understand, let alone to explain, the very practices of thought and action that provide the shared framework for it.[14]

On the other hand, the historical investigations that have set aside this problem as their organizing principle have helped to bring to light some of the practices that have become constitutive of (capitalist and socialist) modernity, and so of our identity as moderns – the foundations of modern political thought and action. They help us to see how these were constructed and conventionalized, and the alternative forms of political life they supplanted or marginalized. As a result, the studies of Ashcraft, Foucault, Merchant, Pocock, Skinner, and Taylor give us, I believe, a clearer survey of the formation of the practices in which we are participants and the possibilities for modifying them; for thinking and acting differently.[15]

[14] See John Dunn, 'The future of political philosophy in the West', *Rethinking modern political theory* (Cambridge: Cambridge University Press, 1985), 171–90.

[15] Michel Foucault, 'Omnes et singulation: towards a criticism of "political reason"', *The Tanner lectures on human value*, ed. S. M. McMurrin (Cambridge: Cambridge University Press, 1981), 225–54; Carolyn Merchant, *The death of nature* (New York: Harper and Row, 1983); John Pocock, 'Virtues, rights, and manner', *Virtue, commerce and history* (Cambridge: Cambridge University Press, 1985), 37–51; Quentin Skinner, 'The idea of negative liberty: philosophical and historical perspectives', *Philosophy in history*, ed. R. Rorty (Cambridge: Cambridge University Press, 1984), 193–224; and two articles to which I am particularly indebted, Charles Taylor, 'Overcoming epistemology', *After philosophy*, ed. K. Baynes (Cambridge, Mass.: MIT Press, 1987), 464–88, and 'Philosophy and its history', *Philosophy in history*, ed. R. Rorty, 17–31.

CHAPTER 5

Rediscovering America: the Two treatises and aboriginal rights

INTRODUCTION

Three hundred years after its publication the *Two treatises* continues to present one of the major political philosophies of the modern world. By this I mean it provides a set of concepts we standardly use to represent and reflect on contemporary politics. This arrangement of concepts is not the only form of reflection on modern politics, not our 'horizon' so to speak, but it is a familiar and customary one.

At the centre of Locke's political philosophy is a theory that accounts for much of its appeal. This is a delegation theory of popular sovereignty built out of two concepts: political society and property. First, political societies are said to be derived from the delegated political powers of the individual members. The members always retain the right to regain these powers when their governors act contrary to their trust, overthrow them by means of revolution, and set up new governors as they think good. Second, the productive powers of any political society are said to be derived from the labour power, the property, of the individual members. These powers also are, as Locke puts it, 'given up' in establishing political societies so they may be 'regulated' by government for the public good. Again, if labour power is regulated contrary to the trust the members have the right to overthrow their governors and set up new ones.

Many of the leading problems of the modern world, as well as the diverse solutions to them, can be and have been posed in the terms of this theory of popular sovereignty. Locke's concept of political society provides the foundation for questions of political legitimacy: What constitutes consent to delegate political power? How much power should be delegated and for what ends? What levels of participation and representation are appropriate? When is revolt justifiable? His concept of property provides the foundation for questions of economic

justice: To what extent should labour power be regulated? Can it be organized without exploitation? What is a just distribution of the products of labour? These great questions of political and economic justice, from the Scottish enlightenment through Wollstonecraft, Marx, and Mill to Rawls and Dworkin, have been asked and answered to a remarkable degree within the problem space opened up by Locke's concepts of political society and property.[1]

In this chapter I do not wish to deny that these two concepts provide an appropriate and useful representation of many aspects of modern politics. Rather, I would like to argue that the concepts of political society and property are inappropriate to and misrepresent two specific political problems: the problems of aboriginal self-government and ecology. These two problems are closely related. The struggle of aboriginal peoples for recognition as self-governing first nations is not only a struggle to right an injustice that dates from the era of European expansion: the denial of their status as distinct political societies with title to their traditional lands. It is also a struggle to reclaim their traditional lands and to practise their customary forms of land-use. This has brought them into direct conflict with the modern forms of land-use that pose the greatest threat to the environment. Whether they are the Maori of New Zealand, the aboriginal peoples of the Amazon rain forests or the Haida of the Queen Charlotte Islands, the 250 million aboriginal peoples are at the forefront of the ecological movement. The ecologically benign forms of land use, attitudes to nature and property relations they seek to preserve seem to offer an alternative to the ecologically destructive forms of property and attitudes to nature that have gradually elbowed theirs aside over the last 400 years. I mean that aboriginal land use and property relations offer an alternative, not in the sense of a solution, but in the sense of a contrasting concept of property that is different enough from our own to give us the much needed critical distance from the basic assumptions that continue to inform our debates about property and ecology.[2]

The reason why Locke's concepts of political society and property

[1] See, for example, Ian Shapiro, 'Resources, capacities and ownership: The workmanship ideal and distributive justice', *Political Theory* 19, 1 (Feb. 1991), 47–73.

[2] For an introduction see Juliam Burger, *First peoples: a future for the indigenous world* (New York: Anchor Books, 1990).

are inadequate to represent these two problems clearly is that Locke constructed them in contrast to Amerindian forms of nationhood and property in such a way that they obscure and downgrade the distinctive features of Amerindian polity and property. Let me state this thesis in two parts. First, Locke defines political society in such a way that Amerindian government does not qualify as a legitimate form of political society. Rather, it is construed as a historically less developed form of European political organization located in the later stages of the 'state of nature' and thus not on a par with modern European political formations. Second, Locke defines property in such a way that Amerindian customary land use is not a legitimate type of property. Rather, it is construed as individual labour-based possession and assimilated to an earlier stage of European development in the state of nature, and thus not on equal footing with European property. Amerindian political formations and property are thereby subjected to the sovereignty of European concepts of politics and property. Furthermore, these concepts serve to justify the dispossession of Amerindians of their political organizations and territories, and to vindicate the superiority of European, and specifically English, forms of political society and property established in the new world. In using these concepts in this way Locke was intervening in one of the major political and ideological contests of the seventeenth century.

What were the long-term consequences? Locke's theory of political society and property was widely disseminated in the eighteenth century and woven into theories of progress, development, and statehood. Debates – between jurists and humanists, free traders and mercantilists, and capitalists and socialists – over the great questions of political and economic justice have thus tended, as we have seen, to work within this basic conceptual framework. Consequently, in interpreting the *Two treatises* there is a similar tendency to overlook the European–Amerindian context and to ask questions which take the concepts for granted.[3] Indeed, the very manner in which Locke

[3] There are notable exceptions to this tendency to ignore the American context. See Richard Ashcraft, 'Political theory and political reform: John Locke's essay on Virginia', *The Western Political Quarterly* 22, 4 (December 1969), 742–58; John Dunn, 'The politics of Locke in England and America in the eighteenth century', *John Locke: problems and perspectives*, ed. John Yolton, (Cambridge: Cambridge University Press, 1969), 45–80; Peter Laslett, 'John Locke, the great recoinage, and the origins of the board of trade: 1695–1698', *ibid.*, 137–65; Herman Lebovics, 'The uses of America in Locke's *Second Treatise of government*', *Journal of the history of ideas* 47 (1986), 567–81.

arranged these concepts causes a reader to overlook the way European concepts of political society and property are imposed over and subsume Amerindian nations and property (thus foreshadowing what was to occur to a large extent in practice in the following centuries). One misses the philosophical and ideological contest in the text between European and Amerindian sovereignty and property (for a reader sees only the result of the contest) and misunderstands some of the basic arguments of the text. Moreover, insofar as these concepts of political society and property continue to be taken for granted, aboriginal claims to self-government are misunderstood. And, the critical perspective on the ecological crisis that their systems of property and resource use could provide is correspondingly lost.

Accordingly, my aim in this chapter is to recover the context in which Locke presented the concepts of political society and property in contrast with Amerindian forms of government and property, and to show how this increases and alters our understanding of the *Two treatises*. By setting out a clear view of how these four concepts were arranged, I also hope to loosen their continuing hold on political thought today.[4] The chapter consists in four sections. The first two are on the role of the state of nature and the account of state formation in the *Two treatises* in the light of the Amerindian context. A brief section on the uses of Locke's arguments in the eighteenth century follows, and the conclusion brings the issue up to the present.

DISPOSSESSION: THE ROLE OF THE STATE OF NATURE

Locke had extensive knowledge of and interest in European contact with aboriginal peoples. A large number of books in his library are accounts of European exploration, colonization and of aboriginal peoples, especially Amerindians and their ways. As secretary to Lord Shaftesbury, secretary of the Lord Proprietors of Carolina (1668–71), secretary to the Council of Trade and Plantations (1673–4), and member of the Board of Trade (1696–1700), Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system during the Restoration. He invested in the slave-trading Royal Africa Company (1671) and the Company of Merchant Adventurers to trade with the Bahamas (1672), and he was

[4] For this type of approach see James Tully, ed., *Meaning and context: Quentin Skinner and his critics* (Princeton: Princeton University Press, 1988).

a Landgrave of the proprietary government of Carolina. His theoretical and policy-making writings on colonial affairs include the *Fundamental Constitutions of Carolina* (1669), Carolina's agrarian laws (1671–2), a reform proposal for Virginia (1696), memoranda and policy recommendations for the boards of trade, covering all the colonies, histories of European exploration and settlement, and manuscripts on a wide range of topics concerning government and property in America.[5]

In the *Two treatises* America is immediately identified as one example of the 'state of nature' and then classified as the earliest 'age' in a worldwide historical development. '[I]n the beginning all the World was *America*' Locke asserts in section 49.[6] America is 'still a Pattern of the first Ages in *Asia* and *Europe*' (108), and Amerindians and Europeans who make contact with them 'are perfectly in a State of Nature' (14, cf. 109).

