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### Locke on Territorial Rights

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## Locke on Territorial Rights

### Comments

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# Locke on Territorial Rights

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**Abstract:** Most treatments of territorial rights include a discussion (and rejection) of Locke. There is a remarkable consensus about what Locke's views were. For him, states obtain territorial rights as the result of partial transfers of people's property rights. In this article, I reject this reading. I argue that (a) for Locke, transfers of property rights were neither necessary nor sufficient for territorial rights and that (b) Locke in fact held a two-part theory of territorial rights. I support this reading by appealing to textual and contextual evidence. I conclude by drawing a lesson from Locke's views for current debates on territorial rights.

States exercise political power over the areas they claim as their territories. When they do so legitimately, states possess *territorial rights*. At its core, a state's territorial right is its right to have jurisdiction over a certain geographical area. If a state has territorial rights, then people can become subject to its legitimate authority by being present in the geographical area over which it governs.

Most treatments of territorial rights include a discussion of John Locke. Locke stands out as one of the earliest political thinkers devoting attention, however briefly, to this topic. There is remarkable agreement on what his views were. For Locke, it is said, states obtain territorial rights by means of individual acts of

property submission by their subjects. As part of their political consent people transfer to the state a small part of their property right. This gives the state the right to demand allegiance of anyone who might subsequently enter the property. Entering submitted property is, to use Locke's phrase, to consent tacitly to the state's authority.

This view is idiosyncratic. Many now argue that there is a categorical distinction between the rights of states to jurisdiction and the rights of individuals to property.<sup>1</sup> And Locke's theory of territory is often mentioned only to be summarily rejected, so as to indicate the need for an alternative approach. I believe that this interpretation of Locke is mistaken. As I will argue, Locke did not see territorial rights as based in property. Instead, his approach is considerably more complex, and more modern, than is now realized. Moreover, Locke's views contain an important lesson about what is at stake in discussions of territorial rights. Thus, while the focus of this article is primarily historical, my findings are relevant to contemporary debates as well.

On the reading of Locke I propose, there are two elements to how territorial rights are obtained. Internally, a state gains the right to rule over the people in its territory by being the first to exercise justified political power within an area. When people remain in this area they give the state their tacit consent. Thus, for Locke, tacit consent can justify not only the authority of a state that already has territorial rights, but it can also justify those territorial rights themselves. Externally, a state gains the exclusive right to exercise such political power within its territory by securing the agreement of other states not to engage in competitive exercises of

political power. This is achieved through international treaties. Before defending this reading, a word about territorial rights is required. There is some dispute about how to understand these rights. Some adopt extensive definitions. A. John Simmons, the most prominent defender of the reading of Locke that I will challenge, defines territorial rights as a complex bundle of claims, including:

(1) rights to exercise jurisdiction (either full or partial) over those within the territory, and so to control and coerce in substantial ways even non-citizens within it; (2) rights to reasonably full control over land and resources within the territory that are not privately owned; (3) rights to tax and regulate uses of that which is privately owned within the state's claimed territory; (4) rights to control or prohibit movement across the borders of the territory; and (5) rights to limit or prohibit 'dismemberment' of the state's territories (Simmons, 2001, p. 306; compare Stilz, 2009, p. 186).

Others, like David Miller (2011, pp. 92–3), adopt a more parsimonious (although still extensive) view. According to Miller territorial rights include rights to (1) jurisdiction, (2) resources found on the territory and (3) control immigration.

For present purposes I will adopt only a very simple understanding of territorial rights and focus on element (1) alone. That is, I will understand a state's territorial right as its exclusive right to rule within a certain geographical area. More precisely, a state has a territorial right over area A if it has the exclusive moral right to issue and enforce law (exercise political power) over people's actions and possessions in A because they are in A.<sup>2</sup>

This more modest focus is advisable for a number of reasons. One is that it will help to keep our discussion manageable. Another is that this is the only issue to which Locke directly spoke. In any case, element (1) will likely be a centrally important component of territorial rights. The present modest account thus avoids begging any further questions.

### **The Standard Reading**

The question we are asking is under what conditions, for Locke, can a state have rightful jurisdiction over land? When has a state legitimate authority over people and their possessions because they are present in a particular area (the territory)?

According to the standard interpretation of Locke, a state obtains territorial rights because the original founders of political society submitted, as part of their consent, not only their persons to its authority but their property as well. In short, at its founding, individuals transferred to the state some of the incidents of their natural property rights. The state thus obtained the right to set conditions to the subsequent use or ownership of the land. Among these conditions is that people accept its authority.

A state's territorial right is thus quite literally patched together from the partially transferred property rights of its subjects. Its right to rule becomes attached to the land in the same way easements can. For Locke, Simmons writes (2001, p. 317), 'the state's right to territory constitute[s] a weak form of property'. This reading is said to find support in a number of passages from Locke's *Second Treatise*, and especially section 120. There Locke writes:

By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being (Locke, 1988 [1689], Second Treatise [II], para. 120).<sup>3</sup>

Thus, anyone who later acquires or enjoys any of the land annexed to the commonwealth '*must take it with the Condition it is under; that is, of submitting to the Government of the Commonwealth*' (II, 120, emphasis in original).

