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The Common Law and the Constitution: John Locke and the Missing Link in Law

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A Preliminary Speculation

My theme is the Common Law and the Constitution, a topic which I intend to approach in a slightly round-about fashion. I once thought I might take this tangential approach because the direct paths seemed to me to be so well trod, and yet in retrospect I think this is really not the case. Now, I think that it is because a direct approach runs counter to the present American legal culture. It seems to me that, with the exception of efforts to reconstruct the origins of the Constitution, it is rare today to think of the U.S. Constitution as an aspect of the common-law. This contemporary rarity contrasts with current British experience, as well as with the views held by the Framers who were well aware of its reliance on and participation in the common-law experience.¹

I do not suggest that no one thinks either of common-law influences among the origins of the U.S. Constitution, or even that there are not strong arguments for a continuing understanding of constitutional principles according to their common-law understandings. The recent writings of John Philip Reid and Mary Sarah Bilder speak well of the vitality of the study of the first, as do the writings of Jim Stoner speak well for the second.²


Rather, it is an impression, reinforced by some mining of the databases, that Americans have come to see their Constitution as a timeless ideal – unmoored from its common-law parentage, ambivalently treating the construction of constitutional precedents as a somehow different process from other judicial developments of the law. Several ideas appear to me to contribute to this notion, not the least the leap-frog effect of treating the moment of the Framing as a time of crystalline purity, so that the Constitution is more like a civilian code than the common law, to which we resort directly for the resolution of new disputes with less regard for our precedents.

In that resort, we might consider the intellectual origins of the Framing to flesh out the meaning of sparse terms, and so the history seems to work backward from the ratification, rather than, as I think, a common-law understanding applied today would work, backward from the time of inquiry.

If I am right in this effect, then we have altered our understanding of the constitution, changing it from a common-law instrument to something else, perhaps even something more civilian. (Perhaps, and this can hardly be popular during the Presidency of the second George Bush, something more French.)

There are many candidate reasons for this effect. One is the thesis, propounded most recently by Larry Kramer, is that the constitution is really a popular instrument, intended to reflect the will of the people in whose name it is written. Another is something akin to Corwin’s higher law model, in which a transcendent value of justice became manifest in the Framing, when “higher law at last attained a form which made possible the attribution to it of an entirely new sort of

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3Try running natural-language searches on “common law” and “constitution” in Lexis and Westlaw, and compare the ratios for yourself.

4On this similarity, see George P. Fletcher and Steve Sheppard, American Law in a Global Context: The Basics (Oxford University Press, 2005).

validity, the validity of a statute emanating from the sovereign people.”⁶ There may be something to such approaches, and I accept them each as plausible.

But another thread runs through our understanding of the Framing, which turns on the pedigree of its ideas. We also see the Constitution of 1787 as a particular example of the American enlightenment, in which the genius of the new world (or at least its Anglophone contingent) enshrined in its revolution the liberalizing genius of the European enlightenment.⁷

One aspect of this thread, then, might be the significance of the writers relied on by the Framers. This significance has given the writings of these authors an independent importance in debating the meaning of ideas that are potentially based upon them, an importance that encourages the museum quality of both original meanings in the Constitution and the meanings of the authors’ ideas themselves. Thus contemporary observers of the constitution find themselves considering not only the influence of the common law on the Framers of the Constitution but also the independent significance of a pantheon of authors whom they admired.⁸

I will suggest, and I hope to give at least a brief demonstration, that the allure of these writers, or at least one of them rests in part on the resonance of his writings with common-law principles that are usually ignored when considering his thought. Indeed, I will try to show not only a correlation between several ideas usually thought to be the result of philosophy and history independent of the law and the common law itself but also the later emergence of these same ideas as constitutional principles derived as a textual constructions of the text that reflected them.

⁶EDWIN S. CORWIN, HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 89 (Cornell University Press, 1955).


⁸For instance, in the marvelous compendium, THE FOUNDER’S CONSTITUTION, the editors include entries relatively few entries from European writers who influenced the Framers, yet must still include a broad selection, excerpting Burke to illuminate two constitutional provisions; Calvin for one, Hume for five; Harrington for two, Lambarde for one; Locke for twelve, Machiavelli for one; Montesquieu for thirteen, and Adam Smith for two. See THE FOUNDER’S CONSTITUTION (Philip B. Kurland & Ralph Lerner, eds.)(five vols.) (Liberty Fund, 2000). Writers of the common law, including Blackstone, Coke, Hale, various statutes and pleaders, were excerpted even more often.
Few writers are now seen to have more influenced the Framers of the Constitution of 1789 than John Locke. Most writers, such as Bernard Bailyn, Gordon Wood, Forrest McDonald, and Jack Rakove, give him pride of place, along with a short list of others who have been long familiar to us – Montesquieu, Voltaire, Rousseau, Harrington, Bolingbroke, and maybe Hobbes. The varied lists that historians and polemicists present might argue as much for the backgrounds of the various authors as also for their contemporary biases. How much emphasis shall we place on Machiavelli, or Cicero, or on Jonathan Edwards or the book of Isaiah? The chorus of intellectual godfathers is great, but Locke remains at least a favorite soloist to many contemporary ears.

There are many reasons for Locke’s significance to the revolutionary generation and to the constitution’s Framers, particularly Madison and Jefferson, whose writings are so often influenced by him. Clearly, many aspects of the Constitution both as it was conceived and as it was drafted

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were indebted to Locke’s ideas, most notably in *Letters on Toleration* and his *Second Treatise*. Another reason is, perhaps, that Locke’s writing style, especially in his masterpiece, *The Second Treatise on Government*, has a tendency to seem completely unencumbered by its time and climate. One can read his statements about equality, rights, and property into contemporary propositions and arguments with no sense of anachronism, but with an implied authority that arises not only from the strength of Locke’s assertions and reasons but also from the influence they had in the founding.

