RIGHTS-BASED THEORY AND CONTEMPORARY POLITICAL CHALLENGES: A FRESH READING OF LOCKE IN LIGHT OF BENTHAM AND BURKE

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American radical commitment to individual rights has been attributed to the profound influence of John Locke on American political culture. However, in this article, the author demonstrates that Locke's Second Treatise of Government *could be read to have more in common with Burke and Bentham—harsh critics of natural-rights theory—than with the American extreme views on rights and the politics that grow out of such views. It could even be argued that Locke makes no room for an entrenched bill of rights and that he actually attempts to guard against the very anarchical tendencies Bentham and Burke see as inevitably coming from extreme rights-based ideologies.*

This article may have particular interest to New Zealand readers as they contemplate the adoption of an entrenched constitution. From the author's American perspective, it appears that New Zealand constitutional conventions do not contain the extreme commitment to natural rights theory that is on display in the United States, and it may be that Americans continue to be plagued by the problems Bentham and Burke anticipated due to their failure to remain consistent with the more rational and practical elements of John Locke's theory. In other words, it is possible that the presence of an entrenched bill of rights in New Zealand would not necessarily lead to the difficulties Americans are experiencing with their rights-based constitutionalism.

I INTRODUCTION

Like David Hackett Fischer,[1] during my relatively recent visit to New Zealand, I was struck by the seemingly ubiquitous Kiwi commitment to questions of fairness in contrast with the American

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1 David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States* (Oxford University Press, New York, 2012).

penchant for individual freedom. However, unlike Fischer, who keeps a relatively neutral historian's eye, I found myself inclined to harsher conclusions. In contrast to the New Zealand Parliament's ability to aggressively pursue the public good, American political processes are often frustrated by a legalistic fetish for protecting individual rights enumerated in an entrenched constitution. This experience has led me to a fresh reading of John Locke's *Second Treatise of Government* while reflecting on the criticisms of rights-based ideologies by both Edmund Burke and Jeremy Bentham. As New Zealanders continue to contemplate the adoption of an entrenched constitution, the question this article raises for New Zealand readers in particular becomes: Is the fact that Americans continue to be plagued by the problems Bentham and Burke anticipated due to the American failure to remain consistent with John Locke, or is it simply impossible to build on Locke's rights-based foundation without falling prey to the predicaments Bentham and Burke raise? My sense is that Americans have distorted Locke's theory with their political practices and that New Zealand constitutional conventions would help to guard against Kiwis going down the same road as Americans – even if they were to adopt an entrenched bill of rights. But my understanding of the dynamics of New Zealand political culture is limited and I will leave the answer to that question for others to determine.

In *Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution*, Bentham provides a scathing critique of the notion of natural rights as a foundation for constructing society.[2] Bentham concludes that the concept of natural rights is "simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts".[3] Much like Hobbes, Bentham reasons that any meaningful commitment to rights is totally dependent on the enforcement of positive law by strong government. Bentham is also convinced that the concept of rights actually grew out of long historical experience involving the protection of rights that were legally determined, and that it was nonsense to think of rights existing outside of society. For Bentham, reversing the causal order of this equation is ultimately anarchical and destructive of the general welfare. Toward the end of his essay he concludes:[4]

> *Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters, 'gorgons and chimaeras dire.' And thus it is, that from *legal rights*, the offspring of law, and friends of peace, come *anti-legal rights*, the mortal enemies of law, the subverters of government, and the assassins of security.

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2 Jeremy Bentham "Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution" in Jeremy Waldron (ed) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, New York, 1987) 46.

3 At 53.

4 At 69.

In similar fashion, Edmund Burke argues the "pretended" rights of natural-rights theorists threaten to destroy the "*real* rights of men" that have been historically and socially determined over the ages, and that these pretend rights are "absolutely repugnant to" civil society's demand that the individual gives up any claim to be "his own governor":[5]

> He inclusively, in a great measure, abandons the right of self-defence, the first law of nature. Men cannot enjoy the rights of uncivil and of a civil state together. That he may obtain justice he gives up his right of determining what it is in points the most essential to him. That he may secure some liberty, he makes a surrender in trust of the whole of it.

Burke is also sceptical of the human ability to reason and thereby comprehend the many complexities of society in advance. He is therefore a strong advocate of looking to tradition and social conventions that have developed over time. He sees it pure folly for a people to attempt to start from scratch by adopting a new constitution meant to provide the governing foundation for all of society.[6]

Bentham is specifically critiquing the French Declaration of Rights published in 1791 and Burke is critiquing the revolution that led to that declaration. However, it could be argued that the same criticisms apply to the United States and its entrenched Bill of Rights, and potentially any society that adopts an entrenched bill of rights. In the United States, with the help of the Supreme Court of the United States, abstract individual rights continue to be protected – sometimes at the expense of the public's general welfare. For example, recent Supreme Court decisions have frustrated legislative attempts to curb corporate influence on American elections[7] as well as reduce the public's ability to address issues of gun violence.[8] Surely, "nonsense upon stilts"[9] is an apt description of a society whose ability to respond to mass shootings in public schools is compromised due to an abstract commitment to the individual right to bear arms in self-defence. At times, Supreme Court decisions appear perfect examples of Bentham's claims regarding the anarchical nature of natural law rights as well as Burke's concern that historically developed rights become "scrambled for and torn to pieces by every wild litigious spirit".[10]

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5 Edmund Burke "Reflections on the Revolution in France" in Jeremy Waldron (ed) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, New York, 1987) 96 at 104–105.

