Challenging Nozick: What Natural Property Rights?

Anne-Sophie Ouellet

Master of Laws

Faculty of Law

University of Toronto

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Abstract

Nozick is famous for his incendiary claim that “taxation is on par with forced labour.” Although Nozick’s views on distributive justice and property have been abundantly discussed, the vast majority of the literature focuses on these elements as if they were distinct. Taking seriously Nozick’s challenge, however, indicates that these dimensions are closely interrelated. This essay aims at bridging the current gap in the literature between property and taxation theory. In doing so, I put forward a challenge of my own: can Nozickians show that there is a natural right to property that would be binding prior to the advent of a convention? I believe they cannot. I argue that the most notorious contenders - Locke’s labour-mixing argument, the self-ownership thesis, and Kant’s freedom-based account of private property - cannot ground a natural right to private property. This, I argue, greatly threatens Nozick’s argument against the legitimacy of taxation.
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Introduction

It is common place among libertarians to contend that taxation is an illegitimate use of state powers because it interferes with individuals’ right to private ownership. Robert Nozick is probably the most famous proponents of that view. In Anarchy, State and Utopia, he provocatively claims that “[t]axation of earnings from labour is on par with forced labour”:¹ we have a natural property right in our labour and its fruits and therefore, when the state taxes its citizens’ income, it acts like if it had a partial property right in them. According to Nozick, entitlements are historical, and distributive justice has nothing to do with need: property titles are justified as long as they respect the principles of justice in acquisition and in transfer, and they command absolute respect. Private ownership is in direct contradiction with the state’s power to tax.

Unsurprisingly, this account of the relation between taxation and ownership has prompted vigorous criticisms, including that of Thomas Murphy and Liam Nagel in their famous Myth of Ownership.² They argue that property rights cannot stand as an independent evaluative standard for the legal system, including the tax system, because “private property is a legal convention.”³ To function as it currently does, our property system depends on structures (such as a judicial system, the enactment of an official form of currency, and the taxation system) that cannot be set up by private interests. Therefore, because ownership functionally depends on other public institutions to function, ownership is not a natural concept, and cannot impose moral constraints on the tax system. They conclude that there is no such thing as a right to pre-tax income. The state is thereby entitled to claim the product arising from its institutions, and to redistribute property through taxation. There is no natural right to private property, and therefore, Nozick lacks ground for imposing such a constraint on regulatory powers of central governments.

Although I am quite sympathetic to Murphy and Nagel’s conclusions, I believe their approach is unfit to refute Nozickians and other libertarians. The idea that legal rights, including property rights, are a legal convention because they depend on social and political institutions is not

³ Ibid at 8.
inconsistent with the claim that there is a natural right to property. In other words, the fact that our property system rests on a taxation system is no evidence that there is no prepolitical right to privately own property. In this thesis, my objective is to respond to Nozick’s claim regarding the legitimacy of taxation. Murphy and Nagel’s approach, I believe throws light on the sort of argument needed to refute Nozick’s challenge: instead of presuming that there is no pre-political right to private property, one must show why Nozick is not entitled to rely on natural rights to oppose the state’s power to tax. Therefore, I propose to examine Nozick’s theory of natural rights, and assess whether it grounds a natural right to private property. My contention is that it does not.

Although Nozick’s views on taxation and entitlements have been abundantly discussed, the vast majority of the literature either focuses on the impacts on property theory, or on the effects his claim has on distributive justice. Taking seriously Nozick’s challenge, however, indicates that these dimensions are closely interrelated, and must be addressed together. This essay aims at bridging the current gap in the literature between property and taxation theory. I will argue that although ownership is often treated as the paradigmatic case of strictly private interests, the interconnection of public and private law is made particularly salient in the case Nozick raises. This, in turn, impacts how we think both about private and public law, in addition to providing insight to the concept of ownership, and the legitimate foundations of the state.