This significance of Locke’s writings – at once seemingly enmeshed in the constitutional history and yet unlimited by it – has a consequence both for the constitution and for Locke. For the constitution, the significance contributes to the sense of the constitution as timeless ideal. For Locke, the significance is the suggestion that to understand a concept of Locke’s, such as his notions of rights or of property, is to understand a concept in the constitution itself.

Thus, “Lockean rights” have achieved a meaning that is nearly divorced from their seventeenth-century, theistic origins. Thus Locke has served as the authority for a rationalist claim of rights to possessive individualism, as well as the foundation for arguments for a state limited from nearly all intrusions into the private realm, and to a model of property and property rights limited only by lawful acquisition of rights and by self-interested transfers of those rights without any

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13 For example, the editors of *The Founders’ Constitution* chose to excerpt Locke’s writings to illuminate several themes in document as a whole, including the popular basis of political authority (*Second Treatise* §§ 4-15, 54, 119-22 & 163); the right of revolution (*Second Treatise*, §§ 149, 155, 168, 207-10, 220-31 & 240-43); republican government (*Second Treatise*, §§ 95-99); separation of powers (*Second Treatise*, §§ 143, 144, 150 & 159); representation (*Second Treatise*, §§ 157-58); property (*Second Treatise*, §§ 25-51, 123-26); constitutional government (*Second Treatise*, §§ 89-94, 134-42, 212); as well as particular references in the Preamble (*Second Treatise*, § 131), Article II, section 1, clause 1, on executive powers, (*Second Treatise*, §§ 144-48 & 155-68), the First Amendment on religion and on petitions (both from *A Letter Concerning Toleration* [1689]), and the Fifth Amendment on due process (*Second Treatise* §§ 138-40). The influence of Locke on America, particularly on the colonists is explored more fully in BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM (Oxford University Press, 1996).

further limits. According to these models, a citizen’s “humanity does depend on his freedom from any but self-interested contractual relations with others. His society does consist of a series of market relations.” More generally, “Lockean rights stipulate that each human possesses a natural right to his life, liberty, and honestly acquired property. This leads to a negative conception of liberty: freedom from coercion against ones person and legitimate property.”

There has been some considerable effort to reverse this anachronistically propelled and polemically charged meaning. Most impressively, Jeremy Waldron’s recent scholarship has restored our understanding of the theological underpinnings of Locke’s arguments about sovereignty. More broadly, Richard Ashcraft’s scholarship has presented Locke’s works in the context of the political debates in which Locke offered them, restoring a sense of the revolutionary manner in which the Whigs argued against the divine rights of kingship and the indolent claims to status as an aspect of understanding Locke’s arguments for equality, rights, property, and the state.

Even so, these attempts to reassert the context of Locke’s argument have yet to consider an influence that is well known to have otherwise affected the Whig movement, and that is well known as an influence on the arguments affecting the state presented by other writers who

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influenced the Founders— the common law. It is not that scholars have not looked for the common law influences in Locke’s writing. Indeed, there are a few references to the law in Locke’s texts, and scholars (especially the trailblazer Peter Laslett) have considered them in some slight depth. Yet, to date, these references have been tangential to understanding Locke’s arguments, limited to his readings or recommendations for education, rather than an aspect of his arguments of state.

The accepted views have instead been either to ignore the effects of the common law upon Locke’s writings or to reject their possibility. John Pocock sees in Locke’s text the rarity of Locke’s omission of an argument for limited government based on the history of English law. Ashcraft, in his superb historical setting of Locke’s writings in the political context prior to the Glorious Revolution, considers the law as an active element of the political milieu, as in the influence of the trials or exiles of Locke and his fellow travelers on his thought. Still, he skips his chance to consider Locke’s engagement of the common law by considering that the omission of a discussion of law in The Second Treatise tells us nothing and, in a separate passage, commending us to consider the views that had preceded him. Laslett reflects the view scholars take toward Locke’s thoughts on the controversies of the common law and the precedents of the English constitution. “To the

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21See JOHN LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS (Peter Lastlett, ed.) (Cambridge University Press, 1963) [hereinafter, “LOCKE, TREATISES (Laslett)”]. Both Laslett’s and Locke’s use of law are discussed further below.


24Id. 189 n. 26, 257 n. 115.
constitutionalists of Locke’s day and ours arguments of this sort mattered a very great deal: to Locke apparently, they mattered not at all” at least in the parts of the text we not lost to us.\textsuperscript{25} James Tully, taking the specific challenge of understanding Locke’s notion of property according to the “range of normative vocabulary and conventions available” to him in the literature before and during the time of his writing, ignores the common law, focusing instead only on “the seventeenth-century natural law and natural right ‘discourse’ to which Locke was a contributor” as well as “other natural rights theories.”\textsuperscript{26}

In sum, the common law has not been rejected as a possible source of Locke’s ideas. It has instead been ignored.