6 At 106–107.

7 *Citizens United v Federal Election Commission* 558 US 310 (2010).

8 *District of Columbia v. Heller* 554 US 570 (2008).

9 Bentham, above n 2, at 53.

10 Burke, above n 5, at 99.

Many have characterised this American commitment to individual rights as evidence of the profound influence of John Locke on American political culture.[11] However, in this article I demonstrate that a fresh reading of Locke reveals that when it comes to political practice in civil society, Locke could be read as having more in common with Burke and Bentham than he has with the American perspective. Locke actually makes no room for a bill of rights aimed at protecting individual rights from majority rule. Furthermore, Locke fully rejects the individual's ability to judge his or her own cause while living in civil society. In so doing, Locke attempts to guard against the very anarchical tendencies Bentham and Burke see as inevitably arising from extreme rights-based theories.

II A FRESH LOOK AT LOCKE: POLITICAL POWER IN CIVIL SOCIETY

Before starting my analysis, I need to make myself clear. In taking a fresh look at Locke, I am not attempting to enter the scholarly business of attempting to determine the correct way to read Locke in terms of attempting to demonstrate what he actually meant. I am satisfied with leaving that task to others. Rather I am suggesting that there is a way to read Locke as fully attempting to anticipate the criticisms of Bentham and Burke. In reading Locke this way, we may be able to find a synthesis between the classic liberal concern for individual rights and Bentham and Burke's concerns regarding the weaknesses of rights-based theories.

In Chapter One of *Second Treatise of Government*, John Locke sets out to differentiate political power from paternal power by reminding readers what he establishes in the *First Treatise*, which is that paternal power must not be confused with political power.[12] In doing so, he does not emphasise the limits of political power. Rather, he differentiates political power from paternal power in an effort to establish the proper justification for political power. One might be tempted to read Locke as implying a core tenet of classic liberal theory: that there is a private sphere where society's political power must be understood as having no business entering.[13] But Locke himself does not make this argument. In fact, in this chapter, along with the later chapter, *Of Paternal Power*, Locke sets limits on the private sphere and not the other way around. For example, in dilating on paternal power, he qualifies parental rule over children as quasi in nature:[14]

> Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a *sort of rule* and jurisdiction over them, when they come into the world, and for some time after; but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they art wrapt

11 See for example Louis Hartz *The Liberal Tradition in America* (Harcourt Brace, New York, 1955).

12 John Locke *Second Treatise of Government* (The Liberal Arts Press, New York, 1952).

13 See John Stuart Mill *On Liberty* (Bobbs-Merrill Educational Publishing, Indianapolis, 1956).

14 Locke, above n 12, at ch 6, section 55 (emphasis added).

> up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal.

As Locke sees it, we only understand the true nature of political power correctly when we see it as qualitatively different from the temporary nature of paternal power over children. Political power is not a mere extension of this limited parental power. Rather, Locke could be read as defining political power in a rather far-extending – almost Hobbesian – way:[15]

> 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 defense of the commonwealth from foreign injury; *and all this only for the public good*.

This sentence is Locke's first summation of what political power is. He spends the rest of the *Second Treatise* furnishing this definition with important details. Here, I want to emphasise the potentially Burke/Bentham-like nature of this definition by highlighting two key points. First, note that in this passage, Locke states the purpose of government as aimed purely at serving the public good and not at the preservation of private rights. Second, Locke defines political power as a right, implying that rights do not exclusively belong to individuals. As I demonstrate below, for Locke, this right to exercise political power belongs exclusively to those entrusted to govern civil society. In fact, as is further demonstrated, from Locke's perspective once political power has been properly constituted the power to regulate property is no longer a private right at all. Any and all legitimate claims to property within civil society are determined by the political power of civil society which holds the exclusive right to make such determinations. Within civil society, the only individual discretion allowed is the discretion granted by those with the right to exercise political power.[16] Individuals may be given the discretion to raise pigs on their property or to turn private property into a toxic waste dump, but such discretion can also be withheld. True, Locke envisions the public as being made up of autonomous individuals, each with what Locke calls natural rights of life, liberty, and property while living in a state of nature, but I demonstrate below that in civil society, Locke

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15 At ch 1, section 3 (emphasis added).