A brief overview of my approach. In Chapter 1, I will first outline Nozick’s theory of natural rights, and his entitlement theory, in order to present Nozick’s challenge against taxation. In examining Nozick’s account, it will become more evident that Nozick does not actually explain how

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4 There are notable exceptions, like Jeremy Waldron’s famous essay entitled The Right to Private Property (Oxford: Clarendon Press, 1988). James Penner has also contributed to this question in “Misled by Property” (2005) 18:1 Can J Law Jur 75 [“Misled”].


a right to private property arises in the state of nature. In Chapter 2, I will therefore provide a brief definition of what I mean by “natural right”, and I will then examine possible foundations that Nozick could rely on to ground a natural right to private property. Based on their notoriety and their relevancy to Nozick’s conceptual apparatus, I will be focusing on Locke’s labour-mixing argument, the self-ownership thesis, and Kant’s freedom-based argument. None of these arguments, I claim, succeeds in establishing or justifying at least a right of exclusive use or a right to exclude that would be binding prior to the advent of a convention. In Chapter 3, I will show that Nozick’s challenge is seriously (although not conclusively) thwarted if none of those grounds succeed in establishing or justifying a right to exclude or to exclusive use prior to a convention. I will thus review Nozick’s challenge in light of the arguments I surveyed in Chapter 2. Finally, I will discuss how Nozick’s challenge remains relevant for assessing or devising an account of property, even though his premises are called into doubt. I believe that it reminds us of the necessity to have a property structure that explains the difference between legitimate and illegitimate use of state action. As I will show, many existing accounts of property fail to provide such practical guidance.

The argument I present in this thesis is, as I mentioned above, not conclusive. That is, it does not show that a natural right to private property, and far less natural rights in general, cannot be justified. All this proves is that none of the surveyed grounds do. That being said, the three foundations I examined are probably the most widespread and robust arguments for grounding a natural right to property. Therefore, I believe that showing that none of these three arguments succeeds in showing there is a natural right to private property greatly challenges the Nozickian stand against taxation. And I think that my endeavour in this essay should be construed just as that: as a challenge to proponents of the idea that pre-political rights bind the state, and prevents them for setting up some of the most basic and foundational public institutions that characterize our constitutional democracy. The argument I present here is sufficient to shift the burden of proof to them: they must now explain how these alleged constraints on state action arise, and I believe it is not an easy burden to meet.
Chapter 1
Nozick's Challenge

1. Why Nozick?

Before I present Nozick's theory of rights and entitlement theory, I wish to reflect on why Nozick is an interesting starting point for my purpose, that is, to examine the structure of our conception of property rights and the relationship this conception bears to the question of the legitimacy of the state’s public powers. Nozick is not a property theorist, and although he is most famously known for *Anarchy, state, and Utopia*, published in 1974, his work in political philosophy is somewhat of a deviation from his field of expertise, which ranged from epistemology to metaphysics. Besides, *ASU* was heavily criticized and almost consistently rejected; Nozick never really pursued the work he started in *ASU*, nor did he respond to its critics. How comes, then, should Nozick be considered a leading figure in property theory?

Simply put, I don’t think Nozick should be regarded as a property theorist, because he simply is not. Nozick overlooks the work of classical political philosophers who placed property at the core of their doctrine. One notable exception to this long list of omission is the work of John Locke, but again, it is not clear why Nozick relies so heavily on Locke's property theory: he really never discusses why Locke’s account is worth upholding, what is the value of his theory over that of others, or even why he decided to ground his entitlement theory in the Lockean proviso. Finally, Nozick does not seem particularly interested in the structure of property rights *per se*; he takes for granted the concept of property as full liberal ownership, that is, as including all Honoreian

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7 Nozick, * supra* note 1.
9 For instance, he heavily rests on Kant’s ethics, but completely ignores Kant’s doctrine of rights, and more specifically his comments on property and the problem of first appropriation. The work of other classical philosophers who located the concept of property at the core of their political philosophy is also completely absent from *ASU*. I am thinking here of Pufendorf, Grotius, Hume, and Hegel. Similarly, no reference is made to central issues of property theory, which are nonetheless crucial to Nozick’s argument, such as: what exactly is ownership, and what powers (such as the power to
incidents of property. In that regard, Nozick does not bring to the table a significant contribution to property theory.