\textit{Locke and the Common Law}

We should not be surprised that Locke is rarely considered in the light of the common law. Indeed Locke refers to the common law, or at least to its books, very sparingly. Although his early books on \textit{The Civil Magistrate} flirt with legal matters as an aspect of the regulation of religion, they do little relative to the common law.\textsuperscript{27} When he does refer to lawbooks, in \textit{The Second Treatise on Government}, Locke refers relies on common-law authors for the quite un-legal proposition that kings may give their subjects their freedom by attempting to subject them to the rule of a different monarch. For this point, he says,

\begin{quote}
if there needed authority in a Case where reason is so plain, I could send my Reader to Bracton, Fortescue, and the Author of the Mirror, and others, Writers, that cannot be suspected to be ignorant of our Government, or Enemies to it. But I thought Hooker alone might be enough to satisfie those Men, who relying on him for their Ecclesiastical Polity, are by a strange fate carried to deny those Principles upon
\end{quote}

\textsuperscript{25}Locke, \textit{Treatises} (Laslett), \textit{supra} note [], at 90.

\textsuperscript{26}James Tully, \textit{A Discourse on Property: John Locke and His Adversaries} ix (Cambridge University Press, 1980).

which he builds it.28

Otherwise, his only express references to lawbooks or legal sources are in recommendations to others that a gentleman should read some law as a part of a general education.

It would be strange to suppose an English gentleman should be ignorant of the law of his country. This, whatever station he is in, is so requisite, that, from a justice of the peace to a minister of state, I know no place he can well fill without it. I do not mean the chicane or wrangling and captious part of the law; a gentleman whose business is to seek the true measures of right and wrong, and not the arts how to avoid doing the one, and secure himself in doing the other, ought to be as far from such a study of the law, as he is concerned diligently to apply himself to that wherein he may be serviceable to his country. And to that purpose I think the right way for a gentleman to study our law, which he does not design for his calling, is to take a view of our English constitution and government, in the ancient books of the common law, and some more modern writers, who out of them have given an account of this government. And having got a true idea of that, then to read our history, and with it join in every king’s reign the laws then made. This will give an insight into the reason of our statutes, and show the true ground upon which they came to be made, and what weight they ought to have.29

He noted the books he had in mind more specifically in later correspondence.

With the history he may also do well to read the ancient lawyers, (such as are Bracton, Fleta, Henningham, Mirrour of Justice, My Lord Cook on the second Institutes, and the Modus Tenendi Parliamentum, and others of that kind whom he may find quoted in the late controversies between Mr. Petit, Mr. Tyrel, Mr. Atwood, etc., with Dr. Brady; as also, I suppose, in Sedler's treatise of The Rights of the Kingdom, and Customs of our Ancestors, whereof the first edition is the best,) wherein he will find the ancient constitution of the government of England. There are two volumes of State Tracts printed since the Revolution in which there are many things relating to the government of England.30

28LOCKE, TREATISES (Laslett), supra note [], at 475.


30John Locke, Some Thoughts Concerning Reading and Study for a Gentleman, 1703 in THE EDUCATIONAL WRITINGS OF JOHN LOCKE: A CRITICAL EDITION WITH INTRODUCTION AND NOTES 397, 401 (James L. Axtell, ed.) (Cambridge University Press 1968). This is a variant of a letter sent initially to the reverend Richard King, printed initially by Pierre Desmaizeaux in 1720 in A COLLECTION OF SEVERAL PIECES OF MR. JOHN LOCKE. The text of the other variant is less specific as to books and omits the reference to Coke. See 8 THE CORRESPONDENCE OF JOHN LOCKE 56, 58 (E. S. De Beer, ed.) (Oxford University Press, 1989); 10 LOCKE, WORKS, supra note [], 306, 308. This letter is described further below, in the text accompanying note[]. One name that seems odd in this list, at least to me, is Henningham. This is not a name one finds in the lists of signal lawbooks by the likes of Coke, my suggestion in this regard below notwithstanding. No writer by that name appears in the S.T.C. One possibility is that Locke refers Elliot’s argument in the Five Knight’s Case. Sir Arthur Heveningham, one of the five, was sometimes referred to as Henningham. See SIR THOMAS
Granted, Locke’s writings on education were later than his apparent writing of *The Second Treatise*, which appears to have been drafted about 1679-1680. Yet, the writings cited in his letter to the reverend Richard King roughly parallel his cites in *The Second Treatise*, and so one might reasonably assume these are the books he read, or at least continued to be seen to have read.

On the other hand, Locke’s relatively slight bows to the law appear more to contribute to the appearance to his interpreters that he knew no law at all. In considering the passage from *The Second Treatise* quoted above, Laslett snarkily suggests that there “is no evidence that [Locke] possessed or read any of these books, a fact which bears on his indifference to constitutional history and constitutional development.” Of course, in this note Laslett must mean that there is no additional evidence; the evidence of the text itself must at least suggest something, if no more than that he’d read something else that cited them.

Indeed it is apparent that Locke was familiar with a wide range of law books, some of them quite specialized, beyond those he mentioned in his inventories for the education of others. In Harrison and Laslett’s definitive inventory of Locke’s library, they note that Locke owned 390 titles on law and government, of which 59 books and tracts were on law alone. Among them were not only works merging law and politics, such as Locke’s copies of the *Argumentum Anti-Normanicum* (by the barrister Edward Cooke, based on Sir Edward Coke’s preface to his ninth volume of the *Reports*)


*Laslett, Introduction in Locke, Treatises* (Laslett), supra note [], at 78.

*Locke, Treatises* (Laslett), supra note [], at 475 n.48-9.

but also quite technical books of the common law, such as Rastell’s law dictionary.\textsuperscript{34}

Interestingly, Harrison and Laslett recognize, at least when they talk about his philosophy, that we cannot discount the possibility Locke had a read a book merely because he did not own it. They realize he read widely from Machiavelli but rarely let slip that knowledge, but he was well versed in Aristotle, while holding few of his works.\textsuperscript{35} There seems to be no reason why a similar allowance would not be expected in other fields.