16 Locke does make one exception to the individual's power of judgement in civil society. With potentially some disagreement with Burke, yet remaining fully consistent with Hobbes, Locke sees individuals as retaining a right to self-defence, at least in the heat of the moment. It is important to emphasise, however, that for Locke, it is only during the heat of the moment that a person retains a right to self-defence in civil society, and that this is due to the fact that in such situations there is no one but the self to turn to. Therefore, even on this issue Locke is not totally inconsistent with Burke as Burke qualifies the degree to which he sees individuals giving up the right to self-defence with the phrase "in a great measure". It is probably more accurate to read Locke and Burke as both being on a similar page with Hobbes, who argues that it is impossible for individuals to totally abdicate their right of self-defence because it goes beyond human nature to do so. That said, what simply cannot be justified by turning to Locke is an individual right to bear arms for self-defence purposes: a right claimed by many living in America and supported by the Supreme Court of the United States in its *Heller* decision.

sees those granted political power as having the exclusive right to regulate, define, and preserve property for the public good.[17] In fact, in ch 5, where Locke directly focuses on the question of property he seemingly sets no limits on civil society's political power to regulate: "… for, in governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions".[18] Within civil society, Locke's position could easily be read as failing to support the absolute property-rights notion Bentham considered to be "nonsense upon stilts".[19]

Finally, before leaving Locke's concluding sentence in ch 1, we need to remember that in ch 9 Locke defines property in an expansive – even all inclusive – way. For Locke, property includes the terms life and liberty. Accordingly, Locke could be read as seeing political power rightfully able to regulate all aspects of an individual's estate, life and liberty:[20]

> 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 no body, why will he part with his freedom? Why will he give up 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*.

In sum, Locke's definition of political power reveals that he is not necessarily guilty of promoting the anarchism Bentham and Burke are concerned with regarding the French Revolution. Locke answers Bentham's and Burke's concern that natural rights-based theories leave too much discretionary power to the individual by removing any right to exercise personal discretion from individuals living in civil society. Political power is the right to make all manner of decisions regarding the lives, liberties, and estates of individuals living within civil society. This is not to suggest that we should read Locke's theory of political power as identical to Bentham's or Burke's. Unlike both of these rights-based critics, Locke sees a benefit in viewing the individual and the individual's perception of rights as the primary unit of analysis and as a good starting-point for making sense of political power. Moreover, Locke views natural law – with its emphasis on individual rights – as remaining salient within civil society. It is to this issue I turn next. It is this

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17 Locke, above n 12, at ch 2, section 6.

18 Locke, above n 12, at ch 5, section 50.

19 Bentham, above n 2, at 53.

20 At ch 9, section 123 (emphasis added).

aspect of Locke that is potentially the most anarchistic and therefore most susceptible to the criticism of Bentham and Burke.

III OF THE STATE OF NATURE AND PROPERTY RIGHTS

In ch 2, *Of The State of Nature*, Locke lays the foundation for understanding what he considers to be the true nature and source of political power by discussing the natural rights individuals enjoy before civil society is constructed.[21] It is not entirely clear that Locke supports the idea that these rights exist in any absolute sense for individuals living within civil society. Not only do individuals give up a high degree of personal judgement regarding the regulation of life, liberty and property, we discover in ch 5 that Locke states several times that absolute property rights exist in a state of nature only where there is no scarcity.[22] This does not necessarily get Locke off the hook of criticism that talk of natural rights is altogether antithetical to civil society, but a fair reading of Locke demands that we not jump to conclusions too quickly.

Of The State of Nature is a complex chapter which allows for multiple interpretations. One way of reading it is to emphasise that Locke starts by implying that the state of nature continues to exist simultaneously with civil society. For example, he states: "To understand political power right and derive it from its original, we must consider what state all men are naturally *in* …".[23] We can take some significance from the fact that Locke uses the present tense here. Though he later states that humans leave the state of nature when entering civil society, we need not view Locke as referring to the state of nature only as an attempt to set up some grand pre-civil-society state of nature that all individuals leave once and for all when agreeing to join civil society. Rather, we could read Locke as using this chapter primarily as an attempt to make a case for reason. Like others in his day, Locke understands reason as consistently governing human interaction, even when living within civil society. Locke could be read as arguing that the state of humans living by reason never disappears. It is our natural state; we are naturally reasoning individuals. This reading of Locke reminds us that for the most part, human interaction – even in civil society – is rather peaceful. Most of us get along fairly well even in the absence of the constant presence of a police officer entrusted with enforcing the law. Many of us spend long periods without even encountering a single law enforcement officer. Many of us might spend our entire lives without seeking legal redress for grievances suffered.

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21 Locke, above n 12, at ch 2.

22 At ch 5. I recognise that Jeremy Waldron argues rather convincingly that the proper reading of Locke's provision "enough and as good left for others" cannot be understood as an absolute limitation of obtaining private property. Waldron might very well be correct. However, in a day where scarcity is a reality, where there simply is no frontier to escape to, I see no reason to not take full advantage of the implications of Locke's controversial provision. Indeed, accepting the provision as a key part of Locke's understanding of property rights, makes it possible to find common ground between Locke, Bentham and Burke while considering the possibility of discovering property rights for all individuals. See Jeremy Waldron "Enough and as Good Left for Others" (1979) 29 The Philosophical Quarterly 319.