The two basic elements of his theory of popular sovereignty in a state of nature are illustrated by examples of life in native America. First, the inhabitants exercise what has come to be called 'individual popular sovereignty' or 'individual self-government'. That is, 'the *Execution* of the Law of Nature is in that State, put into every Mans hands' (7). This individual and natural exercise of political power comprises the abilities to know and to interpret standards of right (natural laws), to judge controversies concerning oneself and others in accordance with these laws, and to execute such judgements by punishments proportionate to the transgression and appropriate for purposes of restraint and reparation (7–12, 136). Individuals are free to order their actions within the bounds of natural laws and are equal

[5] There is no collection of Locke's colonial writings nor even a bibliography of them. See John Locke, *The fundamental constitutions of Carolina*, *The works of John Locke*, 10 vols (Germany, Scientis Verlag Aalen, 1963) (a reprint of the 1823 edition), x. This volume also contains 'The whole history of navigation from its original to this time' (1704), 358–511, sometimes attributed to Locke. John Locke, 'Some chief grievances of the present constitution of Virginia . . .', Bodleian, Locke MS. e. 9. Bodleian, Locke MS. c. 30 is on colonial affairs. See also W. Noel Sainsbury, ed., *Calendar of state papers, colonial series, America and the West Indies*, 43 vols (London, 1862), esp. IX–XI, *Records in the British public record office relating to South Carolina 1663–1710*, 5 vols. (Cambridge: Cambridge University Press, 1928–47), Langdom Cheves, ed. *The Shaftesbury papers and other records relating to Carolina . . . to 1676, South Carolina historical society collections* 5 (London: 1897).

[6] All quotations from John Locke, *Two treatises of government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1970). Numbers in brackets refer to sections in the *Second treatise* unless preceded by a 1.

in the 'Power and Jurisdiction' to govern the actions of those who transgress these bounds (4,6). This system of individual self-government is illustrated with examples from America (9, 14, 107). Political society is then defined in explicit contrast to this natural mode of individual self-government: namely, where individuals have given their 'natural power' to the community and set up 'a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders' (87).

The second aspect of life in America that is definitive of the state of nature is individual and exclusive rights over one's labour and its products. Everyone is free to exercise their labour in accordance with natural law for the sake of preservation and without the consent of others. Appropriation without consent is illustrated with examples of Amerindians acquiring fruit and venison (26), hunting deer (30), growing corn (48), and so on. Property in political society is then defined in explicit contrast to their natural mode of labour-based property: namely, where labour, appropriation and its products are regulated by government and positive laws (30, 38, 50, 129).

Two major conclusions follow from the premise that America is a state of nature. First, Locke claims in the *First treatise* that no one doubts that European planters have a right to wage war 'against the *Indians*, [and] to seek Reparation upon any injury received from them', and this without authorization from a constituted political authority (1.130, cf. 1.131). In this case, a European planter in the West Indies is exercising his right to execute the law of nature and seek reparations as explained in the *Second treatise*. Although Locke calls this a 'strange Doctrine' (9), there is one sense in which it is commonplace.

Within the long reflection on European contact with America from 1492 to 1690, a number of justifications were advanced for the assertion of European sovereignty over the new world. Papal grants, royal charters, symbolic acts, such as the planting of crosses, discovery and occupation, the right to trade, and the duty to spread Christianity to non-Christians were the most common. Objections were raised to each of these justifications by writers such as Francisco de Vitoria (1480–1552), Alonso de la Vera Cruz (1507–84), and Bartholomé de Las Casas (1484–1566).[7] After advancing a number of objections to

[7] For surveys of European justifications for sovereignty in America see Delia Opekokew, *The first nations: Indian government and the Canadian confederation* (Saskatoon: Federation of Saskatchewan Indians, 1980); Brian Slattery, *Ancestral lands, alien laws: judicial perspectives on aboriginal title* (Saskatoon: University of Saskatchewan Native law centre, 1983); Wilcomb E. Washburn, 'The moral and legal justifications for dispossessing the Indians', *Seventeenth-century America, essays in colonial history*, ed. James M. Smith (Chapel Hill: University of North Carolina, 1959), 15–32; Ruth Barnes Moynihan, 'The patent and the Indians: The problem of jurisdiction in 17th century New England', *American Indian culture and research* 2, 1 (1977) 8–18; Chester Eisenger, 'The Puritan justification for taking the land', *Essex Institute historical collections* 84 (1948) 131–43; Maureen Davies, 'Aspects of aboriginal rights in international law', *Aboriginal peoples and the law*, ed. Bradford Morse (Ottawa: Carleton University Press, 1985), 16–47; James Muldoon, *Popes, lawyers, and infidels* (Pennsylvania: University of Pennsylvania Press, 1979); L. C. Green and Olive P. Dickason, *The law of nations and the new world* (Calgary: The University of Alberta Press, 1988); Robert A. Williams jr, *The American Indian in Western legal thought: the discourse of conquest* (Oxford: Oxford University Press, 1991).

the standard justifications, Vitoria concluded his long discussion with a justification of conquest he believed to be invulnerable. Since both Spaniards and Amerindians are in the state of nature, if the Spaniards conduct themselves in accordance with the law of nature, then they have the right to defend themselves against any wrong committed by the Amerindians 'and to avail themselves of the rights of war'.[8] The natural right of self-defence to proceed with force against the violators of natural law was adapted by Francisco Suarez (1548–1617), Hugo Grotius (1583–1645), and Samuel Pufendorf (1632–94). Locke's 'strange Doctrine', although it differs in some respects from the arguments of his predecessors, is a reassertion of this conventional justification of war and, as we have seen, Locke uses it in this context.

When a person violates natural law they lose their natural rights and they may be enslaved or killed (16–24). Scholars who work on this part of Locke's theory assume that it refers to black slavery.[9] Notwithstanding, it may also refer to Amerindian slavery. Of all the English colonies, Carolina had the largest slave trade. In 1663 eight proprietors were granted full title to the area that covers most of present-day North Carolina, all of South Carolina and almost all of Georgia. The proprietors established government and a system of property in order to recruit settlers to engage in agriculture, initially drawing surplus planters from Barbados. Lord Shaftesbury and Locke assumed leadership of the project in 1669. Their plan was to make a profit from land-rent and the trade of agricultural products. The colonists turned instead to the more lucrative fur and slave trade with the Amerindians, even though this was expressly forbidden in article 112 of the constitution. Agriculture failed, the settlers became

[8] Francisco de Vitoria, *De Indis et de jure belli relectiones*, Classics of International Law (Oxford: Clarendon Press, 1917), section II (p. 153e).

[9] This scholarship is reviewed in Wayne Glausser, 'Three approaches to Locke and the slave trade', *Journal of the History of Ideas* 51, 2 (April–June 1990), 199–216.

heavily indebted to the proprietors, little profit accrued to the proprietors and the trade with the coastal native nations, the Cusabos and Coosas, led to conflict. Locke introduced a temporary law in 1672 forbidding Amerindian slavery and offering the native peoples individual plots of land under proprietary government. The colonists ignored the law and, after the 1674 peace treaty with the powerful Westos nation against the Spanish to the south, they expanded their trade. The Lords Proprietor responded with an unsuccessful proposal to settle a new group of planters at Locke's island and with an attempt to control the Indian trade themselves, declaring a monopoly in 1677. By 1680 the fur trade and the sale of Indian slaves to the West Indies were the staples of Carolina's economy.[10]

When either slavery failed or all other means of dealing with the Amerindians proved ineffective, the practice in the colonies was to make war against the local tribes in a piecemeal fashion. For example, the colonists in Carolina revolted against the proprietors' monopoly on Indian trade, declared war on the Westos in 1679 and killed those they were unable to enslave. The usual justification for wars of this type was that the Indians had resisted the settlers in some way or stolen something, and so violated natural law, activating the settlers' right to defend themselves and avail themselves of the rights of war.[11]

Locke underscores in no uncertain terms the natural law right to punish theft and violence with death and he construes this as a state of war (8–11, 17–19). I am quite aware that these passages in chapters 2 and 3 are standardly interpreted as references to the right to punish Charles II in an armed revolt. Be this as it may, the very terms Locke uses to describe the offenders who may be 'destroyed' are the terms used to describe, and so dehumanize Amerindians in the books in Locke's library.[12] Offenders are characterized as 'wild Savage Beats'

[10] Bodleian, Locke MS. c. 6, fols 213, 216 and c. 30; *Records BPROSC, II.* 200, Cheves ed., *Shaftesbury papers*, 171–3, 193, 266–7, 311, 352, 381–2, 400, 432. The Agrarian law of June 21, 1672 is in William J. Rivers, *A sketch of the history of South Carolina to the close of the proprietary government by the revolution of 1719* (Charleston, 1856), 358. See Herbert R. Pascal, 'Proprietary North Carolina: a study in Colonial government' (Ph.D. dissertation, University of North Carolina, 1961).

[11] For the war of 1679 see M. Eugene Sirmans, *Colonial South Carolina* (Chapel Hill: University of North Carolina Press, 1966), 3–75. For the use of just war arguments, see Francis Jennings, *The invasion of America: Indians, colonialism and the cant of conquest* (New York: W. W. Norton, 1975) 105–28.

[12] For example, John Smith, *A description of New England* (London: 1616). See, in general, Robert F. Berkhofer, *The white man's Indian: images of the American Indian from Columbus to the present* (New York: Knopf, 1978).

who 'may be destroyed as a *Lyon or a Tyger*' (11, 16). In section 10 the natural right of the governments of England, France and Holland to punish or put to death 'an Indian' who violates natural law is put forward as the proof and illustration of this violent doctrine.

The second major conclusion Locke draws from the premise that America is a state of nature is that appropriation of land may take place without consent. Appropriation without consent is the main argument of chapter 5. The sections are carefully organized to prove and substantiate it. Nor is it surprising that Locke took such care in presenting his argument, for it is a departure from his earlier views, from the views of earlier natural law writers, and from the fundamental principle of western law: *Quod omnes tangit ab omnibus tractari et approbari debet* (what touches all must be approved by all).[13]

Appropriation without consent has given rise to more commentary than any other argument in Locke's political philosophy. The problem is to show how appropriation can take place given the background premise that everyone has a natural right to the means of preservation.[14] This is a problem generated in part and in theory by Filmer's criticism of the role of consent to property in Grotius' theory, but in some of the secondary literature the background premise is overlooked and it is then mistaken as solely a problem of justifying the division of English and European societies into propertied and propertyless classes.[15] The fact that the chapter is organized around a contrast between Europe, where appropriation without consent is not permitted because political societies exist, and America, where appropriation without consent is permitted because it is a state of nature, is rarely mentioned. That the argument justifies European settlement in America without the consent of the native people, one of

[13] For Locke's earlier view that property must be based on consent, see 'Morality', Bodleian, MS. Locke c. 28, fols 13–40. For his predecessors see James Tully, *A discourse on property: John Locke and his adversaries* (Cambridge: Cambridge University Press, 1980).

[14] For the background premise and the full theoretical framework of Locke's argument see Tully, *A discourse on property*, 53–95; Richard Ashcraft, *Locke's Two treatises of government* (London: Hyman, 1987), 81–150; Gopal Sreenivasan, *The limits of Lockean rights in property* (Cambridge: Cambridge University Press, forthcoming); Stephen Buckle, *The natural history of property* (Oxford: Oxford University Press, 1991).