Indeed, Locke’s proximity to other books is certain. It is well known that during the years he was writing \textit{The Second Treatise}, and indeed intermittently through his adult life, he had the benefit of the library of his patron Anthony Ashley Cooper, the first Earl of Shaftesbury. Although Shaftesbury’s library was famously devoted to antiquities, it also contained the law holdings to be expected of a Lord Chancellor.\textsuperscript{36} Those holdings included the \textit{Reports} of Sir Edward Coke, as well as the Second \textit{Institutes} Locke mentioned in his syllabus.\textsuperscript{37}

From his proximity to these seventeenth-century books we can consider an alternate explanation of Locke’s readings on law. There are numerous references in seventeenth-century authors, especially Coke, to the authority of early lawbooks, and it is as easy to suppose that Locke had read once or referred later to these later books to learn of their authority. Coke recites the

\textsuperscript{34}See id., at 74, noting the \textit{Argumentum}, and at 170, noting Locke’s ownership of \textit{La Termes de la Ley} (1629).

\textsuperscript{35}Id. 21-22. Still, the inclination to conclude what Locke read from the books he held persists in many scholars. See J.R. Milton, \textit{Locke’s Early Political Reading}, 24 \textit{LOCKE NEWSLETTER} 81 (1993).

\textsuperscript{36}Cooper, a one-time student of Lincoln’s Inn, who had served as Chancellor of the Exchequer, was created Earl of Shaftesbury in 1672 and served as Lord Chancellor from 1672 to 1673. See K. H. D. Haley, \textit{The First Earl of Shaftesbury} (Oxford University Press, 1968). Locke met Cooper in 1666 and became a member of his household in 1667, residing in it for eight years including Shaftesbury’s chancellorship, as well as several years later, following Locke’s return from several years in France. See H. R. Fox Bourne, \textit{The Life of John Locke} (1876) (Thoemmes, 1991).

\textsuperscript{37}See the three handlists of Shaftesbury’s catalogues in PRO 34/20, particularly list 14. List 30/24/xlvii/30, which contains no books of the common law, is in Locke’s hand. One question that the emphasis on books omits is the degree to which Shaftesbury and Locke conferred and discussed these matters. It would seem odd that they never discussed the nature of property at all.
authority of books from legal antiquity in a rather similar order and selection (at least for the earliest books), both in the prefaces to the third and to the tenth volumes of the Reports. Similar lists were repeated in books less specialized in the law.

In fact there is a bit more evidence in his writings that Locke at least was familiar with lawbooks later than Bracton and The Mirrour. In his Carolina constitutions, Locke (to some degree with Shaftesbury) wrote, “Since multiplicity of comments, as well as of laws, have great inconveniencies, and serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the common or statute laws of Carolina, are absolutely prohibited.”

One might conclude that this resolution was intended to exclude from Carolina courts works along the lines of the Institutes of Sir Edward Coke, despite his favorable reference to it in his educational program. Such a conclusion, even if it represents Locke’s admonition for the colony, would not necessarily signal Locke’s rejection of Coke. Indeed it is remarkably like Coke’s own

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38The list particularly fits the preface of the tenth Report. See 1 Selected Writings of Sir Edward Coke 76-77; 337-342 (Steve Sheppard, ed.) (Liberty Fund, 2003).

39These lists were generally citations of books supporting a proposition. Coke is the most likely source for a reference of books preferred for study. But see Sadler and Cooke, such as Pax per breve Regis, is a short Expression; but it might have a long gloss, and be compared with all our books; laying this for a principle or foundation of Law, That Writs were made by Parliament; and without such common Consent, could not be changed. Of which, the Mirrour, Bracton, Fleta, divers others. But of another Breve de pace, before the Combat, in Right or Assize, Glanvil, Hengham, and the Register.

John Sadler, Rights of the Kingdom, Or, Customs of Our Ancestors Touching the Duty, Power, Election, or Succession of Our Kings and Parliaments, Our True Liberty, Due Allegiance, Three Estates, Their Legislative Power, Original, Judicial, and Executive, with the Militia Freely Discussed Through the British, Saxon, Norman Laws and Histories, with an Occasional Discourse of Great Changes Yet Expected in the World 191 (J. Kidgell, 1682)

Many of our Law-Books were written in Latin before the Norman Invasion, as appears by the Ancient Rolls of Mannors, and Court Barons, and our Old Authors, Glanvill, Bracton, Tilsbury, Hengham, Fleta, the Register, and the Book of Entries.


warning near the end of his prologue to the second part of his *Institutes*. “Upon the Text of the Civill Law, there be so many glosses and interpretations, and again upon those so many Commentaries, and all these written by Doctors of equall degree and authority, and therein so many diversities of opinions, as they do rather increase then resolve doubts, and incertainties, and the professors of that noble Science say, That it is like a Sea full of waves.” 41

What do we make, then, of the twentieth-century scholarly inference from Locke’s sparing use of the common law that he knew nothing of it, or cared little for it? At the least, Ashcroft is right, that we should draw few conclusions from his silence. Yet there is more one might do, which is to respect his admonitions for the educated gentleman and consider that his topics of government and property might reflect a knowledge of the law appropriate to a gentleman of his day.

*Locke’s Property*

The limited scope of this paper does not suggest we make a full-scale comparison of every aspect of Locke’s theories to the common law. Rather, I would like to consider just a few aspects of the concept of property he expressed in *The Second Treatise*, which are both essential to his views of the individual and the state and central to many of the arguments that the Framers believed themselves to be adopting from his writings. 42

Locke has become synonymous with his theories on the origins of private property, on the extent of thought, action, and materiel subject to property, and on the function of the state as the guarantor of property rights. Such grand theory has attracted the lion’s share of modern scholarly

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consideration, which – even in its most detailed and careful parsings – has elided integration with common-law doctrine or context, an elision that is appropriate for quite distinct reasons. At such levels of conceptual breadth, few cases might have arisen in the common law, and few doctrines would be Threaded throughout these major premises, however, are some minor premises, and it is in these that we might plumb the depths for soundings from the common law.