23 Locke, above n 12, at ch 2, Section 4 (emphasis added).

Conflicts do arise, but the normal human experience is one where we settle our disputes without turning to those with the exclusive right to exercise political power over us. Locke could therefore be read as implying that we only turn to the political power of civil society during those times we are incapable of relying on reason alone in settling our disputes. The rest of the time, we remain in our natural state.

In this natural state, Locke emphasises the existence of what he calls natural rights: life, liberty, and property – rights we use our natural ability to reason on. Locke sees human life properly understood as revolving around the natural human attempt to preserve and ensure individual prosperity. As humans engage in this process, they inevitably come into contact and at times conflict with others. When this happens, reason will teach humans how to get along. For Locke, political power is properly understood as nothing but an extension of this human ability to reason about how to preserve life, liberty and property.[24] It is because humans tend to be "partial" to their own individual situation, Locke argues, they often fail to reason properly.[25] Hence, Locke argues, humans willingly – and rationally – give up all personal authority to settle disputes on matters they are incapable of resolving on their own. When they do this, they, in a sense, enter civil society and rely on civil society's political power. It is reason, aimed at preserving life, liberty, and property, that makes humans willing to do so. In other words, Locke is in agreement with Burke in suggesting that the very purpose of joining civil society is to subordinate all personal judgement regarding human disputes to civil society's political authority.

Importantly, however, this reading of Locke does not protect him from Burke's and Bentham's most telling criticism. Bentham sees it as irresponsible to even assume a starting-point of individual rights. For him, society "is held together only by the sacrifices that men can be induced to make of the gratifications they demand" and that to obtain such sacrifices is extremely difficult and is the primary task of government.[26] Any talk of rights makes the obtaining of this sacrifice far more difficult, Bentham argues, and should therefore never be used as the basis for making sense of political authority.[27] On the other hand, Burke does not share – and fundamentally rejects – Locke's faith in reason. For him, society is far too complex to be understood by human reason alone. He therefore emphasises the importance of preserving social conventions and historical traditions we may not be fully capable of comprehending.[28] In light of these criticisms, the question becomes:

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24 Whether this reason is 'natural' or universal, as Locke could be read to imply, is beyond the scope of this article. What is important here is that for Locke, human reason is the source of political power. Human reason teaches us to respect and avoid harming each other and it is this reason we rely on in making those laws that govern civil society.

25 Locke, above n 12, at ch 9, section 125.

26 Bentham, above n 2, at 48.

27 At 48.

28 See Burke, above n 5, at 116–118.

though Locke himself uses reason to justify limits on any anarchical and irrational tendencies that might come from a rights-based starting-point, can society successfully contain the anarchical tendencies individuals might be tempted to adopt if a society accepts natural rights theory as the foundation for building society?

One answer to this question is that there really is no acceptable alternative but to try. In other words, the proverbial cat is already out of the bag. Humans in western societies are fully into thinking of themselves as having rights that deserve to be protected and, if anything, this belief seems to be spreading. Faith in the ability to reason with individuals to help them understand the imperative to give up an absolute right of discretion when conflicts arise would appear vital to our future ability to get along, making this fresh reading of Locke all the more pertinent.

The challenge of answering this question increases when we take up Locke's discussion of property rights. On this topic, Locke again provides an important caveat that could be helpful: a caveat that has the potential of greatly limiting any individual claim to an absolute right to property. In fact, Locke could be read as not attempting to establish an absolute right to private property at all. Rather, he could be viewed as attempting to explain why the human experience requires some sense of private property and how the conception of private property should be properly understood by rational humans living in civil society where scarce resources are the norm. Here Locke seems guilty of failing to understand that notions of property are more likely to be culturally derived than to come from some universal sense of reason, but he need not be read as guilty of embracing absolute property rights.

Locke could be read as viewing the question of private property as raising a particular problem. The challenge is to determine how individuals can possibly claim any private property at all – given that "God" initially gave the whole earth to all human individuals "in common".[29] Since initially, all humans owned the entire world in common, he asks, how can any single individual lay claim to any private property at all?[30] Here Locke once again uses what he sees as common sense to answer the question. He argues that even though the world does belong to all in common, individuals must be able to lay claim to some element of private property in order to even stay alive: in order to even eat.[31] For Locke, it would be silly to think that God gave the world to humankind only to watch them all perish due to the inability to claim private property. But importantly, Locke can easily be read to be stating that if any individual has a right to life, all individuals have an equal right to life.

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29 Locke, above n 12, at ch 5, section 25.

30 Locke uses the term "men" rather than humans. But given that I am not convinced that a proper reading of Locke requires to read him as if he is meaning only males, I am choosing not to rely on the male pronoun. In Chapter 6 Locke even argues that the term "paternal power" should really be "parental power" given that mothers have the same power over their children as fathers have. He submits to the term paternal because that is the term that is accepted in the world.

31 Locke, above n 12, at ch 5, section 26.

If any individual has a potential right to private property, all individuals have an equal potential right.