Similarly, in II, 73, Locke asserts that, despite people's inability to subject others to political authority, children can end up incurring political obligations as a consequence of their parents' actions. After their parents' decision to submit their property, they can only enjoy the land on which they have grown up on the condition that they accept the sovereign's authority:

there being always annexed to the Enjoyment of Land, a Submission to the Government of the Country, of which that Land is a part; ... it being only a necessary Condition annex'd to the Land, and the inheritance of an Estate which is under that Government, reaches only those who will take it on that Condition, and so is no natural Tye or Engagement, but a voluntary Submission ... if they will enjoy the *Inheritance* of their Ancestors, they must take it on the same terms their Ancestors had it, and submit to all the Conditions annex'd to such a Possession (emphasis in original).<sup>4</sup>

As a result of the state's partial ownership of the land, subsequent people can enter the territory only if they (tacitly) consent to accept the terms set by the state. Locke writes:

every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it (II, 119) (emphasis in original).

Such tacit consent is given by 'barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government' (II, 119), and by residing on the land that is within a state's rightful territory, 'living quietly, and enjoying Priviledges and Protection under them' (II, 122). In this way, the state acquires a lasting territorial right over the area.<sup>5</sup>

## **Two Problems**

The textual evidence in favor of the standard interpretation appears to be strong. In the next section I will show that this appearance is deceptive. First, however, I will point out two serious problems with the standard reading: for Locke, the submission of property by subjects is neither necessary nor sufficient for a state's territorial rights.

### ***The Submission of Property is Not Necessary for a State's Territorial Rights***

A state's territorial right is the right that people accept its authority if they are in a territory. The first source of concern about the standard reading is that Locke does



not think transfers of property *necessary* for a state's right that people in its territory accept its authority.

One way to see this is by looking at Locke's doctrine of tacit consent. Locke discusses tacit consent in a number of different contexts, including his treatment of the founding of political societies. He repeatedly asserts that such societies can be founded by tacit consent.<sup>6</sup> However, this foundational tacit consent must be given for some other reason than that one is on a state's rightful territory. After all, no such state can exist before foundational consent has been given. So even if tacit consent to a state with territorial rights is given because of previously submitted property rights, *foundational* tacit consent is not.

Locke does not mention the submission of property in this context. He talks about the organic processes by which small-scale families develop into early civil societies. Thus, in II, 94, Locke talks about cases where a sovereign's authority 'by a tacit Consent devolved into his hands', because of 'some one good and excellent Man, having got a Preheminency amongst the rest'. This tacit consent was given because people 'tacitly submitted to it, and the easiness and equality of it not offending any one, every one acquiesced, till time seemed to have confirmed it' (II, 110). In early civil societies, states develop gradually, with people tacitly consenting to them in ways that have to do with custom and acquiescence.

Locke takes the outcome of these processes to be genuine political states. After all, the point of these sections is that fathers do not (*qua* fathers) have natural authority *despite* the fact that states originally developed out of families. Thus, Locke writes that 'the natural *Fathers of Families*, by an insensible change, became the

*politick Monarchs* of them too' (II, 76, emphasis in original). Visitors and newcomers in these states will thus have to consent tacitly to their authority, otherwise historically early states would have been without territorial rights until subjects decided to submit their property. This would have made such societies *very* different from all other states Locke discusses in the *Two Treatises*, and there is no reason to believe this was the case. Nor is there reason to believe that the territorial rights of these early societies were created on some separate occasion.<sup>7</sup>

The same is visible in Locke's treatment of jurisdiction over coastal waters. Locke describes the ocean as unowned, 'that great and still remaining Common of Mankind' (II, 30). The oceans are held in common given Locke's labor theory of appropriation – they could not be privately appropriated since they cannot be improved by laboring on them. All one can establish property in is what one might extract from the sea by laboring: 'what Fish any one catches in the Ocean ... is *by* the *Labour* that removes it out of that common state Nature left it in, *made* his *Property*' (II, 30, emphasis in original).

It follows from this that if the submission of property were necessary for a state to have jurisdictional rights over territory, then states could not have jurisdiction over their coastal waters. This would have been a novel and highly controversial view in Locke's time since the status of the high seas and coastal waters was subject to heated political and philosophical debates. These issues occupy a central place in the works of Grotius and Pufendorf, both of whom Locke deeply admired and with whose work he engaged. And the English and Scots were engaged in a dispute with the Dutch over fishing rights in their coastal waters (Tuck,

1999). The fact that Locke did not think himself compelled even to mention the possibility that his view might imply rejection of the consensus view that coastal waters could fall within a sovereign's jurisdiction is further evidence against the contention that the submission of property is necessary for territorial rights.

If Locke's discussion of early political societies and coastal waters suggests that transfers of property are not necessary for a state to acquire territorial rights, the substance of his views suggests the same. For Locke, the transfer of property cannot be necessary for the rightful exercise of political power. For one, the powers of government are based on people's transferred executive rights to enforce the law of nature (II, 171). But people's executive rights are *natural* rights, whereas property rights are *acquired*. Whether or not one has the executive right thus cannot depend on whether or not one has a (partial) property right.<sup>8</sup> Moreover, the permissibility of exercising one's executive right can also not be limited by other people's property rights. Criminals cannot escape justice by insisting on their property rights. If they could, the state of nature would be marred by serious injustice, not mere 'inconveniences'.

