

## LOCKE VERSUS HOBBS: POLITICAL ECONOMY OF PROPERTY RIGHTS

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### Abstract

Secure property rights and the rule of law are crucial for economic growth, a topic included in every economics principles textbook and many upper division elective courses. SCOTUS decisions regarding property rights provide useful material for discussing these issues. Seventeenth century political philosophers Thomas Hobbes and John Locke offered very different views of the role of the state and the rights of man. While also of historical interest, this framework sets the stage for debate regarding the proper role of the state, the judiciary, philosophical influences that determine judicial decisions and the implications for takings under the Fifth Amendment. This article provides a detailed outline of their views with a focus on their treatment of individual liberty and property rights. To facilitate instructor preparation for classroom discussion, extensive references to the original texts are included.

Key Words: Property Rights; Natural Law; Political Economy; Eminent Domain; Kelo

JEL Classification: B12; H13; K11; P14; P16

### Introduction<sup>2</sup>

Economists and policymakers widely agree that property rights and adherence to the rule of law are crucial for economic growth.<sup>3</sup> Without well-defined property rights, secured by an unbiased judicial system, investors and entrepreneurs are hesitant to make the investments necessary that ultimately raise the standard of living. Private ownership of property and confidence that the courts will enforce contracts in an impartial manner provide a level of assurance for property owners so that they are willing to incur the risk involved in putting their property or financial capital to productive use, thereby creating value for others and, potentially, a profit for themselves. Most economics principles textbooks include a chapter on economic growth.<sup>4</sup> Private property rights, competitive markets, impartial enforcement of contracts, limited government

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<sup>2</sup> For a more general introduction to Locke and Hobbes, see Rowley 1998b and Rowley 1998a.

<sup>3</sup> Numerous authors have added to the research in this area. For a sample of this literature, see: Acemoglu and Johnson (2005), Acemoglu, Johnson and Robinson (2005); North (1991); McMillan, Whalley and Shu (1989); Besley and Ghatak (2009); Barzel (1989); Cooter and Schafer (2012); O'Driscoll and Hoskins (2003); and Lo and Tian (2002).

<sup>4</sup> I usually assign Holcomb (1998) to students as it provides a good summary of ideas in this area and economic freedom, an index ranking countries that includes many components considered important for economic growth.

regulation, low levels of corruption, low tax rates, stable currency and financial markets are usually among the listed guidelines for achieving prosperity and growth in per capita real GDP.<sup>5</sup>

Private property rights have been key to economic growth in the United States. The Founding Fathers included the Takings Clause, “nor shall private property be taken for public use without just compensation,” of the Fifth Amendment to the U.S. Constitution to protect property rights while carving out a limited exception to facilitate necessary government projects. Historically, eminent domain was understood to be the power of the government to force property owners to sell their home, business or other property to the government for some public use such as the construction of a railroad, highway or other large project. Today, the power of eminent domain enables government officials to take property from one private owner and transfer it to another private owner under an increasingly wide interpretation of “public use,” including increased tax revenues to the government. Regulatory takings involve government regulations that restrict or prohibit use of private property, often without compensation.

Decisions by the Supreme Court of the United States (SCOTUS) have shaped property rights in the United States. *Kelo v. City of New London* (2005),<sup>6</sup> a landmark case in which these arguments came before the SCOTUS, got a lot of attention in the media and set off a public debate regarding property rights in the United States. The city of New London, Connecticut condemned an entire neighborhood, including the home of Suzette Kelo as part of an economic development plan to revitalize the ailing local economy with the intent of then transferring the property to Pfizer Pharmaceuticals. Mrs. Kelo, represented by the Institute for Justice, challenged the condemnation on the basis that the taking was not for public use.<sup>7</sup>

The majority opinion in *Kelo*, in favor of the City of New London, represented a dramatic reinterpretation of the Fifth Amendment. The majority opinion by Justice Stevens, noting the record of deference to legislative decisions, expanded the interpretation of “public use” language dramatically to include “public purpose,” leaving the determination of property rights in the hands of the legislature. In a concurring opinion, Kennedy resists this deference to the legislature. The dissenting opinion written by Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, amounted to a harsh rebuke of the majority opinion for deferring to the legislature and warned that all property is at risk of seizure with the weakest among us at greatest risk. She argued that that such deference reduces the Public Use Clause to “little more than hortatory fluff.” Because the majority in *Kelo* relied heavily on her prior opinion in *Midkiff* (1984),<sup>8</sup> O’Conner’s dissent in *Kelo* attempted to correct her own “errant language” in *Midkiff* that contributed to the error of the majority in *Kelo*. She argued that, “The Founders cannot have intended this perverse result.” Justice Thomas also wrote a dissenting opinion, arguing that the

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<sup>5</sup> Several principles textbooks use the nighttime satellite image of the Korean peninsula as an illustration of the impact of different policies and institutions.

<sup>6</sup> *Kelo v. City of New London, Connecticut*, 125 S.Ct. 2655 (2005).

<sup>7</sup> A film version of the *Kelo* story, “Little Pink House”, is available on DVD or streaming services. For more information, visit, <http://littlepinkhousemovie.com/>.

<sup>8</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984).

errors are even more severe and calling for a return to the original meaning of the Public Use Clause.

Given the divided nature of the Court as well as the intense media attention and public outrage, many states attempted to bolster protection for property rights. In the years following the Kelo decision, at least 45 states enacted reform legislation, with various protections for private property, though many argue that the reforms are insufficient. Sandefur and Sandefur (2016) outline much of the relevant history and make recommendations for reforms. The fight for property rights was lost for Mrs. Kelo and her neighbors. In subsequent years, Pfizer abandoned the project and to this date, the land remains vacant.<sup>9</sup>

The Kelo case, with the various minority opinions displaying the debate over deference to the legislature, provides an interesting backdrop for the discussion of property rights, the role of government and the judiciary in the system of checks and balances. As outlined in Biser (2017), the writings of John Locke and Thomas Hobbes provide a useful framework for this classroom discussion. These two seventeenth century political philosophers influenced the Founding Fathers<sup>10</sup> and their works set the stage for the United States Constitution and the Takings Clause of the Fifth Amendment.

Hobbes and Locke approach the topics of natural law and civil society, important in the discussion of property rights and the power of government over private property, in very distinct ways. From their respective starting points, they derived vastly different approaches to the treatment of property rights and individual liberty, ultimately leading to dramatically different conclusions regarding the proper role of the state. Locke's definition of property is vastly broader than the modern notion commonly used, enabling discussion of a wide variety of topics. While we generally think of real estate or perhaps personal items as property, this narrow interpretation was not the manner in which Locke used the term. By property, he envisaged all the natural rights of an individual.<sup>11</sup>

Consistent with Locke's broad definition of property, this analysis applies to topics beyond physical taking of real property, including asset forfeiture, adverse possession, regulatory takings, etc. Although often overshadowed by the broader context, the dispute over property rights serves to demonstrate the differing notions regarding the very basis of civil society and the proper role of government. This analysis of the tension between Hobbes and Locke will shed light on important

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<sup>9</sup> A short video provided by the Institute for Justice, the law firm representing Suzette Kelo, outlining the story and some of the media coverage is a very effective way to introduce the Kelo story to students in the classroom and is available at <https://ij.org/case/kelo/>. That website also provides numerous court documents, press releases and other items of interest related to the case that would also be of use in understanding the background of the case.