Nozick is utterly interesting, however, for his ideas on the relation between private holdings and the regulatory powers of central governments, a view that is more pervasive than one would like to think. And I believe this view is so common precisely because of how we tend to think of ownership: it is rarely considered as a problematic concept outside of legal theory debates, and it is generally taken for granted in its most robust form—exactly like Nozick does. In this essay, I want to show that ownership is a contentious concept, and that it is not only of interest to property theorists. The way Nozick frames issues of redistribution emphasize the fundamental role ownership plays in political philosophy, and in this regard, Nozick’s work provides the perfect opportunity to challenge this pervasive conception that we have a pre-political right to property.

To sum up, Nozick is interesting for my purpose because he frames issues of political philosophy in such a way that his doctrine rests on core concepts of property theory, even though he does not analyze those issues from a property theory standpoint. In this essay, I will bring out a property theory perspective to a political philosophy debate, and attempt to highlight how property theory, and private law theory, is in fact at the core of public policy issues, such as the normative questions raised by the redistribution through taxation.

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10 Christman defines the liberal conception of ownership in the following terms: “private liberal ownership amounts to the enforcement of individual rights to use, possess, destroy, transfer, and gain income from goods (or if any of these rights are curtailed, it is not for the purpose of shaping the distribution of wealth in the society at large). That is, liberal ownership is a package of rights that is not regulated or reshaped for distributive purposes.” (Christman, Myth, supra note 5 at 6).

11 Maybe I should specify that this view is most widely shared by the general population, rather than within academic circle. Allegedly, it is generally a more moderate view than what Nozick presents in ASU. But the core elements are the same: individuals have rights as of nature, the government is perceived as an intrusive figure, interfering with those rights. It is indeed a very common, and even growing, rhetoric, that specifically targets the legitimacy of the taxing power.
2. Nozick’s Theory of Natural Rights

“Individuals have rights, and there are things no person or group may do to them (without violating their rights).”\textsuperscript{12} At first sight, ASU’s incipit seems hardly questionable and quite straightforward. Persons deserve respect. But this seemingly unequivocal claim is soon proving to be more challenging than it first seemed. What exactly are those rights, why do individuals have them, and more importantly, do the different interests at stake all warrant the same treatment and if so, what makes them absolutely inviolable? These questions lie at the core of Nozick’s doctrine of natural rights. As I mentioned before, Nozick does not approach these issues in a systematic fashion. The purpose of this section is to provide a more structured account of the doctrine of natural rights that underlies Nozick’s defence of the libertarian state. Rights, according to Nozick, are moral side constraints, and individuals hold them \textit{qua} person, in virtue of their capacity for autonomy. I will examine each of these propositions in turn.

2.1. What Are Rights?

Nozick construes rights as constraints on actions that do not allow for any derogations. Instead of regarding the non-violation of special interests as end state to be realized, rights function as side constraints on the goals we set—individually or collectively—to achieve.\textsuperscript{13} A conception of rights as side constraints does not tell us how we should live our life, or what we should strive to accomplish. Rather, it tells us what we may permissibly do to achieve those ends we decide to pursue. For instance, I may decide I want to find a cure for cancer. The conception of rights as side constraints does not have anything to say on whether this project is worth pursuing, but it constraints the means I can deploy to realize it. Hence, in elaborating my cancer cure, there are things I am not allowed to do, such as testing my treatment on persons against their will—whether or not the drug could end up saving millions of people. Doctrines of rights as side constraints hold that ends cannot be achieved at any price.\textsuperscript{14} Rights are interests so fundamental that they should be upheld without compromise, regardless of the circumstances: “Individuals have rights, and there are

\textsuperscript{12} Nozick, \textit{supra} note 1 at ix.
\textsuperscript{13} See \textit{ibid} at 28. See also Bader, \textit{supra} note 8 at 19.
things no person or group may do to them (without violating their rights).” That being said, the moral constraint view of rights does not tell us why individuals hold rights, and why they are or should be inviolable, as Nozick claims. The reason for this lies in a separate claim Nozick makes regarding the importance of the separateness of individuals, and their capacity for purposiveness.