For Locke, then, states can gain a right to rule over a part of the earth, and thus a right that the people who are present there consent or leave, without first securing their (partial) property rights. It follows that the submission of property is not a necessary condition for the territorial rights of states.

***The Submission of Property is Not Sufficient for a State's Territorial Rights***

The argument above opens up the alternative reading proposed below. Before moving on to develop that view, however, let us consider another, potentially more devastating problem: contrary to the standard reading, Locke's arguments in the *First Treatise* imply that the submission of property could not be *sufficient* for a state to obtain territorial rights.<sup>9</sup>

The purpose of the *First Treatise*, of course, was to critique the views of Robert Filmer. In *Patriarcha*, Filmer had defended absolute government by arguing that political authority lies with the descendants of Adam. God had given the entire earth to Adam, and this secured Adam's absolute title to govern. The authority of subsequent rulers depended on their inheriting this title from Adam. A key part of Filmer's view, therefore, was that 'the first principles of government ... necessarily depend upon the original of property'.<sup>10</sup>

Locke provided a number of arguments against this. His strategy was to outline the various steps of Filmer's argument, and criticize each of them separately. Thus, Locke argued that God had granted Adam only the right to use the earth, not a full-blown property right. But more important for our purposes is Locke's claim that, even if Adam had a genuine property right to the entire earth, this still could not establish his rightful authority or sovereignty. The passages I discuss below contain the latter part of Locke's argument.

An important part of Locke's argument is that there is a clear conceptual distinction between property and sovereignty. Locke devotes a number of sections in chapter nine of the *First Treatise* to this. Part of his argument is that property and sovereignty are disanalogous in two important ways. First, the appropriate rules for

the succession of political authority are nothing like those for the inheritance of property (I, 91, 93). And second, the rationale behind property, and the freedom it affords its owner, is very different from the rationale behind sovereignty, and the freedom it affords its holder. Locke writes:

Property, whose Original is from the Right a Man has to use any of the Inferior Creatures, for the Subsistence and Comfort of his Life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing, that he has Property in by his use of it, where need requires: but Government being for the Preservation of every Mans Right and Property, by preserving him from the Violence or Injury of others, is for the good of the Governed ... the Sword is not given the Magistrate for his own good alone (I, 92).

If authority were based in property, then the characteristics of the former should be similar to those of the latter. But they are not. Property may be used for the benefit of its possessor. Sovereignty is supposed to aim at the preservation of all. Therefore, sovereignty is not a form of property.<sup>11</sup>

This argument and the distinction upon which it rests were clearly important to Locke. He helps himself to them at various points in the *First Treatise*. One example is section 41, where Locke considers what would follow if one were nevertheless to accept, as Filmer did, that Adam had been given the entire earth as his private property:

But yet, if after all, any one will needs have it so, that by this Donation of God, *Adam* was made sole Proprietor of the whole Earth, what will this be to his

Sovereignty? And how will it appear, that *Property* in Land gives a Man Power over the Life of another? or how will the Possession even of the whole Earth, give any one a Sovereign Arbitrary Authority over the Persons of Men?

(I, 41, emphasis in original)

Because of the hard conceptual distinction between property and authority, establishing that Adam had property over the world could not establish his authority to govern. It is one thing to own land, but quite another to have the right to govern over people and their possessions.

The same point appears earlier in the *First Treatise*. Locke observes that even if it had been God's will that '*Adam was made General Lord of all Things*, one may very clearly understand him, that he means nothing to be granted to *Adam* here but Property, and therefore he says not one word of *Adam's Monarchy*' (I, 23, emphasis in original).

These passages and their argument create a problem for the standard reading. The thesis that, for Locke, territorial rights are ultimately based in transferred property rights creates a serious tension, not to say outright contradiction, within his work. It requires us to read Locke as first denouncing the view that sovereignty is grounded in property in the *First Treatise*, only to put forward a similar justification himself in the *Second Treatise*. Such a reading is implausible.

The defender of the standard reading might object here that Locke is making a more limited point, namely that no *direct* inference from property to authority is possible. This would pose no conflict with the standard reading, which holds not

that rights to property are *the same* as rights to authority, but only that (partial) rights to property enable the state to demand that people consent to its authority. The relation between property and sovereignty according to the standard reading, then, is an indirect one, mediated by tacit consent (Simmons, 2001, pp. 317–8).

The problem with this response is that Locke explicitly denies it. This denial comes in the context of Locke's insistence that the distinction between property and sovereignty is so robust as to preclude *any* derivation of sovereignty from property, including by roundabout ways. This argument appears in sections 41–3 of the *First Treatise*. These passages are now mostly famous for their endorsement of a right to use what is necessary for subsistence but play a quite different role in the *First Treatise*. They establish that no derivation of sovereignty from property *whatsoever* can succeed.

To show this, Locke imagines a scenario in which someone who owned the entire world would deny others access or use of that property unless they recognize him as sovereign. Even this indirect way of grounding sovereignty in property must fail, he says, because our property rights are circumscribed so as to rule out any such offer:

The most specious thing to be said, is, that he that is Proprietor of the whole World, may deny all the rest of Mankind Food, and so at his pleasure starve them, if they will not acknowledge his Sovereignty, and Obey his Will. If this were true, it would be a good Argument to prove, that there never was any such *Property* (I, 41, emphasis in original).