<sup>10</sup> Subsequently developed views on property rights, such as those by Henry George or Karl Marx would also merit classroom discussion. For an introduction to George, see Hooper (2017). Kiandantzis (2007) briefly summarizes the ideas of Marx. These articles are brief and useful as student reading assignments to inform the discussion without diverting too much from the main task.

<sup>11</sup> "lives, liberties and estates, which I call by the general name - property." (Locke 1690, para. 123).

issues concerning the role of the judiciary and be of interest in debates regarding the Court, institutions, economic growth and numerous other areas of research.

This Hobbes versus Locke framework is particularly useful in the analysis of property rights in the context of court battles over eminent domain abuse.<sup>12</sup> Judges and Justices ascribing to the Lockean vision of rights and the role of government would be more likely to decide in favor of property owners while those who lean toward the Hobbesian notion of an all-powerful sovereign would be more willing to allow government intrusion into property rights for physical and regulatory takings.

The distinctive viewpoints provide a framework for debate;<sup>13</sup> however, the original texts require careful study. This can impede debate, particularly in a classroom setting where time is limited. This article provides a detailed outline of the conflicting views of Hobbes and Locke regarding the state of nature<sup>14</sup> and the role of government with particular attention to their treatment of property rights.<sup>15</sup> Extensive references to the original texts provide the precise language used by Locke and Hobbes to facilitate the debate.

### **Thomas Hobbes**

The writings of Hobbes focus on the spectrum between anarchy and order, with attention to the break between the state of nature and civil society. The ideal he seeks is order in pursuit of peace with individual liberty sacrificed to this goal. The move out of the state of nature through the formation of civil society is necessary in the search for order.<sup>16</sup>

In the Hobbesian state of nature, equality of individuals<sup>17</sup> and a scarcity of commodities lead to a permanent state of mutual distrust<sup>18</sup> where each person has a right to all things provided by nature and may seize all that he can take, or at least as much as he finds useful.<sup>19</sup> These

<sup>12</sup> See Biser (2017) for suggested cases and additional topics for discussion.

<sup>13</sup> See Biser (2017).

<sup>14</sup> Simmons (1992) and Waldron (1988), each address an additional element of the intellectual debate surrounding Locke's treatment of rights, arguing that many rights derive from a normatively prior duty to obey God's commands.

<sup>15</sup> A substantial literature exists debating the ideas of Locke and Hobbes, individually and in relation to each other. This article merely attempts to summarize the stark differences between these two philosophers, analyzing property and the implications for the role of the state.

<sup>16</sup> Bobbio (1993, p29).

<sup>17</sup> "Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he" (Hobbes 1651, XIII p84).

<sup>18</sup> "From this equality of ability ariseth equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (which is principally their own conservation, and sometimes their delectation only) endeavour to destroy or subdue one another" (Hobbes 1651, XIII p84).

<sup>19</sup> "And because the condition of man (as hath been declared in the precedent chapter) is a condition of war of every one against every one, in which case every one is governed by his own

conditions foster fierce competition among individuals with constant threats of violence.<sup>20</sup> Competition, diffidence and vainglory bring conflict between men<sup>21</sup> and give rise to the fundamental problem of power.<sup>22</sup> Hobbes does not view man in the state of nature in high regard.<sup>23</sup> These individuals are driven by their passions, especially for glory<sup>24</sup>. They become embroiled in competition and hostile to each other.<sup>25</sup> Man's pursuit of unconstrained self-interest diverts his attention from productive activities to the predation of others and protection of himself. These conditions leave mankind constantly teetering on the brink of violence with each prepared to bring war against all others.<sup>26</sup> Brutal conflict is inevitable as each seeks to gain and exert power over the others.<sup>27</sup> This desire for power leads to a state of war.<sup>28</sup> Where civil society exists, this war shreds the tenuous bonds among men and society spirals into anarchy.<sup>29</sup> The state of war exists during violent conflict and in the intermediate periods of peace where all stand in fear of death at the hands of others and abstain from violence only for fear of reprisals.<sup>30</sup>

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reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it followeth that in such a condition every man has a right to every thing, even to one another's body" (Hobbes 1651, XIV p86).

<sup>20</sup> "These conditions generate "a situation of merciless competition, which always threatens to turn into a violent struggle" (Bobbio 1993 p39).

<sup>21</sup> "So that in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory" (Hobbes 1651, XIII p85).

<sup>22</sup> "So that in the first place, I put for a general inclination of all mankind a perpetual and restless desire of power after power, that ceaseth only in death" (Hobbes 1651, XI p76).

<sup>23</sup> "They whom necessity or covetousness keepeth attent on their trades and labour; and they, on the other side, whom superfluity or sloth carrieth after their sensual pleasures (which two sorts of men take up the greatest part of mankind)" (Hobbes 1651, XXX p155).

<sup>24</sup> "Glory, or internal gloriation or triumph of the mind ... which proceedeth from the imagination or conception of our *own power*, above the power of him that contendeth with us" (Hobbes 1650, 9 1 p28).

<sup>25</sup> See Note 4.

<sup>26</sup> "In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short" (Hobbes 1651, XIII p85).

<sup>27</sup> See Note 8.

<sup>28</sup> "Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called *war*; and such a war as is of every man against every man" (Hobbes 1651, XIII p85).

<sup>29</sup> "Howsoever, it may be perceived what manner of life there would be, where there were no common power to fear, by the manner of life which men that have formerly lived under a peaceful government use to degenerate into a civil war" (Hobbes 1651, XIII p86).

<sup>30</sup> "For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of *time* is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the

The state of nature is characterized by the absence of an effective government or common power over them capable of maintaining peace. Without peace, no rights can be protected nor can any duties be enforced,<sup>31</sup> thus the state of nature is one of war of all against all.<sup>32</sup> To escape the threat of anarchy, whereby mankind returns to the state of nature, Hobbes erects an irresistible power, capable of providing security for man against his fellow man.<sup>33</sup>

Hobbes is not a complete cynic about the characteristics of man. According to his notion of natural law, man is unable to escape the struggle against his fellow man because of the insecurity of his position in the state of nature. Men are unable to negotiate around the problem by simply joining together, as the inherent distrust for one another cannot be eliminated.<sup>34</sup> Man's capacity to reason allows them to escape this horrifying situation.<sup>35</sup> Right reason prescribes a set of rules, natural laws, to resolve the dilemma.<sup>36</sup> Adherence to these natural laws is impossible<sup>37</sup> without the fundamental rule of seeking peace.<sup>38</sup>

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nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary" (Hobbes 1651, XIII p85).

<sup>31</sup> "The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice" (Hobbes 1651, XIII p86).

<sup>32</sup> See Note 14.

<sup>33</sup> "The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements to his judgement" (Hobbes 1651, XVII p100).

<sup>34</sup> "Also because there be some that, taking pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires, if others, that otherwise would be glad to be at ease within modest bounds, should not by invasion increase their power, they would not be able, long time, by standing only on their defence, to subsist" (Hobbes 1651, XIII p85).