[15] For typical misinterpretations along these lines see Jeremy Waldron, *The right of private property* (Oxford: Oxford University Press, 1989); G. A. Cohen, 'Marx and Locke on land and labour', *Proceedings of the British Academy*, 71 (1985) 357–89; Neal Wood, *John Locke and agrarian capitalism* (Berkeley: University of California Press, 1984). For refutation, see chapter 4 above, Ashcraft, *Locke's Two treatises*, and Sreenivasan, *The Lockean limits*, for a detailed refutation of Cohen and Waldron.

the most contentious and important events of the seventeenth century and one of the formative events of the modern world, is normally passed over in silence. On the other hand, among scholars who specialize in the European dispossession of Amerindians reference to Locke's argument is commonplace.[16]

In the first section of chapter 5 Locke introduces appropriation without consent as the problem he endeavours to solve in the chapter (25, lines 16–19), and he says he has solved it in the middle and final sections (39 and 51). The appropriation of common fruits and nuts, fish and game, and vacant land by means of individual labour is legitimate and creates a property right in the products as long as they do not spoil and there is enough and as good left in common for others. No other forms of exclusive property are recognized and all land that is not actively under cultivation is said to be vacant. Appropriation without consent continues until money is introduced, land becomes scarce, and there is no longer enough and as good for others. Until then, 'there could be no doubt of Right, no room for quarrel' (39), and 'no reason of quarrelling about Title, nor any doubt about the largeness of Possession it gave' (51). Illustrating his solution throughout with examples drawn from America, Locke confidently concludes that any person could appropriate in-land vacant land in America without consent (36):

> let him plant in some in-land, vacant places of *America*, we shall find that the *Possessions* he could make himself upon the *measures* we have given, would not be very large, nor, even to this day, prejudice the rest of Mankind, or give them reason to complain, or think themselves injured by this Man's Incroachment.

The 'Controversie about . . . Title' and the 'Incroachment on the Right of Others' (51) by the 'Quarrelsom and Contentious', driven by 'Covetousness' (34), which Locke constantly refers to and claims to settle, raged across Europe and America from the early sixteenth century to well after 1690. These were controversies over title in the new world among competing European powers, jurisdictional disputes among the colonies, between colonists and their royal or proprietary governors, traders versus planters, and all of these against the aboriginal peoples who had been there for over 12,000 years.

[16] See William Cronon, *Changes in the land: Indians, colonists and the ecology of New England* (New York: Hill and Wang, 1983); and n. 7 above.

Much of Locke's work for the Boards of Trade and Carolina concerned these disputes.

By the early seventeenth century the accepted justification for the assertion of sovereignty in European international law was the discovery, occupation and defence of any part of America not already occupied by a Christian ruler, as long as the settlement was warranted by a charter or grant. Settlement and defence were said to constitute occupation and long usage, the oldest and most widely recognized principle of legal title in the world.[17] This served as a justification relative to other European nations, establishing the monopoly right of a particular European nation to treaty with the native nations within its sphere of influence to the exclusion of other European nations. It did not justify the assertion of sovereignty over the native nations or even the claim to establish co-sovereignty or trading arrangements with them. These relations with the ancient nations of America require a second step.[18] One answer to this further justificatory step was to ignore the Amerindians and to characterize America as *terra nullius*, a vacant land (a condition the principle of occupation and long usage requires). Another strategy was to downgrade the status of the aboriginal peoples to that of beasts or savages so no juridical recognition was required. Often a royal grant would simply grant explorers and invaders the right 'to subdue, occupy and possesse' the inhabitants, 'getting into us the rule, title, and jurisdiction', as Henry VII unsuccessfully commissioned John Cabot.[19]

The rationalizations in royal charters and inter-European agreements were out of touch with the real world of seventeenth-century America. The European newcomers were outnumbered by the natives and dependent upon them for food, trade, and survival. Under these conditions some form of recognition of and accommodation to aboriginal title was required. The natives understood themselves to be self-governing nations exercising sovereign authority over their people and territory, and with a far better claim to occupancy and long usage than any recent European settlement huddled on the coastline could muster. Accordingly, the indigenous nations signed numerous international peace and friendship treaties

[17] See references at n. 7 above.

[18] Slattery, *Ancestral lands*, 26; and Chief Justice John Marshall, part IV below.

[19] In Richard Hakylut, *Voyages touching the discovery of America* (London: Hakylut society, 1850), 21–2.

with European nations, in which they granted rights of trade and use over some of their territory and agreed to co-existing or parallel sovereignty in other areas, and asserted, time after time, their inalienable sovereignty. The classic presentation of this view is in many of the treaties between the Haudenosaunee (Iroquois) Confederacy and the Dutch, English and French nations. The First Nations represent it by a belt of two parallel rows of wampum:[20]

> These two rows [of wampum] will symbolise two paths or vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs, and their ways. We shall travel together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

This view is the basis of all treaties the First Nations made with European governments and their descendants.

A prevalent rival view was that sovereignty resides wholly in a European Crown to which Amerindians are subject. Amerindians have natural rights only to their goods and the small amounts of land they had under active cultivation at the time of contact, and these rights are subject to European law. As the English began to settle and plant, and not just trade, they began to argue that the Amerindians neither occupied and used in the appropriate manner the lands they claimed, nor did they live in political or civil societies. Hence, most of the land was vacant, no consent was required for its use, and the colonists claimed they signed formal treaties, not out of recognition of aboriginal rights, but only when necessity demanded it to mollify the wild and threatening natives.

The proponents of these rival views came into conflict in the 1630s. The first major quarrel began in 1633 as a jurisdictional dispute between Boston, led by John Winthrop, and Plymouth, led by Roger Williams. Williams argued that the royal patent did not convey title to Indian land and that the only legitimate means of possession was by treaty with Amerindian nations in order to acquire rights of usufruct on their property, as he did in Rhode Island and the Dutch

[20] Grand Chief Michael Mitchell of the Mohawk Council of Akwesasne, 'An unbroken assertion of sovereignty', in *Drumbeat: anger and renewal in Indian country*, ed. Bryce Richardson (Toronto: Assembly of First Nations, Summerhill Press, 1989), 105–37. For the treaties of the Haudenosaunee Confederacy and the recognition of native sovereignty see Francis Jennings, ed., *The history and culture of Iroquois diplomacy* (Syracuse: Syracuse University Press, 1985), xiv–xv. For Crown support of native sovereignty see part IV below.

in New York. Governor Winthrop replied that the Indians possessed only what they cultivated; the rest was open for appropriation without consent. The second major contention was the claim brought against the colony of Connecticut by the Mohegan Indians for sovereignty over their traditional lands. It began in the 1670s, appeals were made to the Privy Council in London, and litigation continued for 100 years. What was at stake in these celebrated cases was nothing less than the legitimacy of English settlement in America. They, in turn, were surrounded by innumerable other land disputes throughout the colonies between 1630 and 1690. In addition, two devastating wars against the Indians were connected to these disputes: against the Pequot, 1636–7, and against the Narragansett, 1674–5 (King Philip's War).[21]

In this contentious context appropriation by cultivation and without consent began to be employed to justify the dispossession of Amerindians of their traditional hunting and gathering territories. Some of the major authors are Samuel Purchas, the editor of Hakylut's *Travels* (1629), John White in Virginia (1630), Robert Cushman and Francis Higginson in New England, John Cotton, who replied point-by-point to Roger Williams, Governor Winthrop, and the lawyers for Connecticut in the Mohegan appeals to the Privy Council.[22] The arguments and the very terms used in the pamphlets are strikingly similar to chapter five of the *Two treatises*. No author puts forth an account that is as theoretically sophisticated as Locke's, but the basic terminology, premises, and conclusions for such a theory are present. Locke added his own knowledge of colonial affairs and of the sophisticated analyses of money, labour, and productivity by the

[21] For Roger Williams and John Winthrope see Moynihan, 'The patent and the Indians' (n. 7 above) and Jennings, *The invasion of America*, 128–46. For the Mohegan nation *v.* the Colony of Connecticut see J. H. Smith, *Appeals to the Privy Council from the American plantations* (New York: 1950), 417–42. For the wars against the Pequot and Narrangansett nations see Jennings, *The invasion of America*, 177–326.

[22] Samuel Purchas, *Hakluytus Posthumus or, Purchas his pilgrimes* (London: 1625), IV, bk 9, ch. 20; John White, *The planters plea* (London: 1630), Robert Cushman, 'Reasons and considerations touching the lawfulness of removing out of England into parts of America', 1621, in *Chronicles of the Pilgrim fathers of the colony of Plymouth*, ed. Alexander Young (Boston: Charles C. Little, 1844), 239–53; Francis Higginson, *New Englands plantation* (London: 1631), in *Massachusetts historical society proceedings* 62 (1929); John Cotton, 'John Cotton's answer to Roger Williams', *The complete writings of Roger Williams*, 7 vols. (New York: Russell and Russell, 1963), II; John Winthrop, 'Reasons to be considered, and objections with answers', *Winthrop papers*, 2 vols. (*The Massachusetts historical society* 1931) II, 138–45; *Winthrop's Journal*, ed. J. K. Hosmer (New York: 1908), 293–5.

mercantile writers of the Restoration to create the powerful theory in chapter 5.[23]

Let me now illustrate this with a number of quotations that are similar to the more familiar arguments of chapter 5. Replying directly to the argument that it is illegitimate to 'enter upon the land which hath beene soe longe possessed by others [Indians]', Winthrop writes, 'that which lies common, and that neuer been replenished or subdued is free to any that possesse and improue it'. This is a 'natural right' that holds 'when men held the earth in common [,] every man sowing and feeding where he pleased'. He illustrates this with the same biblical reference Locke uses (38). In contrast, a 'civil right' to jurisdiction over a whole territory only comes into existence after population increase and the enclosure of land make unused land scarce.[24]

Williams argued that hunting and land-clearing certainly constitute use and occupation and, therefore, Amerindians have title to their traditional lands: they 'hunted all the Countrey over', he wrote, 'and for the expedition of their hunting voyages, they burnt up all underwoods in the countrey, once or twice a yeare'.[25] To circumvent this defence, Williams' opponents deployed the argument that only sedentary agriculture and improvement constitute the kind of use that gives rise to property rights and, therefore, hunting and gathering lands may be looked on as vacant wasteland.