In other words, Locke's God does not seem to subscribe to the doctrine of 'first come first served'. Indeed, one could easily read Locke as implying that it would be thoroughly contra-Locke to conclude otherwise. Every single individual is born with as much of a right to life, liberty, and property as any other living individual. From this perspective, no individual has an absolute claim to any property unless every individual has an equally valid and equally protected claim.[32] In other words, Locke could be read as providing strength to those who argue that anyone claiming rights to property without considering the reality of scarcity has no fully defensible claim. The very principle that would initially be used to justify private property – the fact that individuals need to be able to claim private property in order to survive, results in demanding that there be no absolute right to property in a world of scarce resources. Locke would appear to make this point crystal clear when he takes up the question of how labour must be understood as key to differentiating between property held by all in common and that which the individual can claim an exclusive right to. First, his passage on labour:[33]

> 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 labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.

This reliance on labour as the sole determiner of private property is regularly (and I assume properly) understood as a key element of Locke's thinking. However, his reasoning for what turns commonly held property into private property does not end with this statement. At this point Locke seems to be acknowledging that the act of labour to appropriate property already owned in common must be viewed as constituting nothing short of theft – just as one individual's personal labour to steal from another's private property constitutes theft – unless the following extremely critical stipulation is met: "For this labor being the unquestionable property of the laborer, no man but he

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32 Some might be tempted to argue that on this issue Locke is clearly at odds with Bentham's utilitarianism, as he could be read to imply that no individual can legitimately be sacrificed for some calculation of the greater good. However, Locke ultimately grants civil society exclusive authority to regulate property for the public good. And a utilitarian calculation of what the public good is regarding property regulation is not out of the realm of possibility. Similarly, though it might be argued that Locke is guilty of rejecting Burke's views on the absolute necessity of preserving hereditary property rights, even here Locke is not necessarily anti-Burke, as a Burkean answer to the question of property rights is not ipso facto out of the realm of reason for those with political power in civil society.

33 Locke, above n 12, at ch 5, section 27.

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*".[34]

To put it plainly, Locke's logic, at least in this passage, demands that every time a new baby is born into the world, before any living individual can continue to claim an absolute right to any private property, he or she must ask and truthfully answer: Is there still "enough and as good left in common for" this new child? If the answer ever becomes no, then, according to Locke, reason tells us that no absolute claim to a right to property can be justified. Once scarcity is the norm, Locke argues the regulation of property for the public good is demanded by the very natural law that in a state of non-scarcity makes it possible for individuals to claim any property rights: each individual's right to life, liberty, and property. Under the reality of scarce resources, reason tells us that the right to determine the rules whereby any individual may claim any property, must become fully that of civil society and the exclusive exercise of its rightful political power.[35]

Locke's further discussion of the irrationality of hoarding before the human invention of money can be read as solidifying this argument. Locke sees no rational purpose for an individual to take more from the commons than could personally be used without spoiling. To engage in this behaviour is irrational; it makes no sense, it is "nonsense upon stilts".[36] It is only with the human invention of money, which Locke emphasises is a purely social invention, does accumulating wealth beyond immediate personal need become rational. Since money is a human invention, the practice of hoarding should not be mistaken as being necessarily natural. It is a human construct:[37]

> And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them: for supposing an island, separate from all possible commerce with the rest of the world, wherein there were but an hundred families, but there were sheep, horses and cows, with other useful animals, wholesome fruits, and land enough for corn for a hundred thousand times as many, but nothing in the island, either because of its commonness, or perishableness, fit to supply the place of money; what reason could any one have there

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34 At ch 5, section 27 (emphasis added). Again, as I acknowledge in n 22 above, Jeremy Waldron makes a strong argument for why we cannot read the entirety of Locke's essay as suggesting that this provision provides a separate limitation on property. And indeed, through much of the essay Locke does seem to forget this provision altogether and I feel no need to quarrel with Waldron's interpretation. Nevertheless, in this particular passage, Locke recognises that to take from others is stealing – no matter how much labour we put into the process and I see no reason to abandon this provision when attempting to use Locke to our best advantage today.

35 Locke says this even more directly in discussing the fact that while any man or minority of men who have merely given tacit consent to the laws under which they find themselves may freely leave a society under government, they cannot take their possessions with them unless the form of property regulation allows it: Locke, above n 12, ch 8, sections 120–121).

36 Bentham, above n 2, at 53.

37 Locke, above n 12, at ch 5, section 48.

> to enlarge his possessions beyond the use of his family, and a plentiful supply to its consumption, either in what their own industry produced, or they could barter for like perishable, useful commodities, with others? Where there is not some thing, both lasting and scarce, and so valuable to be hoarded up, there men will not be apt to enlarge their possessions of land, were it never so rich, never so free for them to take.