<sup>35</sup> "And reason suggesteth convenient articles of peace upon which men may be drawn to agreement" (Hobbes 1651, XIII p86).

<sup>36</sup> "And therefore, as long as this natural right of every man to every thing endureth, there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily alloweth men to live. And consequently it is a precept, or general rule of reason: *that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war*" (Hobbes 1651, XIV p86).

<sup>37</sup> Bobbio (1993, p46).

<sup>38</sup> "The first branch of which rule containeth the first and fundamental law of nature, which is: *to seek peace and follow it*" (Hobbes 1651, XIV p86).

Men are led to enter into a social contract, which is devised to try to eliminate the insecurities man faces in the state of nature.<sup>39</sup> Though voluntary, this contract to enter civil society is not enough on its own to achieve the necessary peace, as the problem of distrust is still not solved. Upon joining together in civil union, the society must hand over all power to the sovereign, Leviathan.<sup>40</sup> Men consent to prostrate themselves before the sovereign. All rights held by man in the state of nature are laid at the feet of the sovereign who has full authority over all members.<sup>41</sup> Man must transfer all rights except his right to life to a third party, thereby combining the supreme economic and supreme coercive powers in one.<sup>42</sup> By voluntarily subjecting to the irresistible power of Leviathan, man is obliged to obey his every command<sup>43</sup> so long as Leviathan succeeds in fulfilling his obligation to protect the life of the subjects.<sup>44</sup> Necessarily, the power granted to Leviathan cannot be revoked or limited<sup>45</sup> and all must obey his every command in the interest and purpose of ensuring peace within civil society.<sup>46</sup> Civil law, though based on natural law, derives

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<sup>39</sup> “men agree amongst themselves to submit to some man, or assembly of men, voluntarily, on confidence to be protected by him against all others” (Hobbes 1651, XVII p101).

<sup>40</sup> “For by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad. And in him consisteth the essence of the Commonwealth; which, to define it, is: *one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence*” (Hobbes 1651, XVII p100).

<sup>41</sup> “This is more than consent, or concord; it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man: *I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner*” (Hobbes 1651, XVIII p100).

<sup>42</sup> “The power handed over to the supreme authority comprises the supreme economic power (*dominium*) and the supreme coercive power (*imperium*)” (Rowley 1998b, p520).

<sup>43</sup> “A Commonwealth is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that to whatsoever man, or assembly of men, shall be given by the major part the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgements of that man, or assembly of men, in the same manner as if they were his own, to the end to live peaceably amongst themselves, and be protected against other men” (Hobbes 1651, XVIII p101).

<sup>44</sup> See Note 25.

<sup>45</sup> “His power cannot, without his consent, be transferred to another: he cannot forfeit it: he cannot be accused by any of his subjects of injury: he cannot be punished by them: he is judge of what is necessary for peace, and judge of doctrines: he is sole legislator, and supreme judge of controversies, and of the times and occasions of war and peace: to him it belonged to choose magistrates, counsellors, commanders, and all other officers and ministers; and to determine of rewards and punishments, honour and order” (Hobbes 1651, XX p109).

<sup>46</sup> See Note 25.

its legitimacy from the authority of the sovereign;<sup>47</sup> thus, all civil law, as passed from Leviathan, is just and man is not permitted to question this authority.<sup>48</sup> Only when the sovereign lacks the power to prevent a return to the state of nature may man be released from the obligation to obey as he seeks out a new guardian.<sup>49</sup> Disobedience is justified only where this sovereign fails to protect the life of man.<sup>50</sup>

Although the individuals voluntarily offer themselves to be ruled by this absolute authority to achieve peace, which cannot otherwise be gained, liberty is sacrificed in the search for order.<sup>51</sup> The will of the sovereign is law and none can question his authority. There can be no abuse of power by the sovereign.<sup>52</sup> The powers held have been granted by each member of civil society.<sup>53</sup> This sovereign remains in a state of nature relative to civil society, not entering into any contract with any individual or the group.<sup>54</sup>

Hobbes thus defends the absolute power of the sovereign by highlighting the faults of man, who, left to his own devices, would be in a constant state of warfare.<sup>55</sup> To achieve order and escape

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<sup>47</sup> “The law of nature and the civil law contain each other and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature (as I have said before in the end of the fifteenth Chapter), are not properly laws, but qualities that dispose men to peace and to obedience. When a Commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey them” (Hobbes 1651, XXVI p131).

<sup>48</sup> “because every subject is by this institution author of all the actions and judgements of the sovereign instituted, it follows that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice” (Hobbes 1651, XVIII p102).

<sup>49</sup> “For he that wants protection may seek it anywhere; and, when he hath it, is obliged (without fraudulent pretence of having submitted himself out of fear) to protect his protection as long as he is able” (Hobbes 1651, XXIX p152).

<sup>50</sup> “The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them” (Hobbes 1651, XXI p116).

<sup>51</sup> See Note 19.

<sup>52</sup> See Note 34.

<sup>53</sup> See Note 29.

<sup>54</sup> “That he which is made sovereign maketh no covenant with his subjects before hand is manifest; because either he must make it with the whole multitude, as one party to the covenant, or he must make a several covenant with every man” (Hobbes 1651, XVIII p101).

<sup>55</sup> “So that it appeareth plainly, to my understanding, both from reason and Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocratical Commonwealths, is as great as possibly men can be imagined to make it. And though of so unlimited a power, men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse” (Hobbes 1651, XX p112).

anarchy, man is willing to relinquish his liberty<sup>56</sup> and property.<sup>57</sup> Nothing less than an absolute ruler will suffice; thus, the minimal state or otherwise limited government is infeasible.<sup>58</sup>

### John Locke<sup>59</sup>

John Locke writes on the same topics of the state of nature and civil society, but approaches his work from a different perspective, thus painting an alternate picture of the condition of man and constructing a vastly different vision of the state. Locke looks at the spectrum from oppression to freedom, favoring freedom as the reason for man to join together in civil society.<sup>60</sup>

Locke did not share Hobbes' pessimistic view of mankind in the state of nature. All men are born into the state of nature without a common judge with authority over them,<sup>61</sup> subject only to the laws of nature.<sup>62</sup> Peace and harmony in this state of perfect freedom<sup>63</sup> is subject to possible invasion and uncertainty in the absence of government with the persistent threat of a Hobbesian state of war. Fear of aggression and the insecurity of the precarious peace through self-defense will lead men to try to resolve the dilemma through reason. Transgressions of the law of nature

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<sup>56</sup> “But the right of nature, that is, the natural liberty of man, may by the civil law be abridged and restrained: nay, the end of making laws is no other but such restraint, without which there cannot possibly be any peace. And law was brought into the world for nothing else but to limit the natural liberty of particular men in such manner as they might not hurt, but assist one another, and join together against a common enemy” (Hobbes 1651, XXVI p131).

<sup>57</sup> “the propriety which a subject hath in his lands consisteth in a right to exclude all other subjects from the use of them; and not to exclude their sovereign, be it an assembly or a monarch” (Hobbes 1651, XXIV p125).

<sup>58</sup> See Note 31.

<sup>59</sup> Tully (1980) is a well-known and much-scrutinized alternative interpretation of Locke's account of natural rights, and specifically, how Locke's views on natural rights relate to his religious account of natural law and the implications for property.