At the outset, it might be well to take Locke at his word, that property is regulated by law. Indeed, the fundamental purpose of the power of the state is to regulate life and property through laws, for the public good.

Political Power, then I take to be a Right of making Laws with Penalties of death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Public Good.43

This idea of property limited to the good of all – the owner as well as others – is not the result of the state but is the result of the structure of property in the state of nature, prior to the intersection of regulation. For under the law of nature, the fundamental limitation on every person is equality. “For in that State of perfect Equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.”44 Locke views the result of any trespass on this principle, prior to government, as a trespass on the whole species of humanity, because such a trespass is proof the trespasser has chosen a rule other than the reason of the law of nature.45 Through such equality, through labor each man created property in himself, by mixing his labor with the raw materials given in common

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43[John Locke], Two Treatises of Government: In the Former, the False Principles, and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown. The Latter Is an Essay Concerning the True Original, Extent, and End of Civil Government. (Awnsham Churchill, 1690). ¶ 3 [All references hereinafter shall be to this edition by title and paragraph, as in “First Treatise ¶ X” or “Second Treatise ¶ X”].

44Id. ¶ 8.

45Id. ¶¶ 8-10.
to all humanity. Likewise, having such property in a pre-governmental and pre-monetary condition, individuals could then barter freely in exchange, and – because there would be a surplus of raw materials and no incentive to own more than was needed – each person would hold their property without “incroachment on the right of others.”

Thus the only limitations arising naturally on the use of property in Locke’s state of nature would remain the nature of equality in all things. Thanks to Locke’s stipulations of plenty and against greed, property would not stimulate disputes over ownership but over use in unequal ways. Its only basis for dispute therefore would be if it was used in manner that could violate the principle of equality.

Once the government arises through the social contract, each person surrenders the power to govern himself to the state, which then makes laws for the public good, the most important end

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46 From all which it is evident, that tho' 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 conveniencies of Life, was perfectly his own, and did not belong in common to others.

Id. ¶ 44.

47 Id. ¶ 51.

48 Wherever therefore any number of Men so unite into one Society, as to quit every one his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a political, or civil Society. And this is done wherever any number of Men, in the State of Nature, enter into Society to make one People, one Body Politick under one Supream Government; or else when any one joins himself to, and incorporates with any Government already made. For hereby he authorizes the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require; to the Execution whereof, his own assistance (as to his own decrees) is due. And this puts men out of a state of nature into that of a Commonwealth, by setting up a Judge on Earth, with Authority to determine all the Controversies, and redress the injuries that may happen to any Member of the Commonwealth; which Judge is the Legislative or Magistrates appointed by it.

Id. ¶ 89.
of which is to protect the rights of property in each person. The state, then becomes the source of laws that ensure each person a “comfortable, safe, and peaceable living, one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.” For this regulation to occur, each surrenders the power to regulate private property to the state. Famosly, this surrender of property to the state is, for Locke, necessary for its preservation. Without government, there is no case law, no judge, and no bailiff.

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49(Whereas Government has no other end but the preservation of Property). Marginal note appended to Id. ¶ 94.

50Id. ¶ 95.

51Every Man, when he, at first, incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the Community those Possessions, which he has, or shall acquire, that do not already belong to any other Government. For it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: and yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government, to which he himself, and the Property of the Land, is a Subject. By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being.

Id. ¶¶ 119.

52If 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 no Body, why will he part with his Freedom, this Empire, and subject himself to the Dominion and Controll of any other Power? To which 'tis 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 this Condition, which however free, is full of fears and continual dangers: and 'tis 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.

Id. ¶ 123.
First, There wants an establish'd, setled, 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.

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 Mens.

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.\[53\]

In seeking these protections, each person surrenders his property and equality to the state, not so they are destroyed but so they are preserved by specific laws, neutral judges, and appropriate power to make laws, limited to this preservation.\[54\] The property surrendered, like every other right, was limited in the state of nature before its surrender, and so it is, at least impliedly, limited after its surrender by the limit of its use through equality.\[55\]

\[53\]Id. ¶ 124-125.

\[54\]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 suppos'd to extend farther than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the state of Nature so unsafe and uneasy. ¶ 131.

\[55\]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. A Man, as has been proved, cannot subject himself to the Arbitrary Power of another; and having in the state of Nature no Arbitrary Power over the Life, Liberty, or Possession of
The state, therefore, cannot take property once it is lawfully established, without its owner’s consent or for uses that are seen as good merely for the governors of the state. Yet, when such consent is given, even through representatives, Locke again limits absolute rights in property by requiring taxes on it. Property is subject to political regulation, in general.

Political Power is that Power, which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self, with this express, or tacit Trust, That it shall be imploied for their good, and the preservation of their Property: Now this Power, which every Man has in the state of Nature, and which he parts with to the Society, in all such cases where the Society can secure him, is to use such means for the preserving of his own Property, as he thinks good, and Nature allows him; and to punish the Breach of the Law of Nature in others; so as (according to the best of his Reason) may most conduce to the preservation of himself, and the rest of Mankind; so that the end and measure of this Power, when in every Man’s hands, in the state of Nature, being the preservation of all of his Society, that is, all Mankind in general. It can have no other end or measure, when in the hands of the Magistrate, but to preserve the Members of that Society, in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much as possible to be preserved; But a Power to make Laws, and annex such Penalties to them, as may tend to the preservation of the whole, by cutting off those Parts, and those only, which are so corrupt, that they threaten the sound and healthy, without which no severity is lawful. And this Power has its Original only from Compact and Agreement, and the mutual Consent of those who make up the Community.

another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Commonwealth, and by it to the Legislative Power, so that the Legislative can have no more than this. Their Power in the utmost bounds of it, is limited to the publick good of the Society. . . . .