Locke casts his objection here in terms of absolute or arbitrary authority (the kind defended by Filmer).<sup>12</sup> But his argument is the fundamental one mentioned above. This is clear because in the surrounding passages Locke explains that ‘a Man can no more justly make use of another’s necessity, to force him to become his Vassal, by with-holding that Relief, God requires him to afford to the wants of his Brother’ (I, 42); and also because he concludes that ‘all this would not prove that Propriety in Land, *even in this Case*, gave any Authority over the Persons of Men, but only that Compact might’ (I, 43, emphasis added).

‘Even in this case’: the phrase is significant. Locke is emphasizing that even the strongest and most comprehensive kind of ownership in land could not ground rightful authority. And the suggestion is that if *even this* kind of ownership fails to support authority, then no kind of ownership could. This is why Locke concludes this part of his argument by stating that ‘it is clear, that tho’ God should have given *Adam Private Dominion*, yet that *Private Dominion* could give him no *Sovereignty*’ (I, 43, emphasis in original). That is, whatever else the possession of property might enable one to do, because of the ways in which it is morally circumscribed, it cannot make one a sovereign.<sup>13</sup>

The best interpretation of Locke’s *First Treatise*, then, is that it denies that the possession of property can be sufficient for state authority over land. Locke’s argument is twofold. We cannot derive authority from property *directly* because property is conceptually distinct from authority. And we cannot derive authority from property *indirectly* because property rights are circumscribed in ways that preclude this.



The standard reading ascribes to Locke the denial of either of those claims. It thus runs into a serious problem. Not only is it contrary to Locke's explicitly stated view, but it also threatens to undo a central part of Locke's argument against Filmer. For if the *partial* transfer of property rights could suffice for a state's territorial rights, then surely the more extensive property that Filmer alleged Adam and his descendants enjoyed could do the same job.

### **The Evidence for the Standard Reading Reconsidered**

I have said that Locke thought the submission of property by individual subjects to be neither necessary nor sufficient for a state to obtain the right to rule over a territory. But what about the evidence in favor of the standard reading? What about those passages where Locke speaks of the property of subjects as submitted to the sovereign? No credible interpretation can discount these remarks.

However, there is no need to discount these remarks. To see this, consider again the key passages that are said to support the standard reading: II, 73 and 120. Since the two are similar and II, 120 is often presented as the lynchpin of the standard reading, I will focus on the latter. I here reproduce the section in its entirety:

To understand this the better, it is fit to consider, that every Man, when he, at first, incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the Community those Possessions, which he has, or shall acquire, that do not already belong to any other Government. For it would be a direct Contradiction, for any one to enter into

Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government, to which he himself the Proprietor of the Land is a Subject. By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being. *Whoever* therefore, from thenceforth, by Inheritance, Purchase, Permission, or otherways *enjoys any part of the Land*, so annex to, and under the Government *of that Commonwealth, must take it with the Condition* it is under; that is, *of submitting to the Government of the Commonwealth*, under whose Jurisdiction it is, as far forth, as any Subject of it (emphasis in original).

Two things are clear. First, Locke maintains that whoever submits to government must thereby also submit their property. The argument for this is the practical purpose of government. The need for an impartial judge that protects and determines property rights is one of the main motivations for the creation of political society. Thus, a view according to which property would not be subject to the sovereign's authority would make it impossible for government to perform its essential functions. This 'would be a direct Contradiction'.<sup>14</sup> Second, the state's authority over land survives its individual possession. Subsequent owners '*must*

*take it with the Condition it is under'*: they are not free both to own the property and to refuse to consent to the state's authority.

What is less clear, however, is to what extent this section supports the standard interpretation over alternative readings. After all, Locke's claim that a state's subjects must accept its authority not only over their persons but also over their property is one that *any* view of territorial rights will accept. It is obvious that *if* a state has territorial rights, owners of land in that territory must recognize that government's authority over both their persons and their land. This is just what it means for a state to have territorial rights, lest one wants to enter into a 'direct Contradiction'.

Indeed, there is reason to think that II, 120 represents Locke's summary of the correct *conclusion* of his argument in defense of a state's territorial rights, not his explanation of what grounds territorial rights. The topic that Locke is addressing here concerns the conditions of *giving consent*, not the conditions of *acquiring jurisdiction*. Locke is focusing on the position of subjects and denies that they can own property within a state's territory without its falling under the state's jurisdiction. The submission of property discussed in II, 120, then, may refer not to some act of 'submission' as the source of territorial rights, but to 'submission' as the condition of being subject to state authority.

We must take caution not to infer from (1) the claim that if a state obtains its territorial rights by its individual subjects submitting their property, then subsequent owners cannot own such property without recognizing the state's authority over it, and (2) Locke's explicit affirmation of the claim that people cannot

own property that lies within the state's territorial jurisdiction without recognizing the state's authority over it, (3) the conclusion that, for Locke, a state obtains its territorial rights by its individual subjects submitting their property. That would commit the fallacy of affirming the consequent.

The textual evidence for the standard reading of Locke, therefore, is neutral as to the nature of a state's territorial rights or how it may obtain these.