<sup>60</sup> Bobbio (1993, p29).

<sup>61</sup> “Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of Nature” (Locke 1690, para. 19).

<sup>62</sup> “The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order, and about His business; they are His property, whose workmanship they are, made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours” (Locke 1690, para. 6).

<sup>63</sup> “To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man” (Locke 1690, para. 4).

thus require an impartial arbiter of justice to settle disputes that would otherwise remain unresolved due to partiality and self-love.<sup>64</sup>

Private contracts are possible within the state of nature; however, their existence does not imply that men have joined into civil society.<sup>65</sup> Contracts enable individuals to rearrange rights and duties in ways that are mutually beneficial,<sup>66</sup> though some rights remain inalienable and thus impossible to transfer.<sup>67</sup> Man, for example, cannot sell himself into slavery, as the rights to life and liberty are inalienable. The right to property is more accurately described as imprescriptible as man can arrange to sell, destroy or give his property away, but it cannot be legitimately taken from him without consent.<sup>68</sup> The state of nature and the state of war are among the nonconsensual relationships among individuals, to be replaced by consent with a political relationship upon the formation of civil society and implementation of government.<sup>69</sup>

Man living in the Lockean state of nature, defined based on the relationships between men, is strongly moral,<sup>70</sup> living under the laws of nature, of which reason is the basis.<sup>71</sup> A sufficient number of individuals of Hobbesian temperament abound within society to generate uncertainty

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<sup>64</sup> “If man in the state of Nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name - property” (Locke 1690, para. 123).

<sup>65</sup> “for it is not every compact that puts an end to the state of Nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another, and yet still be in the state of Nature” (Locke 1690, para. 14).

<sup>66</sup> “The promises and bargains for truck, etc., between the two men in Soldania, in or between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of Nature in reference to one another for truth, and keeping of faith belongs to men as men, and not as members of society” (Locke 1690, para. 14).

<sup>67</sup> “For no body can transfer to another more power than he has in himself, and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another” (Locke 1690, para. 135).

<sup>68</sup> Rowley (1998c, p406-407).

<sup>69</sup> Simmons (1993, p15).

<sup>70</sup> “Thus the law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men’s actions must, as well as their own and other men’s actions, be conformable to the law of Nature - i.e., to the will of God, of which that is a declaration, and the fundamental law of Nature being the preservation of mankind, no human sanction can be good, or valid against it” (Locke 1690, para. 135).

<sup>71</sup> See Note 47.

and fear.<sup>72</sup> These individuals make forming a government necessary for the protection of society as a whole.<sup>73</sup> The fundamental law of nature is the preservation of mankind.<sup>74</sup> As men are all equal and independent, no one man has the right to harm another's health, liberty or possessions<sup>75,76</sup> and, in fact, must protect one another to give efficacy to the fundamental law of nature. Thus, certain duties are required of man in the state of nature, namely, the duty to do that which is necessary to preserve himself and his fellow man.<sup>77</sup> Concomitant to this duty is the right to expect the same protection from your fellow man. Thus, the state of nature is not a state of license, rather it is characterized by duties and obligations required of all men.<sup>78</sup> Man also has the right and duty to punish those who interfere with natural rights<sup>79</sup> to the extent necessary to make reparations for the wrongful act and deter future infringements, yet, the precarious state of nature is compounded by the fact that man serves as judge in his own case against those who violate the

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<sup>72</sup> See Note 49.

<sup>73</sup> "This makes him willing to quit a condition, which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name - property" (Locke 1690, para. 123).

<sup>74</sup> "...and the fundamental law of Nature being the preservation of mankind, no human sanction can be good, or valid against it" (Locke 1690, para. 135).

<sup>75</sup> See Note 55.

<sup>76</sup> Locke's notion of rights corresponds to the distinction between negative and positive rights (Rowley 1998c, p407); however, this is one part of the classroom discussion that tends to get off track as students find the terminology to be confusing. "Positive" sounds like a good thing, right? Machan (2001) provides a concise description of positive and negative rights in the context of Locke's natural rights while also providing a bit of material to add to classroom debate. I sometimes assign Machan (2001) if the class debate needs a boost as it can lead to numerous lines of discussion about various proposed positive rights (healthcare, universal basic income, etc).

<sup>77</sup> "Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and may not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another" (Locke 1690, para. 6).

<sup>78</sup> "But though this be a state of liberty, yet it is not a state of licence; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it" (Locke 1690, para. 6).

<sup>79</sup> "And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of Nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of Nature is in that state put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation" (Locke 1690, para. 7).

law of nature.<sup>80</sup> Ultimately, those who violate the laws of nature may forfeit all of their natural rights.<sup>81</sup>

While man in the Lockean state of nature faces uncertainty, danger, and the constant risk of falling into a state of war,<sup>82</sup> his circumstances and options are much less dire than the state of man within the Hobbesian state of nature.<sup>83</sup> Depending upon the level of development in society, only certain forms of limited government may be preferable to the state of nature.<sup>84</sup> Locke allows that monarchy may be acceptable for primitive society;<sup>85</sup> however, once a need for property rights has been established, civil society must protect itself against abuses of power by government by limiting the roles that government may take in ruling society.<sup>86</sup>

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<sup>80</sup> “And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute to him, so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. For these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment” (Locke 1690, para. 8).

<sup>81</sup> “That he who has suffered the damage has a right to demand in his own name, and he alone can remit. The damnified person has this power of appropriating to himself the goods or service of the offender by right of self-preservation, as every man has a power to punish the crime to prevent its being committed again, by the right he has of preserving all mankind, and doing all reasonable things he can in order to that end. And thus it is that every man in the state of Nature has a power to kill a murderer, both to deter others from doing the like injury (which no reparation can compensate) by the example of the punishment that attends it from everybody, and also to secure men from the attempts of a criminal who, having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security. And upon this is grounded that great law of Nature, ‘Whoso sheddeth man’s blood, by man shall his blood be shed’” (Locke 1690, para. 11).

<sup>82</sup> See Note 49.

<sup>83</sup> “the life of man, solitary, poor, nasty, brutish, and short” (Hobbes 1651, XIII p85).

<sup>84</sup> Simmons (1993, p26).

<sup>85</sup> “monarchy being simple and most obvious to men, whom neither experience had instructed in forms of government, nor the ambition or insolence of empire had taught to beware of the encroachments of prerogative or the inconveniencies of absolute power, which monarchy, in succession, was apt to lay claim to and bring upon them; it was not at all strange that they should not much trouble themselves to think of methods of restraining any exorbitances of those to whom they had given the authority over them, and of balancing the power of government by placing several parts of it in different hands” (Locke 1690, para. 107).