'We did not conceive that it is a just Title to so vast a continent, to make no other improvement of millions of acres in it, but onely to burne it up for a pastime', Cotton rejoined.[26] 'As for the Natiues in New England', Winthrop explained, 'they inclose noe Land, neither have any setled habytation, nor any tame cattle to improue the Land by, and soe have no other but a Naturall Right [i.e. in the products of their labour]'.[27] 'The Indians', Higginson concurs, have no right to their traditional lands because they 'are not able to make use of the one-fourth part of the Land, neither have they any settled places . . . nor any ground as they challenge for their owne possession, but change their habitation from place to place'. Since they possess very little land, America is *vacuum domicilium*, a 'vacant' or 'waste' land, and so *Vacuum Domicilium cedit occupanti*.[28] 'In a vacant soyle', Cotton

[23] As I have sought to show in other chapters of this volume Locke addressed other problems and contexts as well in chapter 5. [24] Winthrop, *Winthrop papers*, 140–1.
[25] Cited by John Cotton in 'John Cotton's answer', 2: 46–7. [26] Cotton, *ibid.*, 47.
[27] Winthrop, *Winthrop papers*, 141. [28] Higginson, *New Englands plantations*, 316.

points out to Williams, 'he that taketh possession of it, and bestoweth culture and husbandry upon it, his right it is'.[29] Enunciating a principle similar to Locke's famous proviso in section 27, Winthrop concludes, 'soe . . . if we leave them [Amerindians] sufficient for their use, we may lawfully take the rest, there being more than enough for them and us'.[30]

It is clear, therefore, that two functions are served by situating America in a state of nature. First, Amerindian political organization is disregarded and replaced by a so-called natural system of individual self-government, thereby dispossessing Amerindian governments of their authority and nationhood and permitting Europeans to deal with them and punish them on an individual basis. Second, the Amerindian system of property over their traditional territory is denied and it is replaced by a so-called natural system of individual, labour-based property, thereby dispossessing Amerindians of their traditional lands and positing a vacancy which Europeans could and should use without the consent of the first nations. As we have seen, this 'agricultural' dispossession argument was usually advanced with the qualification that, from the colonists' perspective, at the time of first European appropriation there was enough and as good land left for the aboriginal peoples.

Locke was aware that the native peoples did not govern themselves in the wholly individual and independent manner laid out in his description of the state of nature, but were organized politically into nations. However, he describes their national forms of government in such a way that they are not full 'political societies' and thus native Americans can be dealt with as if they are in a late stage of the state of nature. In chapter 8 he asserts that, although Amerindians are called 'nations' (41) and are ruled by elected 'Kings' (108), they fail to meet the criteria of a distinct political society. The reason for this is that their kings 'are little more than *Generals of their Armies*', who, although 'they command absolutely in War', in peacetime and in internal affairs 'they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolution of Peace and War, being ordinarily either in the People, or in a Council' (108, cf. 1.131). They lack the European institutions that, according to Locke, constitute the universal criteria of political society: an institutionalized legal

[29] Cotton, 'John Cotton's answer', 2: 47. [30] Winthrop, *Winthrop papers*, 141.

system, institutionalized judiciary, legislature and executive (87), and the sovereign right to declare war and peace removed from popular control and lodged exclusively in the hands of the King or 'federative' authority (144–8).

The reason Amerindians do not have these institutions is that they have no need of them. They have 'few Trespasses, and few Offenders', 'few controversies' over property and therefore 'no need of many laws to decide them' (107). As a result, they settle the few disputes they have on an ad-hoc and individual basis, as in the state of nature (107). They have few disputes because they have limited and moderate amounts of property. In turn, the explanation for this, which explains their whole system, is that they have limited and fixed desires: 'confineing their desires within the narrow bounds of each mans smal propertie made few controversies' (107). Their desires are limited and they have 'no Temptation to enlarge their Possessions of Land, or contest for wider extent of Ground' because they lack money and large population which activate the desire to possess more than one needs (108). That is, they lack the acquisitive desire to enlarge their possessions that leads to disputes over property and thus to the need for a distinct political society with an established system of property law to settle them. Locke sums this up in *The third letter concerning toleration* (cited in the editor's note to the *Two treatises* 2.108):

> Let me ask you, Whether it be not possible that men, to whom the rivers and woods afforded the spontaneous provisions of life, and so with no private possessions of land, had no inlarged desires after riches or power, should live in one society, make one people of one language under one Chieftain, who shall have no other power to command them in time of common war against their common enemies, without any municipal laws, judges, or any person with superiority established amongst them, but ended all their private differences, if any arose, by the extemporary determination of their neighbours, or of arbitrators chosen by the parties.

The typical form of Amerindian government encountered by Europeans was a confederation of nations presided over by an assembly of the national chiefs.[31] A nation was governed by a council or longhouse of chiefs (sachems) from the internal clans. Each nation had a clearly demarcated and defended territory, a decision-making

[31] This is a simplification of a complex range of political organizations. For an introduction, see Anthony F. Wallace, 'Political organisation and land tenure among Northeastern Indians 1600–1830', *Southwestern journal of anthropology* 13 (1957), 301–21.

body, a consensus-based decision-making procedure, and a system of customary laws and kinship relations. There were few religious sanctions (in marked contrast to New England), no standing army, bureaucracy, police force, or written laws. They lacked the state-centred European society, yet they performed the functions of government as many Europeans observed. '[T]he wildest Indians in America', Roger Williams noted, 'agree upon some forms of Government . . . [and] their civill and earthly governments be as lawfull and true as any Governments in the World'.[32]

Hence, like many European writers, Locke highlights three features of Amerindian political organization to the neglect of the customary system of government that underlies them. He interprets the war-chief from a European perspective as a kind of primitive and proto-European sovereign and he stipulates that native popular (non-delegated) government, over matters of war and peace, is by definition not a political society. But, the war-chief was, and still is, a temporary military commander with no political authority and who can be, and often is, talked down by a political authority, such as a clan mother. Of course, Europeans often took the war-chief as the sole leader in order to undermine the authority of the traditional councils (and perhaps because they were accustomed to the fusion of military and political rule in one person in the colonial lieutenant-governors and governors-general). Second, the chiefs and the council often appointed ad-hoc arbitrators of justice. The ad-hoc procedure may be a source of Locke's concept of individual self-government, but he overlooks the appointment procedure and the unwritten yet orally transmitted system of customary law and sanctions that govern it. Third, he emphasizes the lack of crime and litigation in Amerindian communities, and he explains this by reference to their limited material possessions and their limited desires, as did many observers. Yet, he disregards the national, clan, and family systems of community property and distribution that underpin these features.

With respect to property, the territory as a whole belongs to the nation and jurisdiction over it is held in trust by the chiefs.[33] It is inalienable and the identity of a nation as a distinct people is inseparable from their relation to and use of the land, animals, and

[32] Williams, 'The bloody tenant . . .', in *Complete works* 3: 250.

[33] See Wallace, 'Political organisation and land tenure'; Tim Ingold, D. Riches, and J. Woodburn, eds, *Hunters and gatherers: property, power and ideology*, 2 vols, II (New York: St Martins Press, 1988); and part IV below.

entire ecosystem. Although the land belongs to them, it is more accurate to say, as the Inuit stress, that they belong to the land. Clans and families have a bundle of matrilineal rights and responsibilities of use and usufruct over land for various uses. That is, property rights and duties inhere in the clans and apply to activities and to the geographical location in which the activities take place, not, in the first instance, to the products of the activities. The activities include hunting, trapping, gathering berries, non-sedentary agriculture, clam bed cultivation, fishing, and so on. The distribution and trade of the products is governed by custom and kinship tradition. When the coastal Indians made property agreements with the settlers, as Williams explained to Winthrop, they were granting them rights of co-use of the land, not rights to the land itself (which was inalienable).[34] Finally, families and individual family members own their goods, yet there is a casual attitude towards possessions and an overriding custom of sharing and gift-giving. From the Amerindian point of view, therefore, appropriation without consent is expropriation without consent.

In his depiction of Amerindian property, Locke highlights one specific form of activity – industrious labour and the products of industrious labour – and does not recognize the native system of national territories, the bundle of property rights and responsibilities in activities and their locales, and the customs governing distribution. If he had recognized these forms of property, as Roger Williams and many others who signed treaties did, European settlement in America without consent would have been illegitimate by his own criteria of enough and as good. In addition, Locke has a further reason not to recognize the traditional property of the Amerindians. The argument for dispossession by agricultural improvement was often supplemented by the natural law argument for just conquest if the native people resisted.[35] But, in Locke's theory of conquest (written for another purpose) the conqueror has no title to the property of the vanquished (180, 184). The conqueror has no right 'to dispossess the Posterity of the Vanquished, and turn them out of their Inheritance, which ought to be the Possession of them and their Descendents to all Generations'. Therefore, if the Amerindians had property in their traditional land

[34] Cronon, *Changes in the land*, 61.

[35] The conquest justification of European sovereignty is spurious because the Amerindians did not surrender and the European–Indian wars do not meet the criteria of conquest in international law (Davis, 'Aspects of aboriginal rights in international law', 37–40).

conquest would not confer title over it. However, as Locke repeats twice in this section, in the case of conquest over a people in the state of nature, 'where there . . . [is] more *Land*, than the Inhabitants possess, and make use of', the conqueror, like 'any one[,] has liberty to make use of the waste' (184); thereby bringing his theories of conquest and appropriation into harmony.

In the second half of chapter 5 the concepts of property and political organization in the state of nature are shown to play a further and equally important role. Because the Amerindian political and property system is tied to a world of limited desires and possessions it is unsuited to the development of modern states and systems of property that Locke unfolds in the second half of the chapter. The dynamic development unleashed by the expansion of human desire for possessions after the introduction of money leads to interminable property disputes and so to the need to set up modern states to regulate and govern property relations. From this perspective, Amerindian societies are, as we have seen, defined by the specifically European institutions they lack and by superimposing on them the rudiments of individual, labour-based property, which plays such a prominent role in Locke's theory of historical development. To this we now turn.

WORLD REVERSAL: PROPERTY AND POLITICAL SOCIETY IN A CIVILIZATION OF COMMERCE AND IMPROVEMENT

Locke's theory of the historical development of politics and property comprises the following stages: different degrees of industry among individuals account for differences in possessions in the pre-monetary stage of nature. Money and trade are gradually introduced, spurring the growth of population and the applied arts. An elastic desire for more than one needs comes into being, uprooting forever the pre-monetary economy of limited desires and needs. People seek to enlarge their possessions, either by honest industry or by preying on the honest industry of others, in order to sell the surplus in the market for a profit. All available land becomes occupied and put to use. To solve the quarrels and insecurities that inevitably follow people set up political societies with institutionalized legal and political systems to regulate and protect property.