### **Locke on Territory Revisited**

In light of these arguments, there is a need for a different interpretation of Locke's views on territory – one that does not refer to property. Locke's account of territorial rights, I submit, consists of two elements. The first is a state's 'internal' right to govern over all who are within its territory. This a state can obtain by governing effectively and justly within an area, thereby providing important benefits to its subjects, with the people's consent. The second is a state's 'external' right that other states not similarly exercise political power within its territory. This a state can obtain through international treaties. These elements constitute territorial rights: a state's exclusive moral right to issue, enforce and adjudicate law concerning people's persons and possessions within an area.

### ***Territorial Rights vis-à-vis Subjects***

To see how states might obtain the right that the people in their territories accept their authority, let us return to Locke's discussion of how states historically came about. As we saw above, Locke thought that most early civil societies were not

founded by people literally coming together and expressly consenting to give up their natural executive rights, but by the gradual development of small family-based units into political communities.

Locke considers a number of ways in which this early development of political authority might have taken place. One was as the continuation of parental authority, such as where 'twas easie, and almost natural for Children by a tacit, and scarce avoidable consent to make way for the *Father's Authority and Government*' (II, 75, emphasis in original). Another was by a kind of salience, when 'some one good and excellent Man, having got a Preheminency amongst the rest' comes to be recognized as an authority (II, 94). Yet another was by necessity, when people joined together for defense against external enemies (II, 110).

As part of these processes, Locke thought, authorities received the consent of those over whom they governed. Consent might be given expressly or tacitly, but Locke repeatedly suggests that historically authority was first acquired by tacit consent. The way in which tacit consent is given at the state's founding resembles the way subsequent generations give tacit consent. Later generations, Locke writes, give tacit consent to the authorities by 'living quietly, and enjoying Priviledges and Protection under them' (II, 122). Locke describes foundational tacit consent in similar ways. II, 94 describes how a sovereign might have 'Deference paid to his Goodness and Vertue, as to a kind of Natural Authority', and how this would lead to genuine authority 'by a tacit Consent devolved into his hands'. Similarly, II, 110 compares tacit consent to acquiescence:

*a Family by degrees grew up into a Commonwealth, and the Fatherly Authority being continued on to the elder Son, every one in his turn growing up under it, tacitly submitted to it, and the easiness and equality of it not offending any one, every one acquiesced, till time seemed to have confirmed it (emphasis in original).*<sup>15</sup>

Not only does Locke's *description* of how tacit consent is given at the state's founding resemble his description of how it is given once a state has territorial rights, but he also sees them as having the same *rationale*. Continued residence counts as tacit consent because of the many benefits the state provides compared to the state of nature (II, 130). This is the same reason for which people join into society in the first place. Emphasizing this point, Locke tellingly writes that the benefits of civil society are 'the original *right and rise* of both *the Legislative and Executive Power*, as well as of the Governments and Societies themselves' (II, 127, emphasis in original).

The picture that arises is of states slowly and organically developing while obtaining the tacit consent of the people by their continued residence, acquiescence and approval. These states – the kind Locke was interested in justifying – have the enduring right to rule over the land in the area over which they govern. That is, they enjoy territorial rights. It follows that Locke considered tacit consent by acquiescence or continued residence in a newly formed state sufficient (and, of course, necessary) for it to acquire territorial rights.

Once a legitimate state is created, in other words, it acquires territorial rights over the area within which it governed. II, 120 emphasizes this point. Consent gives states rightful authority over not only persons but also land because:

it would be a direct Contradiction, for any one to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government.

And the state's authority endures over time because:

*Whoever* therefore, from thenceforth, by Inheritance, Purchase, Permission, or otherways *enjoys any part of the Land*, so annex to, and under the Government of that Commonwealth, must take it with the Condition it is under; that is, *of submitting to the Government of the Commonwealth* under whose Jurisdiction it is, as far forth, as any Subject of it (emphasis in original).

Locke thus did not think of territorial rights as having some separate source.

Instead, they are the result of the very same processes by which states come about and acquire authority in the first place: the stable exercise of political power, within the bounds of the law of nature, with the consent of the people. It is for this reason that Locke describes the tacit consent given at the state's founding as 'scarce avoidable' (II, 75), and the transition from the state of nature to civil society as 'an insensible change' (II, 76).

### ***Territorial Rights vis-à-vis Foreigners***

The account above concerns the 'internal' part of a state's territorial rights. What about the 'external' part? How are we to delineate the separate territories of states? And why, on this view, should states have the exclusive right to rule within them?

Locke's answer appeals to international treaties. Early political societies, he speculated, entered into agreements that determined their mutual boundaries. By agreeing on where boundaries were to be drawn, sovereigns established mutually exclusive spheres of jurisdiction and agreed to respect their separate territories.

Locke discusses these treaties in the *Second Treatise* and the *Essays on the Laws of Nature*. The discussion in the *Second Treatise* is offered in passing during his defense of private property. Locke provides a number of arguments to show why modern conditions do not violate the 'enough, and as good' proviso for appropriation. One is that the use of money is equivalent to consent to larger holdings. Another is that appropriation did not subtract but added to what could be owned because of resultant increases in productivity. His third argument is that, sometime in the past, different political communities collectively gave their consent to others' holdings as part of mutual treaties or 'Leagues'.

However, this was not the only purpose of these treaties. In addition to people mutually giving up their original rights to land abroad, they also settled territorial boundaries. In II, 38 Locke offers a speculative history of early times. People left their nomadic existence when they:

incorporated, settled themselves together, and built Cities, and then, by consent, they came in time, to set out the bounds of their distinct Territories, and agree on limits between them and their Neighbours, and by Laws within



themselves settled the *Properties* of those of the same Society (emphasis in original).