<sup>86</sup> “But the golden age (though before vain ambition, and *amor sceleratus habendi*, evil concupiscence, had corrupted men’s minds into a mistake of true power and honour) had more virtue, and consequently better governors, as well as less vicious subjects; and there was then no stretching prerogative on the one side, to oppress the people, nor, consequently, on the other, any dispute about privilege, to lessen or restrain the power of the magistrate; and so no contest betwixt rulers and people about governors or government. Yet, when ambition and luxury, in future ages, would retain and increase the power, without doing the business for which it was given, and aided

Locke's contractarian notions of political society and the natural right to property are central to limiting the power that government may exercise. While property is certainly alienable and forfeitable, this right is one which may be described as imprescriptible in that it cannot be taken by government without the owner's consent.<sup>87</sup> The very purpose for which men enter into political society and transfer rights to government being the preservation of property,<sup>88</sup> no legitimate government could employ means which are a direct violation of its very end.<sup>89</sup>

Locke's justification of private property was, in part, an implicit recognition of the tragedy of the commons.<sup>90</sup>

To find a way around the problems inherent in the lack of property rights, Locke laid out his theory of property, founded on the notion that every man has property in his own person<sup>91</sup> and whatever he removes from the state of nature by mixing his labor with it becomes his property as

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by flattery, taught princes to have distinct and separate interests from their people, men found it necessary to examine more carefully the original and rights of government, and to find out ways to restrain the exorbitances and prevent the abuses of that power, which they having entrusted in another's hands, only for their own good, they found was made use of to hurt them" (Locke 1690, para. 111).

<sup>87</sup> "the supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it; too gross an absurdity for any man to own" (Locke 1690, para. 138).

<sup>88</sup> "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting" (Locke 1690, para. 124).

<sup>89</sup> "But though men when they enter into society give up the equality, liberty, and executive power they had in the state of Nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require, yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse), the power of the society or legislative constituted by them can never be supposed to extend farther than the common good, but is obliged to secure every one's property by providing against those three defects above mentioned that made the state of Nature so unsafe and uneasy" (Locke 1690, para. 131).

<sup>90</sup> "And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature, and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men" (Locke 1690, para. 25).

<sup>91</sup> "Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The labour of his body and the "work" of his hands, we may say, are properly his" (Locke 1690, para. 26).

long as there is enough left for others,<sup>92</sup> a consideration not binding in early times.<sup>93</sup> The limitation on individuals, requiring that one not take more than he can individually make use of, became more important as land became scarce. As society advances, the introduction of money enables man to appropriate more from nature than he is currently able to make use of and store the excess fruits of his labor in non-perishable and non-wasteful form.<sup>94</sup> This enables men to hold an unequal share of what God has provided by application of his labor.<sup>95</sup> Where some men own nothing but their bodies, those who own more than this become their masters. This makes possible a state of nature whereby men enter master-servant relationships consensually.<sup>96</sup> The agreement to use money is an implicit consent to an unequal distribution where the commons have been privatized.<sup>97</sup> Although there are those who are without land, they are not without property as they are still

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<sup>92</sup> “Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, 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 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” (Locke 1690, para. 26).

<sup>93</sup> “Men at first, for the most part, contented themselves with what unassisted Nature offered to their necessities; and though afterwards, in some parts of the world, where the increase of people and stock, with the use of money, had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories” (Locke 1690, para. 45).

<sup>94</sup> “And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life” (Locke 1690, para. 47).

<sup>95</sup> “But, since gold and silver, being little useful to the life of man, in proportion to food, raiment, and carriage, has its value only from the consent of men - whereof labour yet makes in great part the measure - it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth – I mean out of bounds of society and compact; for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver, which may continue long in a man’s possession without decaying for the overplus, and agreeing those metals should have a value” (Locke 1690, para. 50).

<sup>96</sup> “Master and servant are names as old as history, but given to those of far different condition; for a freeman makes himself a servant to another by selling him for a certain time the service he undertakes to do in exchange for wages he is to receive; and though this commonly puts him into the family of his master, and under the ordinary discipline thereof, yet it gives the master but a temporary power over him, and no greater than what is contained in the contract between them” (Locke 1690, para. 85).

<sup>97</sup> See Note 78.

autonomous individuals with natural rights,<sup>98</sup> given Locke's broad definition of property.<sup>99</sup> Thus, the right to property by self-ownership places a considerable limitation on the powers which man would be willing or able to confer upon government with the formation of civil society.<sup>100</sup>

From this more benign view of the state of nature, Locke then lays out his reasoning for man coming together to form civil society, his notions of the proper role of government and presents the case for civil society rising up against government that oversteps this role. While both Hobbes and Locke focus on the contract that creates society itself, Locke differs in his view of the relationship that is formed between society and the government it implements. The Lockean society appoints a fiduciary, which it entrusts to carry out a certain limited role<sup>101</sup> aimed at the preservation of their property.<sup>102</sup> The government is merely an agent of society, entrusted to carry out certain functions.<sup>103</sup> Individuals must give their actual personal consent to transfer political

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<sup>98</sup> "From all which it is evident, that though the things of Nature are given in common, man (by being master of himself, and proprietor of his own person, and the actions or labour of it) had still in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others" (Locke 1690, para. 44).

<sup>99</sup> See Note 4.

<sup>100</sup> "This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life, cannot give another power over it" (Locke 1690, para. 22).

<sup>101</sup> "Though in a constituted commonwealth standing upon its own basis and acting according to its own nature - that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends" (Locke 1690, para. 149).

<sup>102</sup> See Note 71.

<sup>103</sup> "And so, whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people" (Locke 1690, para. 131).

power to this agent.<sup>104</sup> By sacrificing some rights, man can better secure his property through the superior protection provided through government.<sup>105</sup>

The consensual political relationship is ended when the government exceeds this role or otherwise breaches its duty to the people.<sup>106</sup> Society may then replace the government with another.<sup>107</sup> Man can be in the state of nature in the presence of an effective government and common judge, if those who rule do so unlawfully.<sup>108</sup> Conquest by a foreign power<sup>109</sup> and

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<sup>104</sup> “But since the government has a direct jurisdiction only over the land and reaches the possessor of it (before he has actually incorporated himself in the society) only as he dwells upon and enjoys that, the obligation any one is under by virtue of such enjoyment to submit to the government begins and ends with the enjoyment; so that whenever the owner, who has given nothing but such a tacit consent to the government will, by donation, sale or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other commonwealth, or agree with others to begin a new one in vacuis locis, in any part of the world they can find free and unpossessed; whereas he that has once, by actual agreement, and any express declaration given his consent to be of any commonweal, is, perpetually and indispensibly obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of Nature, unless by any calamity the government he was under comes to be dissolved” (Locke 1690, para. 121).

<sup>105</sup> See Note 72.

<sup>106</sup> “there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security” (Locke 1690, para. 149).

<sup>107</sup> “And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject. For no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever any one shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society” (Locke 1690, para. 149).

<sup>108</sup> “Want of a common judge with authority puts all men in a state of Nature; force without right upon a man’s person makes a state of war both where there is, and is not, a common judge” (Locke 1690, para. 19).

<sup>109</sup> “Though governments can originally have no other rise than that before mentioned, nor politics be founded on anything but the consent of the people, yet such have been the disorders ambition has filled the world with, that in the noise of war, which makes so great a part of the history of mankind, this consent is little taken notice of; and, therefore, many have mistaken the force of arms for the consent of the people, and reckon conquest as one of the originals of government. But conquest is as far from setting up any government as demolishing a house is from building a new one in the place. Indeed, it often makes way for a new frame of a commonwealth by destroying the former; but, without the consent of the people, can never erect a new one” (Locke 1690, para. 175).

tyrannical rule<sup>110</sup> are examples of forms of illegitimate power. An abuse of power by the government with respect to the rights of an individual places him in a state of nature even though the government is legitimate with respect to others.<sup>111</sup> Additionally, not all persons living under the rule of a legitimate government are said to have entered civil society. Those who do not possess the capacity to contract<sup>112</sup> or are mere visitors<sup>113</sup> remain in the state of nature.