¶ 135.

. . . .Men therefore in Society having Property, they have such a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take them, or any part of them, from them, without their own consent; without this they have no Property at all. . . . . For a Mans Property is not at all secure, though there be good and equitable Laws to set the bounds of it between him and his Fellow Subjects, if he who commands those Subjects, have power to take from any private Man what part he pleases of his Property, and use and dispose of it as he thinks good.

Id. ¶ 138.

56 Id. ¶ 140.

57 Id. ¶ 171.
Thus, consent alone is not the limit on any regulation, but whether the regulation is made by laws (and not by personal dictates) and is in the interests of the people as a whole. For this point, Locke quotes with something akin to reverence from the speeches of James I to the Parliaments of 1603 and 1609. And, famously, Locke claimed that when the laws are not used according to these interests, the people have a right of revolt.

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59 If one can doubt this to be Truth, or Reason, because it comes from the obscure hand of a Subject; I hope the Authority of a King will make it pass with him. King James, in his Speech to the Parliament, 1603, tells them thus; I will ever prefer the Weale of the publick, and of the whole Commonwealth, in making of good Laws, and Constitutions, to any particular, and private Ends of mine. Thinking ever the Wealth and Weale of the Commonwealth, to be my greatest Weale, and worldly Felicity; a Point, wherein a lawful King doth directly differ from a Tyrant. For I do acknowledge that the special and greatest point of Difference, that is between a rightful King, and an usurping Tyrant, is this, That whereas the proud and ambitious Tyrant doth think, his Kingdom and People are only ordained for satisfaction of his Desires, and unreasonable Appetites; the righteous and just King doth, by the contrary, acknowledge himself to be ordained for the procuring of the wealth and Property of his People. And again, in his Speech to the Parliament, 1609 he hath these Words; The KING binds himself, by a double Oath, to the observation of the fundamental Laws of his Kingdom. Tacitly, as by being a King, and so bound to protect, as well the People, as the Laws of his Kingdom; and expressly by his Oath at his Coronation: so as every just King, in a settled Kingdom, is bound to observe that Paction made to his People, by his Laws, in framing his Government agreeable thereunto, according to that Paction which God made with Noah, after the Deluge. Hereafter, Seed-time, and Harvest, and Cold, and Heat, and Summer, and Winter, and Day, and Night, shall not cease, while the Earth remaineth. And therefore a King, governing in a settled Kingdom, leavesto be a King, and degenerates into a Tyrant, as soon as he leaves off to rule according to his Laws. And a little after: Therefore all Kings, that are not Tyrants, or perjured, will be glad to bound themselves within the Limits of their Laws. And they that persuade them the contrary, are Vipers, Pests both against them and the Commonwealth. Thus that learned King, who well understood the Notions of things, makes the difference, betwixt a King and a Tyrant, to consist only in this, That one makes the Laws the Bounds of his Power, and the Good of the publick the End of his Government; The other makes all give way to his own Will and Appetite.

60 The Reasons 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
This is the familiar song of Lockean property. But if we sing it in the original notes and pay
a bit of attention to the key in which it is written, it seems impossible not to appreciate the debts the
composer must pay to the law.

*Locke and the Common Law of Property*

So what is there to find when comparing Locke’s property to the common law? The
structure, evolution, and detail of the common law of property required Sir Edward Coke to write
over 600 pages of annotations in small print, and I don’t think I can present its entirety here in any
coherent manner. I hope you will be content with just a few examples, even if they are examples I
have chosen to highlight what I see as parallels between Locke and law.

*Law as the Shield of Property, Even from the State*

The heart of Locke’s theory is that the state exists to make laws that protect each person’s
property. Thus, the law protects property even from the officers of the state itself.

Where-ever 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. This is acknowledged in subordinate Magistrates. He that hath Authority to
seize my Person in the street, may be opposed as a Thief, and a Robber, if he
endeavours to break into my House to execute a Writ, notwithstanding that I know
he has such a Warrant, and such a legal Authority as will impower him to arrest me
abroad. And why this should not hold in the highest, as well as in the most inferiour
Magistrate, I would gladly be informed. Is it reasonable that the eldest Brother,
because he has the greatest part of his Father's Estate, should thereby have a Right to
take away any of his younger Brothers Portions? Or that a rich Man, who possessed
a whole Countrey, should from thence have a Right to seize, when he pleased, the
Cottage and Garden of his poor Neighbour? The being rightfully possessed of great

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 Poperty 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.