Significantly, by underscoring the fact that Locke himself emphasised that money is a purely social convention, we can easily view him as in harmony with Burke's and Bentham's lists of concerns. There is no natural right to enjoy the value of socially-constructed money and hence no natural right to a money-enabled anarchistic market economy. Further, with the creation of money, Locke reasons, property regulation becomes a most important social affair:[38]

> 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 labor yet makes, in great part, the measure, it is plain that men have agreed to a disproportionate and unequal possession of the earth, they having, by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver which may be hoarded up without injury to any one, these metals not spoiling or decaying in the hands of the possessor. This partage of things in an inequality of private possessions men have made practicable out of the bounds of society and without compact, only by putting a value on gold and silver, and tacitly agreeing in the use of money; for, in governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions.

In sum, whether Locke fully intended this outcome or not, his argument in ch 5 can easily be read to suggest that the original conception of unregulated private property could only work in a world of no scarcity and no money. Once humans entered the social arrangement of money coupled with a growth in human population and the inevitable onset of scarcity, there can no longer be an absolute right to property: *all* regulation of property becomes the primary function of political power. In fact, once again, not unlike Hobbes' notions of sovereignty, in ch 7, Locke could be read as emphasising that political power must involve civil society having monopoly authority over all property decisions:[39]

> But because no political society can be nor subsist, without having in itself the power to preserve the property and, in order thereunto, punish the offenses of all those of that society, there and there only is political society where every one of the members has quitted his 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 particular member being excluded, the community comes to be umpire by settled standing rules* …

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38 At ch 5, section 50.

39 At ch 7, section 87 (emphasis added).

This reading of Locke turns the contemporary libertarian view of Locke on its head. It suggests that Locke actually rejected the position that government's primary responsibility is to preserve individual property rights. I acknowledge that in ch 11, Locke could be read as fully supporting the libertarian view by stating that the very purpose humans leave the state of nature and form civil society is to better protect their property. However, there is no reason to read this passage without connecting it to what Locke has amply argued regarding civil society and political power. Any property right enjoyed by an individual living in civil society is fully determined by society. Furthermore, at one point Locke appears to advocate the "preservation of the society" as well as "the public good" above any particular individual property right.[40] Note the following statement where he actually qualifies the importance of preserving any particular individual interest. He could even be viewed as consistent with a fairly extreme version of Bentham's utilitarianism. Individuals need only be preserved when their preservation is consistent with the public good:[41]

> The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law which is to govern even the legislative itself is the preservation of the society *and, as far as will consist with the public good*, of every person in it.

In short, this reading of Locke implies that to look to Locke to justify unregulated private property rights, or for that matter, to justify any kind of entrenched bill of rights protecting private property is wrongheaded. That said, it is not clear that Locke's logic for making sense of civil society's political power to regulate property satisfactorily answers Bentham's concern that any talk of private property rights that exist outside those that are understood to be legally derived makes it more difficult for government to extract sacrifices from individuals. Nor does Locke's logic satisfactorily respond to Burke's criticism that human reason can account for all questions regarding property. By attempting to make sense of property rights, it is possible that Locke did make it more difficult to justify any government regulation of property as we see with libertarian readings on Locke and as we see with Supreme Court decisions in the United States. It is to this issue that I turn to now.

IV LOCKE ON MAJORITY RULE, LEGISLATIVE JUDICIAL REVIEW AND INDIVIDUAL ANARCHY

Having examined Locke's understanding of the extent and purpose of political power in civil society, I am now ready to look to Locke's ideas regarding the legislative power and majority rule. Once again, I demonstrate that Locke is fully incongruent with the anarchical notion of a right to individual judgement within civil society. Simply stated: Locke is no anarchist. In civil society,

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40 At ch 11, section 134.

41 At ch 11, section 134 (emphasis added).

Locke grants all legislative authority to the majority.[42] With this understanding, it becomes clear that Locke provides no justification for an entrenched bill of rights that empowers judges to exercise legislative judicial review as a means of promoting individual rights against society.

Indeed, Locke envisions no room for an entrenched bill of rights protecting individuals from what he sees as the legitimately constituted legislative authority of civil society. On this point, Locke seems rather unambiguous in stating that the legislative power "is not only the supreme power of the commonwealth," it is "sacred and unalterable in the hands where the community have once placed it".[43] We find no justification for legislative judicial review in this language. In fact, Locke does not even concern himself with a separate judicial power in all of the *Second Treatise* (judicial power appears to be nothing but an extension of executive power for Locke), and if we acknowledge that legislative judicial review ultimately amounts to legislating from the bench, Locke's final point in ch 11 emphatically rejects this form of judicial review altogether:[44]

> Fourthly, the legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

Locke's majoritarian doctrine could be read as rather absolute. However, he differentiates himself from legal positivism by emphasising that any legitimate legislature must abide by the law of nature: the "law of nature stands as an eternal rule to all men, legislators as well as others".[45] This language would appear to support Bentham's concern over the anarchical nature of natural law talk.[46] But it is not as if Locke does not anticipate this concern. Note, for example, when Locke

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42 Of course, we should not get carried away in seeing Locke as a modern day democrat. His "majority" was not unlike the majority in ancient "democratic" Athens where citizenship was rather limited.