The existence of a common judge is necessary to place men within civil society; however, it is not the only requirement.<sup>114</sup> Man must give up more than simply the right to punish transgressors.<sup>115</sup> An effective government must have the sole right to make, interpret and execute

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<sup>110</sup> “As usurpation is the exercise of power which another hath a right to, so tyranny is the exercise of power beyond right, which nobody can have a right to; and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage. When the governor, however entitled, makes not the law, but his will, the rule, and his commands and actions are not directed to the preservation of the properties of his people, but the satisfaction of his own ambition, revenge, covetousness, or any other irregular passion” (Locke 1690, para. 199).

<sup>111</sup> “Wherever law ends, tyranny begins, if the law be transgressed to another’s harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another” (Locke 1690, para. 202).

<sup>112</sup> “But if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of reason wherein he might be supposed capable of knowing the law, and so living within the rules of it, he is never capable of being a free man, he is never let loose to the dispose of his own will; because he knows no bounds to it, has not understanding, its proper guide, but is continued under the tuition and government of others all the time his own understanding is incapable of that charge. And so lunatics and idiots are never set free from the government of their parents: “Children who are not as yet come unto those years whereat they may have, and innocents which are excluded by a natural defect from ever having.” Thirdly: “Madmen, which, for the present, cannot possibly have the use of right reason to guide themselves, have, for their guide, the reason that guideth other men which are tutors over them, to seek and procure their good for them,” says Hooker, (*Eccl. Pol.*, lib. i. s. 7). All which seems no more than that duty which God and Nature has laid on man, as well as other creatures, to preserve their offspring till they can be able to shift for themselves, and will scarce amount to an instance or proof of parents’ regal authority” (Locke 1690, para. 60).

<sup>113</sup> “And thus we see that foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration as far forth as any denizen, yet do not thereby come to be subjects or members of that commonwealth. Nothing can make any man so but his actually entering into it by positive engagement and express promise and compact. This is that which, I think, concerning the beginning of political societies, and that consent which makes any one a member of any commonwealth” (Locke 1690, para. 122).

<sup>114</sup> See Note 91.

<sup>115</sup> “there, and there only, is political society where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every

natural and civil laws.<sup>116</sup> The contract that forms civil society requires man to surrender many rights; however, he does not face the bleak picture that man faces in Hobbes vision of civil society.<sup>117</sup> While Hobbes requires man to prostrate himself before the sovereign,<sup>118</sup> Locke allows man to retain his natural rights, not least the natural right to property.<sup>119</sup> In the state of nature, there are three imperfections which trouble man: partial judgments,<sup>120</sup> inadequate force to carry out judgments<sup>121</sup> and a variety of judgments passed in similar circumstances<sup>122</sup>. These imperfections require an impartial judiciary, an executive to enforce the judgments and a legislature<sup>123</sup> to express the rule of law.<sup>124</sup>

Achieving these requires man to enter into civil society, thereby voluntarily handing over his right to punish those who transgress against his natural rights.<sup>125</sup> Only by a process of consent

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particular member being excluded, the community comes to be umpire, and by understanding indifferent rules and men authorized by the community for their execution, decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offences which any member hath committed against the society with such penalties as the law has established” (Locke 1690, para. 87).

<sup>116</sup> See Note 86.

<sup>117</sup> “But as men, for the attaining of peace and conservation of themselves thereby, have made an artificial man, which we call a *Commonwealth*; so also have they made artificial chains, called *civil laws*, which they themselves, by mutual covenants, have fastened at one end to the lips of that man, or assembly, to whom they have given the sovereign power, and at the other to their own ears. These bonds, in their own nature but weak, may nevertheless be made to hold, by the danger, though not by the difficulty of breaking them” (Hobbes 1651, XXI p111).

<sup>118</sup> See Note 27.

<sup>119</sup> See Note 49.

<sup>120</sup> “Secondly, in the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence, and unconcernedness, make them too remiss in other men’s” (Locke 1690, para. 125).

<sup>121</sup> “Thirdly, in the state of Nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.” (Locke 1690, para. 126).

<sup>122</sup> “Firstly, there wants an established, 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 biased 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” (Locke 1690, para. 124).

<sup>123</sup> See Note 86.

<sup>124</sup> Barker (1960, p xxi).

<sup>125</sup> “It is this makes them so willingly give up every one his single power of punishing to be exercised by such alone as shall be appointed to it amongst them, and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we have the

can government gain rights and then only those rights unequivocally passed to it by the express grant of man.<sup>126</sup> Locke called for a separation of powers among the branches<sup>127</sup> with the power of government limited to maintaining the rule of law<sup>128</sup> in defense of life, liberty and property.<sup>129</sup> The legislature was to be the highest power,<sup>130</sup> and although it has the task of laying out the rules by which members of the society should live and be judged, its power was strictly limited procedurally to reduce the risk of arbitrary and absolute power.<sup>131</sup>

As Lockean property rights are assigned initially in each person's autonomy,<sup>132</sup> any property that remains unclaimed is acquired by he who first possesses it by annexing his labor to it.<sup>133</sup> This original position forms the basis by which subsequent transfers are judged.<sup>134</sup> Laws of contract are required to govern voluntary exchange and third parties must be protected from

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original right and rise of both the legislative and executive power as well as of the governments and societies themselves" (Locke 1690, para. 127).

<sup>126</sup> "Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent" (Locke 1690, para. 95).

<sup>127</sup> "Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power" (Locke 1690, para. 159).

<sup>128</sup> See Note 86.

<sup>129</sup> See Note 82.

<sup>130</sup> "This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed" (Locke 1690, para. 134).

<sup>131</sup> "For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds, and not be tempted by the power they have in their hands to employ it to purposes, and by such measures as they would not have known, and own not willingly" (Locke 1690, para. 137).

<sup>132</sup> See Note 74.

<sup>133</sup> See Note 75.

<sup>134</sup> "And thus, I think, it is very easy to conceive, without any difficulty, how labour could at first begin a title of property in the common things of Nature, and how the spending it upon our uses bounded it; so that there could then be no reason of quarrelling about title, nor any doubt about the largeness of possession it gave. Right and conveniency went together. For as a man had a right to all he could employ his labour upon, so he had no temptation to labour for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others. What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed" (Locke 1690, para. 51).

external effects with tort law.<sup>135</sup> This government created by the social contract was seen by Locke as creating an environment in which man would thrive and prosper.<sup>136</sup>

As government could only exercise those powers expressly granted to it by society,<sup>137</sup> there was little chance for an invasion of the liberty of individuals without entering a state of war.<sup>138</sup> However, in the face of an absolute and arbitrary exercise of power, society is justified in rising up in revolution to resist an illegitimate government.<sup>139</sup> Locke extended two arguments to justify the right to resist a government guilty of abusing the power granted to it.<sup>140</sup> First, he posited a state of war arising between the people and the government as would result from a change in the legislature<sup>141</sup> or if the legislature were to deliver the people to the subjection of a foreign power.<sup>142</sup> Also, the government would be rightly dissolved where the executive fails to carry out his duty and society falls into anarchy.<sup>143</sup> Secondly, the legislature or executive might overstep those powers granted to it as when it takes or destroys the property of the people,<sup>144</sup> thereby justifying

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<sup>135</sup> Epstein (1995).