2.2. Why Do Individuals Have Rights?

In examining Nozick’s view as to why individuals are the holders of absolute rights on their person, it is worth recalling the context against which Nozick’s theory of rights takes place, for it is deeply shaped by the problem he is trying to solve. Part I of ASU aims at establishing the legitimacy of a minimal state by showing that rights individuals have by nature are not necessarily violated by the creation of the state. Because Nozick wants to show that the state is justifiable to individuals, he must establish the specific features of personality that raises the question of the state legitimacy in the first place. In other words, Nozick has to show that individuals are naturally endowed with qualities or interests that are so important they cannot be morally ignored. In doing so, Nozick must answer the following question: why exactly do individuals have rights? The solution to this question will become the moral background necessary for specifying the particular rights individuals hold ‘naturally.’

Nozick starts this inquiry by making a rather simple statement: we are singular persons who can only live through this singularity. We are separate, discrete beings that do not experience the life of others as we do ours. This, argues Nozick, is morally significant, for what is done to a person is only done to this particular individual; no one else undergoes or shares this experience. The separateness of human life is one of the chief arguments against the utilitarian doctrine of the good: pleasure maximization and pain minimization equations take place across individuals, not within them. If we come to the conclusion that hitting me in the face would achieve the greatest good of all, the equalization of pain is not redistributed among all individuals who take pleasure in seeing me being punched in the face. I am the only one to endure the pain. As Nozick puts it, “there

14 See Bader, supra note 8 at 19.
15 See Nozick, supra note 1 at ix.
16 That is, features that are not attributable to the existence of the state, qualities that exist independently from the state.
is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives.\textsuperscript{17}

This rather obvious observation is nonetheless crucial, for it turns out to be the starting point of Nozick’s moral system. It fuels Nozick’s intuition that personality warrants absolute respect. But the argument is not whole yet: Nozick must provide a distinct moral argument he has not supplied yet for the inviolability of persons. Indeed, the fact of the separateness of our existences cannot ground a moral claim; an ought-statement cannot stem from an is-statement. To bridge the gap, Nozick relies on the deontological ethical theory of Immanuel Kant. More precisely, he rests his case on the second formulation of the categorical imperative which goes as follows: “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.”\textsuperscript{18} According to Kant, moral agents are first and foremost defined by their capacity to set their own ends and to act upon them. Treating a person as a means undermines her moral agency: it negates her ability to undertake the ends she has set for herself. Because autonomy is a defining feature of moral agency, Kant claims that a person cannot will to renounce to her self-determination; it is a contradiction in terms. Therefore, treating a person as a means is categorically irrational, and immoral. Nozick does not really discuss the validity of the categorical imperative;\textsuperscript{19} he implicitly takes this demonstration for granted. The categorical imperative is still central in Nozick’s theory of natural rights. The argument entails that coercion is immoral. Under no circumstances are we allowed to interfere with a person’s autonomy, her freedom being restricted only by the equal rights of others.\textsuperscript{20} Rights provide that space in which a person may deploy her autonomy. As we can now see, not only does the categorical imperative ground Nozick’s claim regarding the inviolability of persons, it also finally explains why he rejects so firmly the moral goal view of rights. Because protection of their autonomy is morally...