Each stage in the development of a modern system of what is now

called surplus production and accumulation is defined by contrast to the Amerindian system of 'underproduction' and 'replacement consumption'.[36] First, the ethic of 'industriousness' that drives and legitimates the process is defined contrastively as superior to Amerindian land use. Although god gave the 'World to men in Common', he did not mean that they should leave it 'common and uncultivated', but rather that they should 'draw from it' the 'greatest conveniences of life'. Accordingly, he 'gave it to the Industrious and Rational, (and *Labour* was to be his *Title* to it;)' (34). Amerindians are then said to draw less than one one-hundredth the number of conveniences from the land that the English are able to produce (41). Second, Locke sets up cultivation as the standard of industrious and rational use, in contrast to the 'waste' and lack of cultivation in Amerindian hunting and gathering, thus eliminating any title they might claim (37, 41, 42, 43, 45, 48). The planning, coordination, skills, and activities involved in native hunting, gathering, trapping, fishing, and non-sedentary agriculture, which took thousands of years to develop and take a lifetime for each generation to acquire and pass on, are not counted as labour at all, except for the very last individual step (such as picking or killing), but are glossed as 'unassisted nature' and 'spontaneous provisions' when Locke makes his comparisons (37, 42, 108 note); whereas European activities, such as manufacturing bread, are described in depth (42, 43). Moreover, the 'industrious' use or labour that gives rise to property rights is equated with European agriculture, based on pasturage and tillage (42), thereby eliminating Amerindian non-sedentary agriculture as a type of use and subverting any title that might have been derived from it.

The coastal Indians lived in villages and engaged in non-sedentary agriculture. Several of the English settlers sought to expropriate the agricultural lands of the natives, for this eliminated the hard labour of clearing land themselves.[37] To justify expropriation, they argued that the Indians, who left their cornfields for the clam beds each year, neither tilled nor fenced, and who let the fields rot and compost every

[36] For these concepts see Marshall Sahlins, *Stone age economics* (Chicago: Aldine-Atherton, 1972).

[37] See Washburn, 'The moral and legal justifications for dispossessing', 23–5 (n. 7 above); Jennings, *The invasion of America*, 58–84; James P. Ronda, 'Red and white at the bench: Indians and the law in Plymouth Colony 1620–91', *Essex Institute historical collections* 110 (1974), 200–15; and Peter Thomas, 'Contrastive subsistence strategies and land use as factors for understanding Indian–white relations in New England', *Ethnohistory* 23 (1976), 1–18.

three years, for purposes of soil enrichment, did not cultivate the land in the proper fashion, and, therefore the land was open for use by others. 'They [the Indians] are not industrious', Robert Cushman explained, 'neither have they art, science, skill or faculty to use either the land or the commodities of it; but all spoils, rots, and is marred from want of manuring, gathering and ordering'.[38] Locke elevates this justification of expropriation to the status of a law of nature (38):

> if either the Grass or his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.

The second contrast is between the limited desires of Amerindians and the unlimited desire of the English to accumulate possessions. When this is not mistaken for a contrast between bourgeois and proletarian motivation in the secondary literature it is often taken to be an astute observation on the difference in motivation of individuals in non-market and market societies; an anticipation of Adam Smith.[39] It is now possible to define Locke's contrast more specifically.

In section 37 the desire for more than one needs is said to follow from the introduction of money and population increase. This acquisitive motivation is contrasted with the pre-monetary motivation of Amerindians (cf. 108). As he famously writes in section 48, without money and a world trading system that develops with it, and so the hope of selling one's surplus on the market for money, no one would have the reason or motivation to enlarge their possessions (48):

> Where there is not something 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. For I ask, What would a Man value Ten Thousand, or an Hundred Thousand Acres of excellent *Land*, ready cultivated, and well stocked too with Cattle, in the middle of in-land Parts of *America*, where he had no hopes of Commerce with other Parts of the World, to draw *Money* to him by the Sale of the Product? It would not be worth the inclosing.

[38] Cushman, 'Reasons and considerations touching the lawfulness of removing out of England', 243 (n. 22 above).

[39] For example in the fine article by John Dunn, 'Bright enough for all our purposes: John Locke's conception of a civilized society', *Notes and records of the Royal Society of London*, 43 (1989), 133–53.

On the other hand, once money and world commerce are introduced, the motivation of the same person will be transformed and they too will seek to enlarge their possessions: 'Find out something that hath the *Use and Value of Money* amongst his Neighbours, you shall see the same Man will begin presently to *enlarge* his *Possessions*' (49).

Locke's argument comprises three claims: Amerindians have limited desires and so no motivation to acquire more than they need; the introduction of a world commercial market ushers in the desire and reason to acquire more than one needs; and this new acquisitive rationality shows itself in the acquisition of land in order to sell the products for money. Leaving aside Amerindian pre-monetary motivation for the moment, the latter two claims need to be qualified. First, it is not true that the introduction of money and world commerce invariably leads to the desire for enlarged possessions of land. The Amerindians had been trading with Europeans for over 100 years when Locke wrote the *Two treatises*. Certainly this gave them the incentive to increase their fur-trapping and to kill animals beyond the limits their replacement needs had previously set. There is no evidence however that they desired to turn to private property in land and market-oriented agriculture. Quite the contrary. They were quite satisfied to trade with the Europeans and to preserve their traditional ways.[40] Furthermore, after 300 years of coercion, not only by market forces but also by missionaries and successive governments to destroy their traditional way of life and to assimilate them to a system of private property, market agriculture, and acquisition, they show few signs of motivational transformation.[41]

Second, it is not an accurate generalization even for all Europeans. The French *Canadiens* in New France traded with the Indians in a world market for at least as long as the English. Yet they did not develop a desire to enlarge their possessions of land and turn to agriculture. They preferred to engage in the fur-trade and adapt to native ways.

Nonetheless, from Locke's perspective that the Amerindians had no property in their traditional lands, Amerindian claims to land and

[40] See A. J. Ray, *Indians in the fur trade: their role as hunters, trappers and middlemen in the lands southwest of Hudson Bay 1660–1870* (Toronto: University of Toronto Press, 1974), 68–9; Cronon, *Changes in the land*, 97–9; Bruce Trigger, *Natives and newcomers: Canada's heroic age reconsidered* (Montreal: McGill–Queen's University Press, 1985), 164–225.

[41] J. R. Miller, *Skyscrapers hide the heavens: A history of Indian–white relations in Canada* (Toronto: University of Toronto Press, 1989).

their contention that colonists must purchase land from them would appear to be proof that they had acquired the desire to enlarge their possessions, not by honesty industry, but by illegitimate means. They would appear to be the 'Quarrelsom and Contentious', driven by 'covetousness' (34) to ingross more than they could use (31). Many of the colonists argued in exactly this way, claiming that the Indians had no desire for land until they learned they could make a profit by selling it to the newcomers. Then the Indians invented fictitious land deeds and sold them many times over to the unsuspecting settlers. Since the Indians had no records of fixed property in land, the conflicting claims were shrouded in mystery and this led to endless disputes over title. So, the colonists continued, even if they wished to recognize Amerindian title, it turned out to be impossible in practice. The colonists concluded that the only sure and indisputable title was thus occupation and cultivation.[42]

Locke's analysis of motivation should also be seen as an observation on the disputes which arose among the English settlers themselves over their insatiable desire to enlarge their possessions. There were two ways to act on the acquisitive desire to enlarge one's possessions of land in the colonies: by agricultural production for the market or by turning to trade with the Indians and to various 'deed-games' in order to avoid the work of agricultural production and the high rents the proprietors levied, and to reap the benefits of acquiring land which was valuable due to its growing scarcity. The latter type of land acquisition was a major cause of contention among the colonists, not only in New England but also Carolina and Virginia.[43] The colonists of Carolina were so outraged by the system of absentee landlords and high rents that Shaftesbury and Locke had established by the constitution of 1669 that they finally revolted and overthrew the constitution in 1719. When John Norris wrote a justification of this revolt against the constitution Locke had helped to design and establish he cleverly based his argument on the *Two treatises of government*.[44]

[42] This is the view presented by John Bulkley, *An inquiry into the right of the aboriginal natives to land in America*, 1725, xvi, xli, discussed below, part III. For a different view of the 'deed games' over Indian land see Jennings, *The invasion of America*, 128–46.

[43] See Bodleian, Locke MS. c. 6, fols 215–16; Cheves, ed., *Shaftesbury papers*, 13–32, 195, 248, 284, 466–8.

[44] John Norris, *The liberty and property of British subjects asserted in a letter from an assembly man in Carolina to his friend in London* (London: 1726). See Sirmans, *Colonial South Carolina*, 29–31. For the extent of Locke's authorship of *The constitution of Carolina*, see J. R. Milton, 'John Locke and the fundamental constitution of Carolina' (unpublished MS.).

The introduction of money and commerce leads to the situation where all available land is under cultivation (40). People are thus no longer free to hunt, gather, and cultivate as they please, but are compelled to live in the system of surplus production and accumulation (36). Locke presents two arguments to justify the extinguishment and replacement of the earlier system of limited production and replacement consumption. First, money is said to be introduced by 'mutual consent' into a system of pre-monetary trade of perishables for durables such as shells [i.e. wampum], pebbles, metal or diamonds (46–7). This hypothesis seems to be based on his knowledge of trade with Amerindians and it is fairly accurate. Amerindians adapted remarkably quickly to trade with the Europeans, often to their advantage, well into the nineteenth century in some cases.[45]

Locke sometimes presents the mutual consent to money as the sole justification required for the putting of all land under commercial cultivation and the extinguishment of the freedom people originally had to hunt, gather, and cultivate as they pleased, on the assumption that agreement to money entails agreement to the consequences (36, 50). However, his major justification is that the market system produces a greater quantity of conveniences (the standard laid out in 34). The presentation of this justification takes up the central sections of the chapter (37–44).

In his first comparison, enclosure and agriculture are said to require one-tenth the amount of land as hunting and gathering to produce the same quantity of conveniences (37). Locke then revises the ratio to one one-hundredth:

> For I aske whether in the wild woods and uncultivated wast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?