Similarly, in II, 45:

though afterwards, in some parts of the World (where the Increase of People and Stock, with the *Use of Money*) had made land scarce, and so of some Value, the several *Communities* settled the Bounds of their distinct Territories, 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 (emphasis in original).

And in the *Essays on the Law of Nature* Locke again claims that territories are delineated by inter-state agreements. He explicitly describes ‘the fixed boundary-lines between neighbouring peoples’ as created by ‘an expressly stated contract’ (Locke, 1997 [1663–4], essay V, p. 107).

These treaties fill two crucial gaps in Locke’s account of territorial rights. First, they offer a principled way of deciding where one sovereign’s jurisdiction ends and another’s begins. By drawing clear boundaries, these treaties demarcate the separate territories of different societies. Second, they explain why sovereigns cannot rightfully exercise power within each other’s jurisdictions. The governments that sign these treaties become contractually obligated to respect each other’s separate spheres of authority.

These treaties thus complement Locke’s account of territorial rights. How might defenders of the standard reading see the significance of these treaties? At first sight, there may seem no need for them: the boundaries of territories are

determined by the underlying property rights. But perhaps they can play a supplementary role. They might, for example, draw boundaries wherever property rights are disputed. In these cases, treaties determine jurisdictional boundaries by determining the property rights on which territory is based. Another suggestion might be that these treaties served to draw boundaries in places where the land between societies was still unowned.<sup>16</sup>

But these suggestions lack support. Sections II, 38 and 45 quite simply state that treaties settle territorial boundaries. They do not refer to unowned territory in particular. Indeed, the passage in the *Essays on the Law of Nature* does not mention property at all. Moreover, when Locke does mention the need to settle property, he says that this is the job of the internal laws of societies, not treaties.<sup>17</sup>

There are two further reasons for understanding the significance of these treaties as I have proposed. First, although we should not read too much into Locke's use of the term 'territory', it is worth noting that the term appears in only two contexts in the *Second Treatise*. One is in Locke's account of how tacit consent makes people bound to comply with the law of the land. The other is how the boundaries of legitimate states come into being in the passages quoted above. The proposed reading explains this connection: for Locke, the term 'territory' refers to the area over which a state has the right to rule.

The second reason is that this reading best fits the intellectual context in which Locke was working, and in particular the debate between Grotius and Pufendorf. I turn to this now.

## **Grotius on Territory**

Richard Tuck (1999; 2003) and James Tully (1980) have drawn attention to an under-appreciated theme of Locke's arguments in especially the *Second Treatise*.<sup>18</sup> It is well known that Locke greatly admired both Grotius and Pufendorf.<sup>19</sup> Tuck and Tully point out that throughout the *Second Treatise* Locke defends Grotius' conclusions against criticisms by Pufendorf. For example, Locke argues that people have a natural executive right to punish transgressions of the law of nature; that 'perfect' slavery was possible only as the result of taking captives in war; and that original appropriation is possible without the consent of others.

This provides another source of evidence about Locke's views on territory. Other things equal, a reading of Locke becomes more plausible if it coheres with the views of Grotius, and conflicts with those of Pufendorf, rather than the reverse. As I show below, there are significant similarities between Grotius' views on territory and the reading I have proposed, while the standard reading aligns Locke with Pufendorf. The reading I have proposed thus fits better the context of Locke's thought.

Among the most innovative and controversial parts of Grotius' writings have been his comments on the relation between property and territory. Grotius began discussion of this relation in *The Free Sea*, but extended and explicated this in *The Rights of War and Peace*. He uses chapter 3 of book 2 to emphasize a distinction between property (*dominium*) and jurisdiction (*imperium*). Grotius emphasizes this distinction because property and jurisdictional rights are likely to be confused. This

is because they are initially brought about in the same way: by first occupation.

Thus, Grotius starts the chapter by writing that:

Our Business then here, is to treat of taking Possession by Right of *Prior Occupation*; which, since those early Times we just now mentioned, is the only natural and primitive Manner of Acquisition. Now, as to what belongs properly to no Body, there are two Things which one may take Possession of, Jurisdiction, and the Right of Property, as it stands distinguished from Jurisdiction ... Jurisdiction is commonly exercised on two Subjects, the one primary, *viz.* Persons, and that alone is sometimes sufficient, as in an Army of Men, Women, and Children, that are going in quest of some new Plantations; the other secondary, *viz.* the Place, which is called Territory. But altho' Jurisdiction and Property are usually acquired by one and the same Act, yet are they in themselves really distinct (Grotius, 2005 [1625], bk. 2, ch. 3, s.4, paras 1–2, emphasis in original; see also bk. 2, ch. 3, s. 13, para 2).<sup>20</sup>

The distinction has important implications according to Grotius. For example, foreign owners of land must accept the state's jurisdiction over the land *ab initio*. And political authority cannot entitle the sovereign to expropriate his subjects. But Grotius was also concerned about *arcifinious* lands – places with natural boundaries – which pose a problem for property-based theories of territory. Suppose, writes Grotius, that the banks of a river belong to different countries, and the river gradually shifts into the territory of one. Since rivers in general belong to whoever owns both banks, it would follow if jurisdiction were based on property that when the river shifts far enough into the land possessed by one country, it would come to

lie within its jurisdiction as well. But this is not the case. Instead, the territorial boundary will shift along. Thus, territorial rights cannot be grounded in property rights (Grotius, 2005 [1625], bk. 2, ch. 3, ss.16–7).

