Second Treatise and 'The Best Fence Against Rebellion'*, 43 THE REVIEW OF POLITICS 198-217 [1981]), notes that the radical character of Locke's right of resistance is that the people may act in *anticipation* of the dissolution of the legislative. The sense of "anticipation" seems to be conveyed by Locke in the "fence" metaphor. Tarcov further argues that "Locke's concern for fences against the worst, rather than for paths to the best or for a balance of good and bad, is not only the basis of the right of resistance and of the principle of anticipation, but the fundamental principle of Locke's liberal politics."

37. Mansfield, *On the Political Character of Property in Locke*, in POWERS, POSSESSIONS, AND FREEDOM 24 (A. Kontos ed. 1979). *See also* M. SELIGER, THE LIBERAL POLITICS OF JOHN LOCKE 171-172 (1969).

38. Parson, *Locke's Doctrine of Property*, 36 SOCIAL RESEARCH 389 (1969).

39. *Id.* at 398.

40. LOCKE, *supra* note 31, at 243.

41. *Id.* (emphasis in original)

42. See J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 95, 108-111 (1980).

43. *See* FIRST TREATISE" 92. "Property. . .is for the benefit and sole Advantage of the Proprietor."

44. *Id.*" 6: "Everyone as he is *bound to preserve himself*, and not to quit his Station willfully; so by the like reason when his Preservaton comes not in competition ought he, as much as he can, *to preserve the rest of Mankind*."

45. STRAUSS, *supra* note 32, at 242-243.

46. C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 199 (1962).

47. Mansfield, *supra* note 37, at 37.

48. Seliger, *supra* note 37, at 166.

49. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (M. Farrand ed. 1966). Madison's statement was echoed throughout the Convention: *see*

Hamilton's remarks on June 18 (*id.* at 302): "One great objt of Govt is personal protection and the security of Property"; Gouverneur Morris on July 5 (*id.* at 553): "property was the main object of society"; Rufus King on July 6 (*id.* at 541): "property was the primary object of Society"; James Wilson seems to have been a notable exception, remarking on July 13 (*id.* at 605) that "he could not agree that property was the sole or the primary object of Governt. & Society. The cultivation & improvement of human mind was the most noble object." It almost goes without saying, however, that this is not a non-Lockean statement.

50. THE FEDERALIST No. 10, at 78.

51. *Id.* at 81.

52. *Property*, 14 Peterson, *supra* note 11, at 26.

53. THE FEDERALIST No. 10, at 79.

54. Mansfield, *The Forms of Liberty*, in DEMOCRATIC CAPITALISM? ESSAYS IN SEARCH OF A CONCEPT 19 (F. Baumann ed. 1986).