It can be seen from the quotation that the comparison is made from the perspective of the system of commercial agriculture, not from an impartial standpoint. The quantity of conveniences each system produces is an irrelevant standard to measure the Amerindian system, since, as Locke knows, the system is designed to produce

[45] See James Axtell, *The invasion within: the contest of cultures in colonial North America* (Oxford: Oxford University Press, 1981) and references at notes 40–1.

limited (replacement) conveniences (36, 48). Also, Amerindian cultivation is overlooked. In addition, the inhabitants are said to be 'needy' and 'wretched' but this would only be the case if they had acquired a desire for more than they need. Finally, he claims that an English farmer in effect leaves 90 acres to mankind in common, relative to the hunter and gatherer who uses 100 acres, because he cultivates only 10 acres (37).[46] This is slightly disingenuous because he points out in section 49 that the same person will be motivated to enlarge his possessions. Hence, it appears that Locke is comparing the two systems either without regard to the standard of replacement, which he knows governs the Amerindian system (36, 48, 107–8), or on the assumption that the native peoples acquired the post-monetary desire for more than one needs.

The sustained argument for the superiority of commercial agriculture begins at section 40. 'Nor is it so strange', he opens, 'that the *Property of labour* should be able to over-ballance the Community of Land'. The reason is that '*Labour . . . puts the difference of values* on every thing'. He states that nine-tenths of the conveniences that are useful to 'the Life of Man', and therefore of value, are the effect of the improvement of labour whereas only one-tenth are due to unimproved nature. This ratio is then adjusted up to 99 parts out of 100 and illustrated with a questionable comparison of the American Indians who, 'for want of improving it [the soil] by labour, have not one hundredth part of the Conveniences we enjoy: And a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day labourer in *England*' (41). Again, the argument presupposes a universal desire to acquire conveniences since people would not value conveniences above all else, nor perhaps even possess this concept, and thus not use up all the land in labouring to produce them, unless they possessed an elastic desire for them.

The thesis that labour creates conveniences of value and benefit to mankind is illustrated in the next section with a contrast between the products of hunting, trapping, and gathering and the labour-intensive products of a commercial society (42). He then rounds his argument off with another comparison with American Indians. Here value and benefit are defined even more explicitly and narrowly as

[46] Cf. Winthrop, *Winthrop papers*, 139, for a similar comparison. Thomas, 'Contrastive subsistence strategies' (n. 37 above) figures that natives and newcomers used about the same amount of land.

how much a 'convenience' will fetch on the market as a commodity (43):

> An Acre of Land that bears here Twenty Bushels of Wheat, and another in *America*, which, with the same Husbandry, would do the like, are, without doubt, of the same natural, intrinsick Value. But yet the Benefit Mankind receives from the one, in a Year, is worth 51 and from the other possibly not worth a Penny, if all the Profit an *Indian* received from it were to be valued, and sold here; at least, I may truly say, not 1/1000.

It seems clear, therefore, that the central sections on labour, value, and commodities are designed to legitimate and to celebrate the superiority of English colonial market agriculture over the Amerindian hunting, gathering, and replacement agriculture that it forcibly displaced. The destruction of centuries-old native American socio-economic organizations and the imperial imposition of commercial agriculture is made to appear as an inevitable and justifiable historical development. It is justified, according to Locke, because native Americans had no rights in the land, consented to the market system in agreeing to the use of money, and desired the change because the use of money changed their motivation. Furthermore, they are better off because the European market system produces 'more conveniences' – a manifestly partial standard that continues to be used down to this day to measure and legitimate the non-native socio-economic systems of North America.

The question-begging standard of 'more conveniences' is also common in the pamphlet literature of the early seventeenth century.[47] For all the confidence these writings convey, they were written against a backdrop of considerable doubt. Long before Marshall Sahlins pointed out the bias in the standard employed, some colonists were raising the same sort of doubts and objections.[48] In the *New English Canaan* (1632), Thomas Morton, like Locke, observed that Amerindians had a few needs and these they were able to satisfy with a minimum of work, leaving them with more leisure time than the colonists. When the colonists alleged that the Indians were therefore poorly clothed, needy, and lazy, Morton replied that perhaps they should be seen as rich and the colonists as poor: 'Now since it is but foode and rayment that we that live needeth . . . why should not the Natives of New England be said to live richly, having no want of either'.[49] Pierre Biard, a Jesuit of New France, compared the limited desires of Amerindians with the insatiable desires of settlers, as did Locke, and drew a similar conclusion:[50]

> their [Amerindians'] days are all nothing but pastime. They are never in a hurry. Quite different from us, who can never do anything without hurry and worry; worry, I say, because our desire tyrannizes over us and banishes peace from our actions.

The normative difference that Locke draws between the two systems is defined further by his contrast between improvement and waste. 'Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*; and we shall find the benefit of it amount to little more than nothing' (42). Similar contrasts run throughout the colonial literature.[51] The juxtaposition gives the impression that land which is not put under labour intensive cultivation for the market is wasted or is not used beneficially. Those who fail to improve the land and take this attitude towards it are looked upon as neither rational nor industrious, and sinful in not heeding god's injunction to appropriate and improve (34, 35).[52]

The impression is false. Amerindians did not 'waste' the land; they used it in different and, in a number of respects, more ecologically benign ways.[53] According to their religious beliefs, all of nature is a world infused with spiritual power and humans are one family of spirits among many with no superior status. Consequently, they tend to seek adjustment to a natural world that is alive and of infinite value independent of human labour. The idea that nature is a wasteland of no value until it is 'improved' by commercial agriculture is sacrilegious for them. The New Englanders on the other hand, with their Christian voluntarism, saw themselves above the rest of nature and under an injuction to subdue and improve it for human purposes.[54] The ethic of improvement underwrites an exploitive stance towards

[47] See references at n. 22 above.

[48] Cronon, *Changes in the land*, 78–81.

[49] Thomas Morton, *New English Canaan*, 1632, in Charles F. Adams, ed., *Publications of the Prince Society*, 14 (Boston: 1883), 175–7. For reactions to Morton, see Richard Drinnon, *Facing west: the metaphysics of Indian hating and empire building* (Minneapolis: University of Minnesota Press, 1980).

[50] Pierre Biard, S. J., 'Relation', in *The Jesuit relations and allied documents . . . 1610–1791*, 73 vols., ed. Reuben G. Thwaites (Cleveland: 1896–1901), III, 135.

[51] See references at n. 22 above.

[52] Roger Williams reversed this, arguing that the colonists were sinful in appropriating without consent (*Complete Works* 2: 40).

[53] Cronon, *Changes in the land*.

[54] Axtell, *The invasion within*, 15–19, 131–78.

nature in the name of 'greater conveniences for mankind' and stigmatizes any other stance as wasteful.[55]

The dynamic process that is set in motion by the introduction of money and world trade leads to the expansion of private property and surplus production until available land is under production. The disputes over property that follow cannot be solved by the ad-hoc and individual forms of adjudication available in the state of nature. At this historical juncture people agree to establish political societies in order to regulate and protect their property (123–6). Thus, by definition, a political society only comes into being on the basis of, and to govern, a regime of private property created by expanding needs and intensive agricultural production for the market (45):

> (where the Increase of People and Stock, with the *Use of Money*) had made Land scarce, and so of some Value, the several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, *by Compact*, and Agreement, *settled the property* which Labour and Industry began.

The formation of 'states and Kingdoms' is defined by a series of contrasts to Amerindian society (38, 45). Since American Indians lack the dynamic system of market-oriented property they have no need for the institutions of a political society to regulate it, and therefore they do not have governments; 'For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions' (50). In an even more ethnocentric conclusion, the system of modern states and commercial property is identified with civilization itself – 'those who are counted the Civiliz'd part of Mankind, who have made and multiplied positive Laws to determine Property' – in explicit contrast to American Indians (30).

In addition to conferring greater conveniences on the members of society, the system of political society and property is said to increase the power or hardness of that society *vis-à-vis* its neighbours. Locke introduces this mercantile theme at the end of his demonstration of the superiority of agriculture and industry over hunting, trapping, and gathering (42):

[55] See Carolyn Merchant, *Ecological revolutions: nature, gender and science in New England* (Chapel Hill: University of North Carolina Press, 1989) for a somewhat similar argument.

> This shews, how much numbers of men are to be preferd to the largenesse of dominions, and that the increase of lands and the right imploying of them is the great art of government. And that Prince who shall be so wise and godlike as by established laws of liberty to secure protection and incouragement to the honest industry of Mankind against the oppression of power and narrownesse of Party will quickly be too hard for his neighbours.

If we read this brief and incomplete remark in the light of Locke's supervision of the old colonial system and his other writings on colonial policy and the art of government, I believe it is possible to locate chapter 5 in a larger context than I have done thus far. After 1674 England's chief rival was France. Shaftesbury and Locke turned their attention to how England and the Protestant states could contain and win out against this powerful competitor for hegemony over the resources of the non-European world. In 1689, with the English throne securely in the hands of a Protestant prince who shared this vision and led England into the Nine Years' War, Locke insisted that the contest with France must be the first concern of policy.[56] The centre of gravity of the struggle with France was America, where the English colonies were surrounded by the French fur-trading routes and military alliances with the Indian nations to the east and north.

There were two major differences between the French and the English in America. France had a small population spread over a large area whereas England had a larger population concentrated along the coast. Second, France established a non-agriculture, fur-trading empire in America and conformed, to a large extent, to Amerindian hunting, trapping, and gathering customs. The English in the colonies brought their agricultural system with them. I conjecture that Locke refers to these two differences in section 42: 'This shews, how much numbers of men are to be preferd to largenesse of dominions, and that the increase of lands [i.e. increase in the productivity of lands – JT] and the right of imploying of them is the great art of government'.

Therefore, I would like to suggest tentatively that in arguing for the superiority of commercial agriculture over Amerindian hunting, trapping, and gathering Locke may also be arguing for the superiority of English colonization over the French fur-trading empire. The

[56] James Farr, 'John Locke on the Glorious Revolution: a rediscovered document', *The Historical Journal* 28, 2 (1985), 385–98, 395–8.

recommendation of the chapter as a whole may be the following. Not only do the English colonists have every right to settle there, but also, if they settle down to agricultural surplus production, and if the king regulates, encourages, and employs them properly, imperial England 'will quickly be too hard' for the French empire, based as it is on what Locke has argued to be the comparatively inefficient, underproductive, wasteful, and out-moded fur-trapping system of the Amerindians. More research on the colonial documents is needed to test this hypothesis.