43 Locke, above n 12, at ch 11, section 134.

44 At ch 11, section 141.

45 At ch 11, section 135.

46 Bentham, above n 2, at 48–49.

argues that legislatures cannot take away an individual's property "without their own consent".[47] He qualifies consent with a purely majoritarian stance:[48]

> It is true, governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent—i.e., *the consent of the majority … .*

At this point we should consider why Locke sees majority consent as necessary for civil government. Remember that in the state of nature, what is lacking is any common judge to settle disputes that individuals are incapable of resolving in the course of human interaction. Locke sees it as not only reasonable but essential to look to a common judge and, as I noted above, in this way Locke is consistent with Burke's (and even Hobbes') idea that civil society demands absolute authority to settle disputes between individuals.[49] Locke further explains that it would be entirely inconvenient for individuals to personally be responsible for executing the necessary punishment of violators. Hence reason drives individuals into civil society and by this very act, Locke argues, every person becomes bound by the will of the majority. To argue otherwise, Locke reasons, would be the same as having no civil society at all. Again, Locke is no anarchist:[50]

> And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free and under no other ties than he was in before in the state of nature. For what appearance would there be of any compact: What new engagement if he were no further tied by any decrees of the society than he himself thought fit and did actually consent to? This would be still as great a liberty as he himself had before his compact, or anyone else in the state of nature has who may submit himself and consent to any acts of it if he thinks fit.

It is also necessary to note that Locke's position on the majority right to rule remains consistent even within his final chapter, *Of the Dissolution of Government*, where Locke emphasises that legislative bodies can indeed violate the law of nature, and when they do the people have a right and even obligation to dissolve government. Again, importantly for Locke, the making of any determination of this sort is not an individual or private matter. Locke leaves this determination to the majority as well:[51]

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47 Locke, above n 12, at ch 11, section 138.

48 At ch 11, section 140 (emphasis added).

49 Burke, above n 5, at 104–105.

50 Locke, above n 12, at ch 8, section 97.

51 At ch 19, sections 240, 242 and 243.

> Who shall be judge whether the prince or legislative act contrary to their trust? This, perhaps, ill-affected and factious men may spread amongst the people, when the prince only makes use of his due prerogative. To this I reply: The people shall be judge; for who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him but he who deputes him and must, by having deputed him, have still a power to discard him when he fails in his trust?
>
> …
>
> If a controversy arise betwixt a prince and some of the people in a matter where the law is silent or doubtful, and the thing be of great consequence, I should think the proper umpire in such a case should be the body of the people.
>
> …
>
> To conclude, the power that every individual gave the society when entered into it can never revert to the individuals again as long as the society lasts, but will always remain in the community, because without this there can be no community, no commonwealth, which is contrary to the original agreement …

With his commitment to the principle of majority rule, Locke attempts to insulate rights-based logic from promoting individual anarchism. But is it possible, or even probable, that by suggesting that government cannot take away an individual's property without consent – even with the stipulation that consent means the consent of the majority – Locke makes it more difficult to call upon individuals to sacrifice for the good of the whole? By establishing majority rule on rights-based theory, does Locke do enough to counter the individual anarchism Bentham is concerned with?

A look at how individuals in America continue to feel empowered by the ideal of absolute rights might imply otherwise. As can be seen by looking at several recent examples, individual free choice remains an article of faith on both the left and right in American politics. In 2011, federal officials rejected New York City Mayor Michael Bloomberg's proposal to bar New York City residents from using federal government issued food stamps to purchase sugary drinks.[52] Rather than even attempting to refute studies indicating that banning such purchases would do much to reduce obesity and diabetes among America's less well off, President Obama's Secretary of Agriculture, Tom Vilsack, positioned himself as fundamentally opposed to taking away freedom of choice from those receiving food stamps, and the Mayor's proposal was scuttled.[53] In a similar way of thinking, conservative critics of President Obama's signature healthcare policy argued that forcing people to buy health insurance opens the door to allowing Congress to require adults to eat broccoli – as if this

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52 Patrick McGeehan "US Rejects Mayor's Plan to Ban Use of Food Stamps to Buy Soda" *The New York Times* (online ed, New York, 19 August 2011).

53 McGeehan, above n 52.

claim alone should be enough to reject the president's healthcare policy.[54] Finally, after receiving federal bailouts, CEOs of United States automakers and large banks continue to find saliency in appealing to the ideal of free choice and private property to resist government regulation of their 'private' business practices. Americans remain quite willing to embrace the individual benefits of welfare policy – be they for the rich or the poor – without being fully willing to accept individual sacrifice for serving the public good. Moreover, as indicated at the outset, the United States Supreme Court continues to use the language of individual rights to thwart public initiatives aimed at promoting a public good. In the United States, an entrenched Bill of Rights appears to promote this anti-Lockean anarchical thinking.