The distinction between property and jurisdiction also played an important role in *The Free Sea*. Grotius there objected to the Portuguese denying the Dutch free passage to trade in the East Indies. He argued that since no one can own the seas, any defense of Portuguese political control over the high seas had to be based on claims of jurisdiction. But the Portuguese could not claim jurisdiction over the seas, and so lacked the right to deny the Dutch free passage (Grotius, 2004 [1609], ch. 5).<sup>21</sup>

On the reading I have proposed, Locke accepted a similar distinction between jurisdiction and property and drew similar conclusions from this. Not only did Locke also mention that foreign owners of land must accept the state's jurisdiction over the land, and that political authority cannot entitle the sovereign to expropriate his subjects, he also agreed with Grotius that appropriation in the colonies was separate from their political control. That is, both thought that unused lands (including lands used by nomadic peoples) were not owned, but might nonetheless fall under the jurisdiction of native peoples. Such lands could be settled and appropriated by colonists, but not without deferring to local authorities (Tuck, 1999, p. 176).

By contrast, Pufendorf (2005 [1672], bk. IV, ch. 5, paras 5–9) had explicitly rejected Grotius' views on territory. Pufendorf saw territorial jurisdiction as based in property. On the proposed reading of Locke, then, he firmly sides with Grotius

and against Pufendorf concerning territory, while the standard reading inverts this relation. This provides a contextual argument in favor of the proposed alternative reading of Locke. It removes what would otherwise be an odd exception to the general theme of Locke defending the views of Grotius against Pufendorf.<sup>22</sup>

This argument is bolstered by two further similarities. One concerns how rights to jurisdiction are obtained. Grotius thought these came about in the same manner as property rights: by first possession. But there is an important difference with appropriation. For a state to enjoy territorial rights, it must effectively exercise political power within it:

Now the Jurisdiction or Sovereignty over a Part of the Sea is acquired, in my Opinion, as all other Sorts of Jurisdiction; that is, as we said before, in Regard to Persons, and in Regard to Territory. In Regard to Persons, as when a Fleet, which is a Sea-Army, is kept in any Part of the Sea: In Regard to Territory, as when those that sail on the Coasts of a Country may be compelled from the Land, for then it is just the same as if they were actually upon the Land (Grotius, 2005 [1625], bk 2, ch. 3, s. 13, para. 2).

The proposed account of Locke on territory holds the same. Groups can obtain territorial rights by occupying and stably exercising political power within an area.

The second similarity concerns the role of international treaties. Grotius thought that where natural boundaries are absent, such as on the high seas, treaties would demarcate the exact boundaries of territorial jurisdiction. Jurisdiction, Grotius argued (and Locke agreed), is based on the natural executive right. And since this right is held 'not by any proper right but of the common right which also

other free nations have', the seas are in principle under common jurisdiction (Grotius, (2004 [1609]), ch. V). However, by entering into international agreements, countries could contract to forgo their freedom to exercise the executive right and create zones of exclusive jurisdiction:

We recognize, however, that certain peoples have agreed that pirates captured in this or in that part of the sea should come under the jurisdiction of this state or of that, and further that certain convenient limits of distinct jurisdiction have been apportioned on the sea. Now, this agreement does bind those who are parties to it, but it has no binding force on other nations, nor does it make the delimited area of the sea the private property of any one. It merely constitutes a personal right between contracting parties (Grotius, (1916 [1609], p. 35).

Locke's brief but repeated mentions of international treaties play the same role in his theory of territory. They demarcate exclusive spheres of political authority because sovereigns have become contractually obligated to respect them as such.

## **Conclusion**

Locke's theory of territorial rights is twofold. (1) States can gain the right to rule over a territory by exercising justified political power within it. When they do, the people who remain in these areas thereby give them their tacit consent. (2) The boundaries of these areas are settled primarily by international treaties. Through entering into such treaties, sovereigns obligate themselves to refrain from exercising political power within each other's territories.

In closing, I will address two final questions to which this argument might give rise. First, if I am right, why have so many misread Locke on this topic? Second, how does this reading of Locke affect the role his thought plays in the development of political philosophy?

About the first question one can only speculate. But there are a few reasonable explanations. One is that attention to Locke's views on territory is a relatively recent phenomenon. Yet few still carefully study Locke's critique of Filmer in the *First Treatise*, a central piece of evidence against the standard view. Sections I, 41–3 still draw attention, but are mainly read for their remarks on distributive justice (the so-called charity proviso), not authority.

More importantly, many now insist on a distinction between state authority and territorial rights. The latter, they argue, do not follow from the former. But for Locke this is not a meaningful distinction. The freedom one lacks in an existing state is the same as one lacks when a state is first created – to remain in the area yet escape political authority. And since Locke had no qualms about this lack of freedom once states exist, why think he had qualms about it when states were first created? As a result, modern audiences might be looking in Locke for something that is not there.