DISSEMINATION

We have seen how Locke's concepts of political society and property are, among other things, a sophisticated theoretical expression of the basic arguments of early colonial writers. Let us now ask if the colonists in turn employed Locke's arguments in their continuing struggle to justify English settlement in native America.

The litigation, mentioned above, between the colony of Connecticut and the Mohegan Indians continued into the eighteenth century and it was considered to be 'the greatest cause that ever was heard at the [Privy] Council Board'.[57] The Mohegans claimed to be a distinct political society with sovereignty over their traditional lands. Hence the Royal Charter could not confer sovereignty over their land to the colony of Connecticut. The only way the colony could gain legitimacy would be for the English nation to negotiate an international agreement with the Mohegan nation in accord with international law. The Privy Council ruled in favour of Mohegan sovereignty in 1705 and again in 1743.[58]

In 1725 the Reverend John Bulkley of Colchester, Connecticut published a book by Roger Wolcott, the late Governor of Connecticut, entitled *Poetical meditations*, and included an article he wrote, entitled 'An inquiry into the right of the aboriginal natives to the land in America'. It is a refutation of the Mohegans' claim to political society and property in their traditional lands based in its entirety on Locke's *Two treatises*. He brings out and presses into service exactly those contrasts I have sought to bring to light in this paper, illustrating each step in the argument with a quotation from Locke.[59]

[57] Smith, *Appeals to the Privy Council*, 418 (note 21 above). [58] *Ibid.*, 434.

[59] John Bulkley, *An inquiry into the right of the aboriginal natives to the land in America*, in Roger Wolcott, *Poetical meditations* (New London: 1726), i–lvi. Bulkley's essay was published separately later in the century. For Bulkley and the rivalry among colonists for Mohegan land, see Richard Bushman, *From Puritan to Yankee: character and social order in Connecticut 1690–1765* (Cambridge, Mass.: Harvard University Press, 1967). For the Mohegan's long struggle, which is in the courts again (1991), see John DeForest, *History of the Indians of Connecticut from the earliest known period to 1850* (Hartford: 1853). Since Bulkley's arguments follows the sections of the *Two treatises* discussed above I have given only a brief recapitulation of it below.

Everyone agrees, Bulkley begins, that the natives have some property rights. The great question is how extensive are they. The defenders of the Mohegans claim that they have a right to all the land and that Europeans must acquire it by compact. But this is false (xvi). Either the Amerindians are in a state of nature or in political society. If they are in state of nature, then the only property they have is that acquired by labour, improvement, and rudimentary exchange. Labour starts and limits property (xxiv). Since the Amerindians had plenty and no motive to acquire more than they needed, they did not cultivate or till (xxviii). It is thus knavish and ignorant to assume they had large tracts of land. They had only a few spots of enclosed and cultivated land.

Furthermore, he continues, the Indians did not have civil societies: they lack laws, established judges, and a legislature (xxx). Their chiefs are simply generals of their armies. Nonetheless, he takes up the counterfactual hypothesis that the Indians did form political societies (xxxv). If they set up political societies by compact, then either they went on to settle property among themselves or they did not. Since they lacked commerce and money, they had no incentive to depart from their natural property of catching and gathering. What inducement or motive was there, he asks, to fix a property in land when they had such a 'rude, mean, inartful way of living' (xl)? Others argue on the contrary that they did have settled property. But this happened only after the English arrived when the Indians saw the advantages of claiming large tracts of land for the purpose of sale (xli). To settle these later claims we would need clear records of fixed property, but none exist. Native claims, such as the Mohegan claims, are shrouded in darkness and lead to disputations (xliii). On the other hand, he roundly concludes, the English had an 'undoubted right to enter upon and impropriate all such parts as lay waste or unimproved' (liii).

When the Mohegan dispute was heard again in 1743 commissioners Horsmanden and Morris restated the case for Mohegan sovereignty. In an acidic commentary William Samuel Johnson

employed the Locke–Bulkley Eurocentric concept of political society to undermine their claim:[60]

> When the English treated with them [Amerindians] it was not with Independent States (for they had no such thing as a Civil Polity, nor hardly any one circumstance essential to the existence of a state) but as with savages, whom they were to quiet and manage as well as they could, sometimes by flattery; but oftener by force. Who would not Treat if he saw himself surrounded by the Company of Lyons, Wolves or Beasts whom the Indians but too nearly resembled . . . but you would not immediately call them an independent State (though independent enough God knows) . . . This notion of their being free States is perfectly ridiculous and absurd. Without Polity, Laws, etc. there can be no such thing as a State. The Indians had neither in any proper sense of the words.

Fifteen years later in Europe the same kind of argument was written into the law of nations. In 1758 Emeric de Vattel (1714–67) stipulated that agricultural improvement and a political society with established laws are necessary conditions for the recognition of sovereignty and nationhood in international law. Accordingly, the Indians of North America not only lacked sovereignty but they also failed in their natural duty to cultivate the soil. Employing these familiar Lockean concepts he concluded that the establishment of 'various colonies upon the continent of North America' has been 'entirely lawful':[61]

> The cultivation of the soil . . . is . . . an obligation imposed upon man by nature . . . Every Nation is therefore bound by the law of nature to cultivate the land which has fallen to its share. There are others who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase . . . Now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labour, and they may not complain if other more industrious nations, too confined at home, should come and occupy part of their lands . . . The peoples of those vast tracts of land roamed over them rather than inhabited them . . . [W]hen the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.

[60] Smith, *Appeals from the Privy Council*, 434–5, note 109 (note 21 above).

[61] Emeric de Vattel, *Le droit des gens, ou principes de la loi naturelle* (1758), *The law of nations or the principles of natural law*, tr. Charles G. Fenwick (Washington: Carnegie Institute, 1902), I. viii. 81, I. xviii. 207–10.

The 'agricultural' or 'improvement' justifications presented by Locke and Vattel were widely cited throughout the eighteenth and nineteenth centuries to legitimate settlement without consent, the removal of centuries-old aboriginal nations, and war if the native peoples defended their property. Vattel's *The law of nations* was selected as a classic of international law in 1902 and thereby became an authoritative source of international law for the modern world. The arguments that the aboriginal peoples are not self-governing nations and have property only in the products of their labour, and that the 'civilized part of mankind' have the right to appropriate and 'improve' their territories in the name of 'greater conveniences' continue to be used in the courts, legislatures, and public opinion.[62]

The agricultural argument was only one of many justifications for dispossession and English settlement in native America. When it was used it was often accompanied by an agreement or deed (registering the property under English law) and some kind of payment, whether this was only to mollify the Amerindians or to recognize that they possessed rights the agricultural argument denies.[63] More common was the practice of treaties and deeds of land transfer between non-natives and natives on the explicit assumption that the native peoples had rights of property over their traditional territories, and, therefore, could alienate property to the settlers by agreement. Treaties of this type were popular with the Dutch and English, and especially the land speculation companies that invaded the Ohio valley in the eighteenth century.[64] Also, as we have seen, the original agricultural arguments of the 1630s were deployed against the treaty-based property claims of Roger Williams and his followers.

The classical presentation of this second type of justification is *Plain facts: being an examination into the rights of the Indian nations of America to their respective countries, and a vindication of the grant for the Six United Nations* . . ., 1781, by Samuel Wharton. As the subtitle reveals, Wharton sought to vindicate the land purchases he had negotiated

[62] See James Tully, 'Placing the *Two treatises*', in *Political discourse in early modern Britain: Essays in honour of John Pocock*, ed. Nicholas Philipson and Quentin Skinner (Cambridge: Cambridge University Press, 1992). For a recent example see Hamar Foster, 'The Saanichton Bay Marina Case: Imperial law, colonial history and competing theories of aboriginal title', *UBC Law Review* 23, 3 (1989), 629–50, 642–7.

[63] Jennings, *The invasion of America*, 128–35. For more detail on this and part IV see James Tully, 'Placing the *Two treatises*' (n. 62 above).

[64] Robert A. Williams, *The American Indian in western legal discourse*, 233–304 (n. 7 above).

with the Haudenosaunee (Iroquois) Confederacy against the counter, charter-based claim of the colony of Virginia. The important feature of this famous tract for our present purposes is that he cites Locke, among others, in defence of his conclusion that 'the aborigines of America have an absolute exclusive right to the countries they possess'. This (alienable) right is based on the natural law of preservation, where the right to their territories is then the necessary means to preservation, and on title from occupancy. Following Blackstone's interpretation of Locke, Wharton holds that Locke's labour criterion is met by occupation alone; an act of occupation being a degree of bodily labour.[65] The *Two treatises* is thus used to defend aboriginal property rights in order to validate English property in America based on consent by individual treatises with Indian sachems, in competition and contradiction with the use of the *Two treatises* by Bulkley and others to deny aboriginal property rights in order to validate English property in America based on settlement and cultivation without consent.

It appears to me, for reasons given above, that Wharton and Blackstone are incorrect to assume that occupation, or hunting and gathering, meets Locke's criterion of labour or 'due use'. Nonetheless, Wharton is correct in arguing that, on Locke's account, native Americans, like everyone, have the right to the means of preservation derived from the natural law of preservation (section 25). However, it does not follow that this right takes the form of a natural right to their hunting, gathering, and non-sedentary agricultural lands. This Locke expressly denies. These lands are vacant. Rather, in tacitly consenting to the use of money the aboriginal peoples consented to the system of commercial agriculture, and so their natural right to the means of preservation must be realized in this system: that is, by turning to commercial agriculture and trade themselves, by working for others or, if they are physically unable to labour, by local poor relief. If this is correct, then Locke's proposal to grant Indians individual tracts of land in Carolina is consistent with the *Two treatises*.