<sup>136</sup> See Note 72.

<sup>137</sup> See Note 84.

<sup>138</sup> See Note 91.

<sup>139</sup> See Note 90.

<sup>140</sup> See Note 90.

<sup>141</sup> “Besides this overturning from without, governments are dissolved from within: First. When the legislative is altered, civil society being a state of peace amongst those who are of it, from whom the state of war is excluded by the umpirage which they have provided in their legislative for the ending all differences that may arise amongst any of them; it is in their legislative that the members of a commonwealth are united and combined together into one coherent living body” (Locke 1690, para. 212).

<sup>142</sup> “the delivery also of the people into the subjection of a foreign power, either by the prince or by the legislative, is certainly a change of the legislative, and so a dissolution of the government. For the end why people entered into society being to be preserved one entire, free, independent society to be governed by its own laws, this is lost whenever they are given up into the power of another” (Locke 1690, para. 217).

<sup>143</sup> “There is one way more whereby such a government may be dissolved, and that is: When he who has the supreme executive power neglects and abandons that charge, so that the laws already made can no longer be put in execution; this is demonstratively to reduce all to anarchy, and so effectively to dissolve the government. For laws not being made for themselves, but to be, by their execution, the bonds of the society to keep every part of the body politic in its due place and function. When that totally ceases, the government visibly ceases, and the people become a confused multitude without order or connection. Where there is no longer the administration of justice for the securing of men’s rights, nor any remaining power within the community to direct the force, or provide for the necessities of the public, there certainly is no government left. Where the laws cannot be executed it is all one as if there were no laws, and a government without laws is, I suppose, a mystery in politics inconceivable to human capacity, and inconsistent with human society” (Locke 1690, para. 219).

<sup>144</sup> “There is, therefore, secondly, another way whereby governments are dissolved, and that is, when the legislative, or the prince, either of them act contrary to their trust. For the legislative acts against the trust reposed in them when they endeavour to invade the property of the subject,

the people in removing and replacing the legislative body.<sup>145</sup> Though the community extended a direct grant of trust, the legislature is strictly limited to exercising the powers expressly granted to it to carry out the ends for which it was formed, namely, the preservation of the property of the people.<sup>146</sup> When a change of government was necessary, this did not always destroy civil society.<sup>147</sup> Only foreign invasion<sup>148</sup> would destroy civil society. Otherwise, the people are free to form a new government without reversion to the state of nature.<sup>149</sup>

### **Implications for the Protection of Property Rights in Civil Society**

Implementation of government implies very different consequences for man under the divergent views of Hobbes and Locke. While using similar terminology to describe the world, the

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and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people” (Locke 1690, para. 221).

<sup>145</sup> “In these, and the like cases, when the government is dissolved, the people are at liberty to provide for themselves by erecting a new legislative differing from the other by the change of persons, or form, or both, as they shall find it most for their safety and good. For the society can never, by the fault of another, lose the native and original right it has to preserve itself, which can only be done by a settled legislative and a fair and impartial execution of the laws made by it” (Locke 1690, para. 220).

<sup>146</sup> “The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making: whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society” (Locke 1690, para. 222).

<sup>147</sup> “He that will, with any clearness, speak of the dissolution of government, ought in the first place to distinguish between the dissolution of the society and the dissolution of the government” (Locke 1690, para. 211).

<sup>148</sup> “The usual, and almost only way whereby this union is dissolved, is the inroad of foreign force making a conquest upon them. For in that case (not being able to maintain and support themselves as one entire and independent body) the union belonging to that body, which consisted therein, must necessarily cease, and so every one return to the state he was in before, with a liberty to shift for himself and provide for his own safety, as he thinks fit, in some other society” (Locke 1690, para. 211).

<sup>149</sup> Simmons (1993, p163).

status of man relative to the government under these two characterizations of society could not be more different.

The Hobbesian vision of the world in the state of nature makes it necessary that men form civil society to seek protection<sup>150</sup> from hostility and the search for power<sup>151</sup> that plots all against all in a state of continual war.<sup>152</sup> All men surrender all rights to one absolute power.<sup>153</sup> Under these circumstances, no social contract with this Leviathan is enforceable, as he will shred any agreement as soon as the total rule has passed from the people to his hands.<sup>154</sup> And, for Hobbes, no less than total submission to government would suffice to control the hostile nature of man.<sup>155</sup>

To escape the horrors of the state of nature,<sup>156</sup> man agrees by social contract<sup>157</sup> to accept the total authority of Leviathan.<sup>158</sup> Complete surrender to government is necessary to achieve the desired peace.<sup>159</sup> Thereafter, all rights exerted by man must come by grant from the government.<sup>160</sup> In this environment, man cannot be said to maintain any natural rights.<sup>161</sup> Any property rights granted are only as certain as the capricious will of the sovereign.<sup>162</sup>

Locke's view of the state of nature<sup>163</sup> and the reasons for men joining together in civil society leave them less willing to relinquish rights held in the state of nature.<sup>164</sup> While it is necessary to have government, the powers granted are far narrower and the rights surrendered are limited to those absolutely essential to achieve the ends for which men come together.<sup>165</sup> As men wish to seek protection, government is limited to the role of referee.<sup>166</sup> Those natural rights that are inalienable are retained and, in fact, cannot be surrendered even voluntarily.<sup>167</sup> The social contract to create government establishes the government as an agent of society.<sup>168</sup>

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<sup>150</sup> See Note 25.

<sup>151</sup> See Note 8.

<sup>152</sup> See Note 14.

<sup>153</sup> See Note 19.

<sup>154</sup> See Note 40.

<sup>155</sup> See Note 29.

<sup>156</sup> See Note 12.

<sup>157</sup> See Note 29.

<sup>158</sup> See Note 27.

<sup>159</sup> See Note 26.

<sup>160</sup> See Note 100.

<sup>161</sup> "For seeing there is no Commonwealth in the world wherein there be rules enough set down for the regulating of all the actions and words of men (as being a thing impossible): it followeth necessarily that in all kinds of actions, by the laws pretermitted, men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves" (Hobbes 1651, XXI p111).

<sup>162</sup> See Note 43.

<sup>163</sup> See Note 46.

<sup>164</sup> See Note 72.

<sup>165</sup> See Note 71.

<sup>166</sup> See Note 86.

<sup>167</sup> See Note 83.

<sup>168</sup> See Note 84.