Nevertheless, the American experience is not necessarily definitive on this question. The American sense of individual liberty that borders on the anarchism Burke and Bentham are concerned with could be due to an irrational and outright rejection of Locke's commitment to the compromises necessary for civil society to function, as well as a commitment to majority rule. One could argue that in adopting their entrenched Bill of Rights along with the power of legislative judicial review, Americans ultimately rejected Locke and the standards he puts in place to avoid anarchistic tendencies. If American citizens did not have access to the arguably non-Lockean Bill of Rights and the arguably non-Lockean Supreme Court willing to overturn Locke's "sacred" legislative authority,[55] it is not clear that a rights-based Lockean foundation would necessarily lead to the American situation where a commitment to absolute individual rights often frustrates legislative attempts to serve the majority's interpretation of the public good. We cannot really know.

V CONCLUSION

Contrary to the theory expressed in the American Bill of Rights, John Locke can easily be read as implying that civil society simply cannot exist simultaneously with any attempt to preserve individual rights outside those that are socially determined. Locke can therefore be read as in full agreement with Burke and Bentham on this crucial point. Furthermore, there is no place in Locke to discover the power of legislative judicial review where individuals are empowered to ask unelected judges to sit in judgement over the "sacred" legislative authority of the majority in pursuit of protecting individual rights.[56] Locke leaves all judgement of political matters to the majority's representatives. The giving up of this individual right of discretion is the essence of civil society. Indeed, as Jeffrey Goldsworthy observes, Locke ultimately justifies parliamentary sovereignty.[57]

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54 Daniel Fisher "Obamacare Judges Must Answer the 'Broccoli Question'" (18 November 2011) Forbes <www.forbes.com>.

55 Locke, above n 12, at ch 11, section 134.

56 At ch 11, section 134.

57 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, New York 1999).

In essence, therefore, it could be argued that Americans fundamentally reject Locke (not to mention Burke and Bentham) in their desire to preserve absolute individual rights against the majority. It is also important to recognise that it is this desire to preserve individual rights that has led to the extraordinary power of the Supreme Court in the United States. Though Court activism remains controversial in the United States, there is little question that one of the Court's primary responsibilities is to check legislative bodies on the basis of preserving individual rights.

That said, any attempt to fully address the argument that Locke's beginning point naturally leads to an over-emphasis on individual rights at the expense of the public good needs to take into consideration the fact that the practice of legislative judicial review has never been codified in positive law in the United States. This implies that the Supreme Court's power to frustrate the will of legislative bodies must be attributed primarily to the American cultural commitment to the principle of individual rights and not because of any formally designated political authority. It is also significant that though Thomas Jefferson uses Locke's logic to justify a separation from England, he, along with all those who signed the American Declaration of Independence, did not wait for a majority to determine that it was necessary to dissolve government. Locke's logic of looking to individual rights as the starting-point for making sense of extensive governmental power has not kept individual thinkers from deeply questioning such power.

As my New Zealand readers understand all too well, a society's constitution is much more than any particular written document, and there must be something distinct about American political culture – and not its written constitution alone – that leads Americans toward embracing what Bentham would inevitably call a nonsensical rights-based interpretation of John Locke. In other words, one might be tempted to think it possible to build a society on Locke's *Second Treatise* emphasis of natural law rights without having to embrace an American-style irrational commitment to rights and the accompanying anarchical results Bentham and Burke are concerned with. But even the reading of Locke provided in this article fails to address Bentham's concern that talk of natural rights results in the limitation of government's ability to emphasise the essential need for personal sacrifice. Rights-based theories may simply start with too much focus on self-gratification. When that emphasis is entrenched in a bill of rights, the natural result could very well be anarchical in nature.

From my limited outsider's perspective, New Zealand's constitution seems largely based on Bentham's and Burke's understanding that the real rights of individuals are legally derived and come from fully participating and sacrificing in society. But that is only part of the story. Along with historian David Hackett Fischer, I have a deep appreciation for the extra-legal New Zealand constitution and its commitment to seeking fairness. Legal positivism does not come close to describing New Zealand's constitution, even with its commitment to parliamentary sovereignty. In other words, New Zealand also appears to be deeply influenced by notions of natural law rights-based theory. It should also be noted that any written constitution that New Zealand were to adopt would operate within New Zealand's larger unwritten constitution. So I doubt that the adoption of an

entrenched constitution would inevitably lead New Zealand to replicate all of the flaws in the American experience. But I am also not convinced that any historical tradition would be enough to fully protect a society against the ills Burke and Bentham warn against with the institutionalisation of natural law rights. Indeed, the very act of adopting an entrenched bill of rights may be where America got off to a wrong start. In spite of an unwillingness to formally grant the Supreme Court the power of legislative judicial review, and in spite of the fact that figures of no less importance than Alexander Hamilton, Thomas Jefferson, and Abraham Lincoln vocally rejected the idea that the United States Constitution grants that Supreme Court opinions which automatically become the law of the land, the dynamic of an entrenched bill of rights seems almost willy-nilly to empower the Supreme Court of the United States to frustrate legislative initiatives aimed at pursuing the public good.