A third non-native title to land in America was a grant from a colonial assembly, on the assumption that jurisdiction was vested in the assembly (either without regard to the native nations or as a result

[65] Samuel Wharton, *Plain facts: being an examination into the rights of the Indian nations of America to their respective territories* (Philadelphia, 1781), 7, 15.

of treaties with them). Wharton's *Plain facts*, for example, is written against the claim advanced by Virginia, and supported by Thomas Jefferson, of jurisdiction over the same territory which Wharton claimed to have purchased from the six Nations (who, in turn, claimed it in virtue of their earlier conquest of the Delaware and Shawnee nations).[66] Like the other two titles, the independent right of a colonial assembly to grant property was also justified with reference to the *Two treatises*. John Otis, in the *Rights of the British colonies asserted and proved*, 1764, based his justification of colonial independence and jurisdiction on Locke's argument that people may leave their home country and set up independent political societies by consent.[67]

ABORIGINAL SOVEREIGNTY

Standing above and sovereign over these conflicting claims to land in native America stands the official title of the British Crown (and the French Crown). The doctrine of Crown title not only denies the legitimacy of the three titles mentioned above. It is also a complete repudiation of the concepts of Indian or 'non-state' property and political society of the *Two treatises*. The official Crown title, as we have seen in the Privy Council decision in the Mohegan nation case, is that the aboriginal peoples of North America are sovereign, self-governing nations with exclusive jurisdiction over and ownership of their territories.[68] Since they were never conquered, their juridical status as self-governing nations continues through the arrival of Europeans and co-exists with British and French sovereignty. Accordingly, the only legitimate non-native titles to land in America are those derived from nation-to-nation treaties of cession negotiated by the Crown and the sachems of the appropriate first nations (thereby recognizing their respective sovereignties), in a public ceremony and without duress. The Crown then grants the ceded land to colonists and, in exchange, agrees to protect the first nations on their Indian Lands from foreign invasion (by the French and Spanish) and from encroachment by settlers and land speculators,

[66] Williams, *The American Indian*, 259–71, 289–305.

[67] John Otis, *Rights of the British colonies asserted and proved* (Boston: 1764), 25–31.

[68] See Chief Justice John Marshall below; Russell Barsh and James Youngblood Henderson, *The road: Indian tribes and political liberty* (Berkeley: University of California Press, 1980); Bruce Clark, *Native liberty, Crown sovereignty: the existing aboriginal right of self-government in Canada* (Montréal: McGill–Queens University Press, 1990).

bearing the three invalid titles mentioned above, as long as the sun shines and the rivers flow.

The underlying premise that the native nations could come under the protection of another sovereign without forfeiting their own sovereignty, laws, and forms of government was based on the old 'continuity' principle of international law, which, ironically, was given one of its clearest formulations by Vattel in *The law of nations*.[69] Moreover, the continuity of a nation's legal and political institutions after the arrival of another sovereign, even in the counterfactual case of conquest, was an article of faith to every Briton, for the pre-Norman institutions of parliamentary government and Common law were understood to have continued unscathed through the Conquest by King William in 1066 and the imposition of Feudal law.[70]

This official doctrine obviously rests on the Crown's acknowledgement of the power of the first nations, especially the Haudenosaunee Confederacy, and of the dependency of the British in America on them for survival and military support against the French. It was proclaimed by the Crown throughout the seventeenth and eighteenth centuries and formally stated in the Royal Proclamation of 7 October 1763, as the Crown sought to consolidate its control and centralize colonial-Indian relations.[71] The Proclamation explains that 'great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest, and to the great Dissatisfaction of the said Indians', and states:

> [I]t is just and reasonable and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting grounds . . .

The Crown doctrine comes quite close to recognizing the aboriginal peoples as they recognize themselves: that is, as we have seen, as

[69] Vattel, *The law of nations*, I. v. (n. 61 above).

[70] See Tully, 'Placing the *Two treatises*' (note 62 above).

[71] For the Royal Proclamation and its context, see Jack Stagg, *Anglo-Indian relations in North America to 1763 and an analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Department of Indian Affairs and Northern Development, 1980), Jack Sosin, *Whitehall and the Wilderness* (Lincoln: University of Nebraska Press, 1961).

independent, self-governing nations in a treaty relation of co-existence with the British and French nations in America. The native leaders reaffirmed their nationhood and independence in the hundreds of treaties with the British and French. As Minivavana, a Chippewa leader, typically informed Alexander Henry at Michilimackinac in 1761,[72]

> Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance, and we will part with them to no one.

The person in the best position to know the political status of the American Indians in the eighteenth century was Sir William Johnson, the Superintendent of Indian Affairs for the Northern half of British North America, who had negotiated the treaties of the mid-century. He informed London on numerous occasions as the Royal Proclamation was being prepared that,[73]

> The Indians of the Ottawa Confederacy . . . and also the Six Nations, however their sentiments may have been misrepresented, all along considered the Northern parts of North America, as their sole property from the beginning . . . I must beg leave to observe, that the Six Nations, Western Indians, etc., having never been conquered, either by the English or French, nor subject to the Laws, consider themselves as a free people.

The Crown title recognition of the aboriginal peoples as self-governing nations with exclusive jurisdiction over and ownership of their territories was entrenched in the Federal constitutional law of the United States by Chief Justice John Marshall in *Worcester v. the State of Georgia* in 1831. After rejecting an agricultural argument for dispossession based explicitly on the *Two treatises* in *Johnson and Graham's Lessee v. M'Intosh* in 1823, Marshall bases his recognition of native nationhood in *Worcester* on the explication of the Royal Proclamation of 1763, backed up by an extensive survey of treatises

[72] Cited in Alexander Henry, *Travels and adventures in Canada and the Indian territories between the years 1760 and 1776* (New York: I. Riley, 1809), 44. See Dorothy V. Jones, *License for empire: colonialism by treaty in early America* (Chicago: University of Chicago Press, 1982). For the continued assertion of native sovereignty see Richardson, ed., *Drumbeat: anger and renewal in Indian country* (note 20 above).

[73] Sir William Johnson to the Lords of Trade, Nov. 13, 1763 and n.d., in O'Callaghan, ed., *Documents relative to the colonial history of the state of New York* 7: 575, 665 (n. 20 above). See Francis Jennings et al., *The history and culture of Iroquois diplomacy: an interdisciplinary guide to the treaties of the Six Nations and their league* (Syracuse: Syracuse University Press, 1985).

between the Crown and the early United States and the Indian nations. He explains:[74]

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws.

He goes on to argue that their status as 'nations' and 'states' was never extinguished but in fact recognized and affirmed by the treaties. The 'several Indian nations' are 'distinct political communities, having territorial boundaries, within which their authority is exclusive', and their 'right to all the lands within those boundaries . . . is not only acknowledged, but guarantied [sic] by the United States'.[75] In addition, while coming under the protection of the United States necessarily restricted their right to trade with other nations, it also places an obligation on the United States to protect Indian sovereignty over their own territory and affairs:[76]

> the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states', says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.'

The Royal Proclamation of 1763 remains part of Commonwealth constitutional law and it is entrenched in the Canadian constitution: in section 25 of *The Constitution Act, 1982*.[77] Also, Chief Justice Marshall has been cited many times in Canadian constitutional law as the authority on the Royal Proclamation. Notwithstanding, the constitutionally protected property and self-government of the first nations have been transgressed innumerable times by the United States and Canadian governments in a 'long train' of abuses and

[74] *Worcester v. the State of Georgia* (1832), 6 Peter 515 (U.S.S.C.) in John Marshall, *The writings of John Marshall upon the federal constitution* (Boston: James Monroe and Co., 1839), 419–48, 426. [75] *Ibid.*, 442, 445. [76] *Ibid.*, 446 (6 Peter 560). (6 Peter 542).

[77] *The Constitution Act, 1982* (Schedule B to Canada Act 1982 [U.K.]) section 25. 'The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from (ne porte pas atteinte) any aboriginal treaties or other freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763 . . .'

injustices. Indian lands have been taken without the form of consent required by the Royal Proclamation and international law, treaties have not been honoured, no treaties have been signed for over one-half of Canada (and thus this land remains under native sovereignty), and the native peoples have been involuntarily subjected to non-native government.[78]

If, therefore, Locke is wrong about the nature of property and government in non-state and specifically Amerindian societies, as I have argued; and if the aboriginal peoples, the British Crown, Chief Justice Marshall, International law,[79] and Canadian and United States constitutional law are right in claiming that Amerindians are self-governing nations with ownership of their territories; then it follows from the central theory of government of the *Two treatises* itself that they have the right to defend themselves and their property, with force if necessary, against these injustices, as the Haida, Gitksan and Wet'suwet'en, Lubicon Cree, Kanesatake, Mohawk, James Bay Cree, and Innu of Labrador, among others, are currently doing.[80] Further, if aboriginal property and self-government (sovereignty) are guaranteed in the constitution and constitutional law, as the evidence shows, and if these are denied and violated in practice; then, by the theory of limited constitutional government and rule of law of the *Two treatises*, and of liberal theories descended from it, every citizen has the right to support, with force if necessary, the first nations in their constitutional struggle to bring 'arbitrary' government to abide by the 'settled, standing laws' they have been 'delegated' to uphold.[81]

[78] There is no substitute for the legal–historical study of individual treaties and nations. For an introduction see Georges Erasmus, 'Introduction', in *Drumbeat: anger and renewal*, 1–43 (n. 20 above), and J. R. Miller, ed., *Sweet promises: a reader on Indian–White relations in Canada* (Toronto: University of Toronto Press, 1991).

[79] See John Howard Clinebell and Jim Thomson, 'Sovereignty and self-determination: the rights of native Americans under international law', *Buffalo Law Review*, 27 (1978) 669–712.

[80] See, respectively, Paul Tennant, *Aboriginal peoples and politics: the Indian land question in British Columbia 1849–1989* (Vancouver: University of British Columbia Press, 1990); Gisday Wa and Delgam Uukw, *The spirit in the land* (Gabriola, BC: Reflections, 1989); John Goddard, *The last stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991); Geoffrey York and Loreen Pindera, *The People of the Pines: The warriors and the legacy of Oka* (Toronto: Little, Brown, 1991); Boyce Richardson, *Strangers devour the land*, 2nd edn. (Vancouver: Douglas and McIntrye, 1991); Marie Wadden, *Nitassinan: the Innu struggle to regain their homeland* (Vancouver: Douglas & McIntyre, 1991).

[81] For the theory see Locke, *Two treatises* 135, 137, 149, 168, 210, 240–3, and chapters 1 and 10 of this volume. For a statement of the constitutional struggle by the Chief of the Assembly of First Nations see Ovide Mercredi, 'Aboriginal peoples and the constitution', in *After Meech Lake: lessons for the future*, ed. David Smith, et al. (Sasktoon: Fifth house publishers, 1991), 219–23.

Consequently, as in many struggles for justice over the last three hundred years, Locke's enduring delegation theory of constitutional government, limited by the popular rights to dissent from and resist abuses of political power, is able once again to criticize and transcend the ideological constraints he placed upon it and serve to expose injustice and justify resistance to it. What could be a more fitting tribute at the tercentenary of the *Two treatises* than its self-critical use to expose and justify public action against a monumental injustice, at the base of two allegedly liberal societies, that the concepts of property and political society in the *Two treatises* have served to cover over and legitimate for far too long.

Governing subjects