This theory of territory adds, I believe, to Locke's significance as a liberal thinker. Locke's work appears on the cusp of a major shift in how the nature of sovereignty and jurisdiction was perceived. And while Grotius first introduced the conceptual distinction between jurisdiction and property, it was Locke who saw its true importance. Far from being the *source* of rightful government, he argued,



individual property rights pose necessary *limits* to it. Citizens retain their natural rights, including their property rights, and the role of government is to render them secure and determinate.

In the end, then, Locke may have been right that separating one's theory of legitimate authority from one's theory of territory is superfluous. Locke saw that the powers of government are based on the natural executive rights of its subjects. But the executive right is neither a part of nor limited by people's property rights. Thus, the conditions of justified government over people do not need to be supplemented with separate conditions of justified government over land. Territorial rights, Locke teaches us, are simply jurisdictional rights.

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## Notes

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<sup>1</sup> See, e.g., Brilmayer, 1989; Buchanan, 2003; Morris, 2002, pp. 262–5.

<sup>2</sup> Territorial rights are thus 'rights over land' in two ways. They include the right to settle and enforce people's rights to land because they are in a particular area. Compare Nine, 2012, pp. 7–11. Thanks to an anonymous referee and Annie Stilz for pressing me to clarify this.

<sup>3</sup> Subsequent references to the *Two Treatises* will be by number of the book and paragraph.

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<sup>4</sup> See also II, 116 and II, 117.

<sup>5</sup> For this interpretation of Locke, see Beitz, 1980; Buchanan, 2003; Gale, 1973; Grant, 1987; Miller, 2007, ch. 8; 2011; Simmons, 2001; Steiner, 2011; Stilz, 2009; Tuck, 1999 among many others.

<sup>6</sup> II, 74, 75, 94, 105, 106, 107, 110, 112. I discuss these sections more fully below.

<sup>7</sup> Of course the defender of the standard reading might say here that, even in this case, people did submit (as part of their tacit consent) their property to the authority. However, this is to make a mockery of the standard interpretation. Not only does it become equivalent to the view I will outline below, but also there is no reason to think that the transfer of the natural executive right (which is the result of consent) must involve a transfer of a property right.

<sup>8</sup> Stilz (2009, p. 191) fails to see this.

<sup>9</sup> Of course proponents of this view might insist that states must satisfy other conditions as well, such as that political rule be just, and that for this reason the submission of property is not a sufficient condition for territorial rights. I have no quarrel with this. My point here is simply this: whatever other conditions might be in place, the submission of property does nothing to further the Lockean case for territorial rights.

<sup>10</sup> Cited in Tully, 1980, p. 56.

<sup>11</sup> In the *Second Treatise*, Locke adds a third argument: property rights do not provide rights over persons, but over land. And jurisdiction requires rights over persons. See II, 120, 121, 139, 180, 182.

<sup>12</sup> I thank an anonymous reviewer for pressing me on this point.

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<sup>13</sup> John Simmons has suggested to me that Locke's point here is merely that consent must be freely given, and that this is precluded by Adam's ownership of the entire earth. However, interpretative charity as well as the dialectic of the *First Treatise* suggests otherwise. Locke's strategy is to consider various interpretations of Filmer's position, and show that none is successful. In I, 41–3 Locke discusses what he thinks would be the strongest possible case Filmer might make for deriving sovereignty from property – not one that he can easily knock down because of a peculiarity about Adam's position as the sole owner of the earth. Moreover, stressing the voluntariness conditions for valid consent is a risky strategy for any interpretation of Locke's thought (if not for modern uses of it). For such conditions threaten not just my interpretation of Locke's views on territory but the entire doctrine of tacit consent.

<sup>14</sup> See also II, 97, 99.

<sup>15</sup> See also II, 94, 105, 106, 107, 112. These passages are often ignored or downplayed, leading authors to assert (falsely) that, for Locke, express consent is necessary at the founding of a commonwealth. See, e.g., Franklin, 1996, p. 414. One notable exception is Simmons, 1998.

<sup>16</sup> The latter seems suggested by Simmons (2001, pp. 314–5). Thanks to John Simmons and an anonymous referee for pushing me on this.

<sup>17</sup> Locke does say that the commons are collectively owned by the community (see also II, 35). But this is not denied by the reading proposed here. All it denies is that this grounds their territorial rights.

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<sup>18</sup> Tully even writes that Locke's *Second Treatise* 'can be read as a defence of Grotius' conclusions against the attacks leveled at them by Pufendorf' (Tully, 1980, p. 178).

<sup>19</sup> Locke (1997 [1703], s.186) recommends the works of Grotius and Pufendorf among those that are indispensable to the education of a gentleman.

<sup>20</sup> It is true that Grotius also talks of land as 'the general Property of the State' (e.g. bk. 2, ch. 3, s.29, para. 3). But in these passages Grotius is quite clearly talking of private property. Private property, Grotius thought, could be created either by individual appropriation (occupation) or by 'initial division', where a community in a consensual manner collectively divided the land. In those cases, and only in the sense relevant to private ownership, does Grotius refer to the state or nation as owning land. I thank Annie Stiliz for suggesting this objection to me.

<sup>21</sup> Tuck (1999, p. 91) labels the passage where Grotius develops this argument as the 'key passage' of *The Free Sea*.

<sup>22</sup> Tuck (1999, pp. 175–81) sees Locke's views on territory as just such an anomaly.

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