*Id. ¶ 223*
Power and Riches, exceedingly beyond the greatest part of the Son of Adam, is so far from being an excuse, much less a reason for Rapine and Oppression, which the damaging another, without Authority, is; that it is a great Aggravation of it. For the exceeding the Bounds of Authority, is no more a Right, in a great, than a petty Officer: no more justifiable in a King, than a Constable. But so much the worse in him, as that he has more trust put in him, is supposed, from the advantage of Education, and Counsellours to have better Knowledge, and less reason to do it, having already a greater share than the rest of his Brethren.\textsuperscript{61}

This paragraph would not have been at all out of place in Sir Edward Coke’s opinion in \textit{Semayne’s Case}, in which a bailiff entering a house to serve a warrant was hurt but could have no claim against the houseowner, because every man’s home is to him as a castle.\textsuperscript{62} It reflects, as he went to some pains to express in that opinion, the view that Magna Carta forbids the loss of any interest in property without a judgment under the law.\textsuperscript{63}

The parallel is a starting place. It suggests, indeed I believe that it suggests strongly, that Locke intended his readers to understand his invocation of the legal protections of property as they existed, or at least as they were already idealized in the legal materials. This is not to say that the law could not become corrupted, either through the creation of overly intrusive rules in law, as was seen all too easily in the \textit{Five Knights Case} leading to the Petition of Right, or through a policy of disregard for the rules as in the quartering of troops in private homes, both problems that Parliament sought to resolve in the Petition of Right in 1628. But those corruptions and many others did not destroy the law’s ideal of respect for and protection of the property of the owner. Further, the parallel suggests that Locke’s protections of property, even to the point of rebellion justified by a failure to realize these protections, still do not imply an absolutism in property. The protections of the property in law were absolute over the lawful rights in property, yet these rights could still be limited, particularly by two powerful boundaries, that property not be used in a manner to harm

\textsuperscript{61} \textit{Second Treatise}, ¶ 202.

\textsuperscript{62} 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195 (K.B. 1603). \textit{Coke 1 Selected Writings} [] (Sheppard ed.)

\textsuperscript{63} “No free man shal be disseised . . . except by lawful judgment of his peers or by the law of the land.” Magna Carta cap. 39. See Coke 2 Selected Writings [] (Sheppard ed.)
another, and that the property interest give way when needed to promote the good of the people.

**The Public Good**

Locke expressly and repeatedly declared that the ownership of an individual in property was subject to the limits of the public good. That indeed, the result of the surrender of all rights including the protection of property to the state was precisely so that the state would promote the public good. The difference between a monarch and a despot is that “one makes the Laws the Bounds of his Power, and the Good of the publick the End of his Government; The other makes all give way to his own Will and Appetite.”

Promoting the public good is the basis for all executive prerogative. “Prerogative being nothing but a Power in the hands of the Prince to provide for the publick good, in such Cases, which depending upon unforeseen and uncertain Occurrences, certain and unalterable Laws could not safely direct. Whatsoever shall be done manifestly for the good of the People, and establishing the Government upon its true Foundations, is, and always will be, just Prerogative.” Locke considers the public good in such prerogative to be synoymous with the “the preservation of the Properties of their People.”

Here, the parallel of Locke to the common law offers a clear choice of comparisons between a traditional argument based on textual analysis and a legal argument based on the significance of doctrine. If one considers the text alone, one can easily find oneself defining the public good as the preservation of property. Property is not limited by the public good; public good is limited by property.

On the other hand. I think it is hard to ignore the parallel apparent in Locke’s choice of the terms of “the public good” as applied to property considered with the ancient maxim of civil and common law, “Salus populi suprema lex est.” For that matter, Locke embraces the rule as well. In

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64 Id. ¶ 200.
65 Id. ¶ 201.
66 Id. ¶ 229. See also First Treatise ¶ 57.
discussing the need for equality, albeit not unlimited equality, in access to the franchise, Locke begins his argument noting, “Salus Populi Suprema Lex, is certainly so just and fundamental a Rule, that he who sincerely follows it cannot dangerously err.”

If Locke means to employ the common-law understanding of public good, he is then invoking a very well understood limitation on property and liberty, one at the heart of several disputes over lands in the seventeenth century, particularly one central to the most significant public works efforts of the times, the draining of the fens and the installation of the sewers of London.

For instance, in his report of Keighley’s Case, Coke noted that a private landowner could become prescriptively obligated to maintain a seawall for the protection not only of himself but for others, and if it failed through his negligence he could be charged with its whole cost of repair, because his rights in the wall were limited for the benefit of salus populi.

Such limitations on property were customary, reasonable, and appear to have been relatively uncontroversial at the time. There is no reason in Locke’s text to believe that he rejected the common understanding of this doctrine in law, which he applied so often and even in its most legal form in his text. Yet they are a much greater limitation on property than one would consider if the greatest possible extent of one’s private use of property is the measure of the public good.

Equality

My last illustration of the possibilities that arise from reading Locke in the light of the law is, I admit, more tenuous and more likely to provoke controversy. Consider he famous claim of equality in rights over property held by each person in the state of nature.

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67 Id. ¶ 158.

68 The maxim originates in the Twelve Tables. [ ]. It was well established in the late feudal common law. See CASE XCIII. 43 Ass. pl. 38. Jenks 50. And it was litigated recurrently in the 1600’s. See Le Case de Tanistry, Davis 33. Cole v. Foxman, Noy 30. Information against Bates, Lane 23. Burrowes v. High Commission, 3 Bulstrode 53.

69 Keighley’s Case, 10 Co. Rep. 139a, 77 Eng. Rep. 1136 (C.P. 1603)(sometimes miscited as if it is Kings Bench).
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 willetteth the Peace and Preservation of all Mankind, the Execution of the Law of Nature is in that State, put into every Mans hands, whereby everyone has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. For the Law of Nature would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that State of perfect Equality, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.\(^{70}\)

This degree of equality is, of course, surrendered with the advent of the social compact, and it is not necessarily restored with the creation of the political compact. Yet, as Locke says, one cannot give a greater interest than one has. If the interest one had in nature was limited by one’s equality, it would seem logically impossible to transfer an interest unlimited by that equality.