As grantor of limited powers for a limited purpose,<sup>169</sup> society will not tolerate a larger exercise of power by government than that necessary for the protection of property,<sup>170</sup> defined broadly.<sup>171</sup> Any move beyond the role authorized, places the government in a state of war against the people<sup>172</sup> and it may legitimately be overthrown.<sup>173</sup> In this minimal state, government has no inherent rights; rather, it has only those rights granted to it<sup>174</sup> and which are revocable by society.<sup>175</sup> Thus, government must not attempt to abridge the natural rights of man, not least the right to property, without the risk of placing itself in a state of war with the people,<sup>176</sup> who hold the ultimate power.<sup>177</sup> Arbitrary exercise of power by government may endanger the life of man, thus running counter to the natural law of preservation.<sup>178</sup> Man cannot alienate those rights necessary to his own preservation; thus, placing certain limits on the possible range of government action.<sup>179</sup>

Protection of property and man's natural right to property are fundamental to Locke's political philosophy. The labor theory of property states that man has a natural right to his body, and thus, the fruits of his labor.<sup>180</sup> The protection of this property being the reason men voluntarily join together in society and grant rights to government,<sup>181</sup> this necessarily implies that no government can take that property from him without his consent.<sup>182</sup> Property rights are not derived from the sovereign; rather, they are natural rights<sup>183</sup> common to all mankind that may be passed between individuals.<sup>184</sup>

Institutional arrangements envisioned by Locke allow individuals to leave the uncertainty of the state of nature behind<sup>185</sup> while retaining certain rights<sup>186</sup> and always exercising control over the government<sup>187</sup> formed by their express consent<sup>188</sup> for certain ends.<sup>189</sup> The Lockean form of state organization leaves the net benefits of society with the people.<sup>190</sup> Key to this structure is

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<sup>169</sup> See Note 71.  
<sup>170</sup> See Note 72.  
<sup>171</sup> See Note 82.  
<sup>172</sup> See Note 129.  
<sup>173</sup> See Note 89.  
<sup>174</sup> See Note 151.  
<sup>175</sup> See Note 156.  
<sup>176</sup> See Note 155.  
<sup>177</sup> See Note 156.  
<sup>178</sup> See Note 90.  
<sup>179</sup> See Note 52.  
<sup>180</sup> See Note 75.  
<sup>181</sup> See Note 71.  
<sup>182</sup> See Note 70.  
<sup>183</sup> See Note 74.  
<sup>184</sup> See Note 51.  
<sup>185</sup> See Note 49.  
<sup>186</sup> See Note 83.  
<sup>187</sup> See Note 156.  
<sup>188</sup> See Note 87.  
<sup>189</sup> See Note 71.  
<sup>190</sup> See Note 72.

representative government<sup>191</sup> and the natural right to property,<sup>192</sup> safe from government appropriation for arbitrary uses.<sup>193</sup>

### Implications for the Law of Takings

The political philosophies of Hobbes and Locke are important for more than simply their historical significance. These two divergent theories have significant implications for modern views of the role of the state with regard to takings. In fact, the approach to property rights employed serves as the very foundation of the debate regarding the proper role of the judiciary and government more generally. If there is no notion of mine and thine, there can be no notion of the protection of property except that which comes from a sense of noblesse oblige by those who hold the sovereign power. All rights are by grant from the sovereign for as long as he chooses to protect the holder. Therefore, the sovereign can do whatever he likes with property and his word is law.

Under a Hobbesian Leviathan, there are no property rights because the people have handed all of their rights over to the state<sup>194</sup> in the search for order.<sup>195</sup> The only rights available are those that the state gives to them.<sup>196</sup> The people have no right to judge what rights they are permitted to retain<sup>197</sup> as they have prostrated themselves before the sovereign.<sup>198</sup> As long as the sovereign preserves their lives, the sovereign can do what he likes with all rights,<sup>199</sup> including property rights.<sup>200</sup> The way in which a particular sovereign allocates rights to the citizens is dependent on what he wishes to gain from his position. Some who hold the sovereign power are roving bandits, quickly taking all they can before moving on to pillage another area. Others who rise to be sovereign set themselves up as stationary bandits. To encourage taxable production, the stationary bandit will permit the subjects broader rights, including the right to property in order to extract a lower percentage of the whole for a longer period in exchange for protection and order (Olson 2000).

In a world governed by a Lockean notion of rights, man holds rights that are not derived from the sovereign.<sup>201</sup> Even though there is an institution of governance, it is a strictly limited

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<sup>191</sup> “first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave up to the community. For no body can transfer to another more power than he has in himself, and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another” (Locke 1690, para. 135).

<sup>192</sup> See Note 165.

<sup>193</sup> See Note 161.

<sup>194</sup> See Note 26.

<sup>195</sup> Bobbio (1993, p29).

<sup>196</sup> See Note 144.

<sup>197</sup> See Note 34.

<sup>198</sup> See Note 27.

<sup>199</sup> See Note 36.

<sup>200</sup> See Note 43.

<sup>201</sup> See Note 58.

government<sup>202</sup> with regard to the natural right to property. Only if individuals can alienate themselves from it, can they lose their property.<sup>203</sup> There are some inalienable rights, specifically, to their lives or liberties.<sup>204</sup> Man cannot sell or even give these natural rights away. The natural right to property, on the other hand, is an imprescriptible right. Mixing one's labor with the land is the basis of achieving physical property<sup>205</sup> and man holds the natural right to this property independent of the sovereign.<sup>206</sup> Though man can alienate his property, by sale, gift or abandonment, no one can rightly take it away from him. As a fiduciary, appointed for certain limited ends,<sup>207</sup> the sovereign cannot invade these rights without man's consent.<sup>208</sup>

## Conclusion

Locke and Hobbes present substantially different views on rights and the role of the sovereign. The Court stands as arbiter between the people and government as long as Justices do not abdicate the role of decision-maker to the legislature. Even reforms that seem to tie the hands of the state legislature are meaningless if the Court is willing to grant deference to the state. Without secure property rights, the nature of the relationship between citizen and sovereign necessarily changes. The appropriate role of government with respect to property, and the scope of government action more generally, hinge on the philosophical approach taken by Justices on the Court.

Landmark cases, including the *Kelo* decision and other SCOTUS decisions, provide material for debate using the Locke versus Hobbes framework (Biser 2017). Certainly, the majority opinion and various concurring and dissenting opinions in *Kelo* provide substantial material for a discussion about the views of SCOTUS Justices with respect to deference to the legislature. References by Justice O'Connor to her language used in *Midkiff* (1984) add greatly to the debate.

This framework is also useful in discussions of current political events. The political process influences the appointment of Justices to the Court, as seen during recent nomination proceedings in the Senate Judiciary Committee hearings. Although the Committee members and media attention during the Brett Kavanaugh nomination hearings strayed far from his judicial record, voter interest in the SCOTUS is high. An interesting follow-up topic for discussion is whether nominees allow political pressure to influence decisions once they seated on the Court. This line of discussion can also facilitate analysis of the philosophical approach of Justices under different political climates throughout history.

The value of the foregoing discussion is in the clarification of important texts to form a common framework for debate, particularly with respect to property rights. Once everyone is on the same page, numerous topics become more accessible for discussion while avoiding many of the pitfalls of open debate in the modern classroom and highly charged political environment.

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202 See Note 165.

203 See Note 161.

204 See Note 52.

205 See Note 75.

206 See Note 165.

207 See Note 84.

208 See Note 109.

Conducted using a Locke versus Hobbes framework, these debates encourage participation and foster critical thinking and reasoned analysis of important issues.

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