For our purposes, the question then becomes what equality could mean in property. The answer is *Sic utere tuo ut non alienam laedas*, the maxim of the common law of property. This rule, “use your property so as not to injure your neighbor’s” is a logical parallel to Locke’s argument. This is especially easy to see in John Rawls’s restatement of Locke’s principle of equality as rights, “Each person shall have the greatest extent of rights consonant with every other person’s exercise of rights.”\(^{71}\)

Although the rule had been used for centuries as a basis for the resolution of claims brought in assizes of nuisance,\(^{72}\) in *William Aldred’s Case*, another of Coke’s reports,\(^{73}\) the rule is for the first

\(^{70}\)Id. ¶

\(^{71}\)Rawls Political Liberalism, Lecture on the History of Political Philosophy. []

\(^{72}\)Indeed the common law drew the concept from Roman law, in the writings of Ulpian. J.H. Baker, *An Introduction to English Legal History* 354, 355 (2d ed. 1979). Nuisances, remedied by the Assize of Nuisance, were common by the time of Bracton. See Coquillette 765-772.

time compared to the competing theory of *salus populi*. A pig sty built in the City of London caused “noxious odors” to enter the house next door and to cut off the light to the house. In bringing his action on the case in nuisance, Aldred argued that the use of the sty interfered with his use of his lands. The defense, that the pig farming was “necessary to the sustenance of man” did not sway the Norfolk Assizes, nor did it sway Coke. Where one landowner’s use of his land interfered with the a use necessary to the enjoyment of another’s land, as with wholesome air and light, the nuisance was actionable. In other words, the right to property is limited by others’ rights to their property.

Other Intersections

These three arenas of property illustrate comparisons between Lockean doctrine and common-law rules that might shed more light on Locke’s intellectual climate, and perhaps his intent. These three areas are hardly exhaustive. A comparison, for instance, of his ideas of intellectual property to the then-infant laws of copyright and patent in England might be quite a nice little

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76This principle was reaffirmed throughout the seventeenth century. See, e.g., Tuberville v. Stamp, 1 Comyns 32 (K.B. 9 W.3); Baten’s Case, 9 Co. Rep. 53b, 77 Eng. Re. 810 (C.P., 8 Jac.).
doctorate for someone. Indeed, it is hard, at least for me, to understand Locke’s argument in *The First Treatise* that God gave to Adam property in the Earth and its creatures as an ownership in common with his children, as opposed to ownership solely in him and his individual successors, unless I consider it a problem in common-law succession as it was understood in the seventeenth century. Indeed, I doubt Locke would have seen it that way either without relying in part on the argument of John Selden to make the point. Likewise, the understanding of the ability of the individual to create rights in abandoned lands looks rather like the existing laws of prescription.

As with the points illustrated above and these other intersections, I do not suggest that Locke was intended to promote a common-law doctrine. In some instances, such as with his notion of equality and *sic utere*, I do not know that we can be certain he was aware of the legal doctrine that paralleled his idea. On the other hand, I see no reason to presume that he was unaware of it, either. And, it is the ongoing presumption against his knowledge and endorsement of the common-law ideas that support his writings that makes no sense to me.

Locke was an educated man in the household of one of the leading lawyers of his day. His dominant arguments regarding the state embraced the most technical field of the law of his time, and the fact is that he got it right. To then employ his arguments without regard to the legal

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77 See the Licensing Act, 13 & 14 Car. 2. c. 33 (1662), a copy of which Locke read and annotated during the Parliament of 1694, some years after writing the *Two Treatises*. See Bodleian Library, MS. Locke b. 4, ff. 75-76, (copy in Archives, PRO 30/24/30/30, ff. 101-102). [http://www.libraries.psu.edu/tas/locke/mss/c1694.html](http://www.libraries.psu.edu/tas/locke/mss/c1694.html). Yet he could scarcely not have known of the act then. Similarly, the resonance and dissonance between Locke’s labor theory of property and the proto-patent effects of the Statute of Monopolies, 21-22 Jac. I, c. 3 (1624), drafted by Coke to protect inventors’ rights in their products for twenty-one years.

78 *First Treatise* ¶ 23, in

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contexts in which they arose encourages analysis lacking that context. Indeed, it encourages precisely the types of misreading that are much in vogue in the discourse of Lockean rights, to imagine them somehow specially in the domain of a constitution above and beyond the types of balance and limit that the common law so carefully accreted while the rights themselves evolved.

Concluding Observations

The Constitution of 1787 is rightly the focus of homage, study, and conservation. Its students have long understood that it owes a debt to the common law, which they have so often seen present in borrowings from Blackstone. It is time, I think to consider what debts might have been owed to the common law from yet other constitutional creditors. We have long recognized that Locke, chiefly among them, did not invent his theory in a vacuum, and that his debts to his friends Shaftesbury and Tyrell as they are to thinkers such as Robert Ferguson and the three H's (Hobbes, Harrington, and Hooker), and from them a greater sense of Locke's radicalism emerges. Once, however, we extend this recognition to Coke, Bracton, and the common lawyers, we can see more clearly his pragmatism and restraint.

I must admit that such a view is appealing to me, but more importantly this must be at least somewhat the view that near contemporaries, who had learned the law from Coke and the common lawyers and read their Locke in that same context, must have had. If we are serious about understanding the ideas that inspired and comprised the constitution, we must accept not only the direct but the indirect influence of the common law upon them. The property, and the rights, that Locke's followers has in mind, were not pure -- not the inventions of a theorist speculating upon forms -- they were already mixed with the law, with its limits, compromises, and balances. That mixture does not make property or rights any less significant in Locke or the Fifth Amendment. Rather, I suspect it makes it more stable, and more capable of establishing the liberties that Locke and the Framers so clearly pursued.