\textsuperscript{17} See Nozick, supra note 1 at 33. See also Bader, supra note 8 at 26.
\textsuperscript{19} See e.g. Thomas Nagel, “Libertarianism without Foundations” in Paul, supra note 5, 191 at 193. See also his discussion on the meaning of life, which provides a slightly distinct, although sufficiently similar argument for the inviolability of persons. To be more specific, Nozick says that rationality, autonomy and moral agency are characteristics that could be eligible foundations to ground rights, but he refuses to choose one, for he says that rights are rather founded on a more complex features that individuals possess and that cannot be reduced to one of these possibilities. That characteristic, he says, is “the ability to form a conception of the life one wishes to lead, and to make choices in pursuit of that conception.” (Nozick, supra note 1 at 48). For the purpose of this essay, I will use autonomy and moral agency somewhat as interchangeable, and always including the ability to form a conception of the good life. On this point, see generally Mark D Friedman, \textit{Nozick’s Libertarian Project: An Elaboration and Defense} (London: Continuum, 2010) at 20.
\textsuperscript{20} See Nozick, supra note 1 at ix. See also Friedman, supra note 19 at 20ff.
required by reason, individuals have rights. The boundaries of these rights constrict the permissible behaviour of every agent: rights do not express an end state, but a moral side constraint.\(^{21}\)

But what exactly are those rights that cannot be violated under any circumstances? What does autonomy require in terms of protection? To add some flesh to his theory of rights, Nozick turns to the Lockean state of nature. He tells us that, in the state of nature, individuals are in “a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man” [...]. The bounds of the law of nature require that “no one ought to harm another in his life, health, liberty, or possessions.”\(^{22}\) Nozick, however, does not expand further on the specific rights his argument gives rise to. He simply claims that, in the state of nature, individuals have an innate right to freedom, to property and to be free from assault. However, Nozick does not provide reasons as to why these rights are required to protect moral autonomy.\(^{23}\) He simply takes that relation for granted. Nozick only skims over the specifics; it is worth recalling here that he does not claim to submit a theory of property \textit{per se}, but rather is concerned with the general idea that individuals hold rights naturally, and that those rights warrant respect. This rudimentary view, however, is an unequivocal defence of robust natural rights, even though those rights are not really argued for.

Nozick’s focus does not rest on the ground for specific natural rights, but rather on the obligations those rights give rise to, especially on the part of the state. Hence, Nozick quickly moves to discuss the boundaries of such rights, in particular property rights. Nozick wishes to confront theories of justice that defend the idea that redistributive justice is necessary and central for a political system to be just. He thinks that such a redistributive process violates the pre-political rights individuals hold in their property. Liberal theories of justice, he says, disregard a fundamental part of the equation: justice in holdings. How can the state, Nozick asks, take what rightly belongs to individuals to redistribute to others? If individuals are entitled to their property, how come that right can be violated in the name of justice? To answer these questions, Nozick needs to expand on what he sees to be the just boundaries of property rights: this is the purpose of his entitlement theory.\(^{24}\)

\(^{22}\) Nozick, supra note 1 at 10 [references omitted].
\(^{23}\) See Scheffler, supra note 21 at 149.
\(^{24}\) See Nozick, supra note 1 at 150.
3. An Entitlement Theory

Nozick starts from the following interrogation: under what conditions the holdings of particular things are in conformity with the demands of justice? Nozick tells us:

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

Nozick's entitlement theory rests on two pillars: voluntary transfers and just original acquisition. Simply put, these are the only two processes through which someone can justly or rightfully acquire a right in a thing. If acquisition of property follows the principle of justice in transfer, or the principle of justice in acquisition, a right in a thing is properly transferred, or created. That right, because it arose from a just process, deserves full protection from violation and interference: property rights are side constraints that restrict our behaviour toward the right holder. What Nozick has in mind here is that distribution of goods is historical: it depends only on the private preferences of the transactors, and on the initial allocation of resources. In Nozick's words, "[j]ustice in holdings [...] depends upon what actually has happened," as opposed to distribution based on need or merit. So what exactly needs to happen for a person to be entitled to her property? How does one acquire holdings in accordance with the principle of justice in acquisition or the principle of justice in transfer?

Justice in transfer is rather straightforward. There are only two requirements for the transfer to generate a rightful claim: (1) the transferor must have a rightful claim in the thing, and (2) both

25 See ibid at 150ff; 202–03. See also Bader, supra note 8 at 36–37.
26 See Nozick, supra note 1 at 151.
27 See ibid.
28 See Christman, Myth, supra note 5 at 30.
29 See Nozick, supra note 1 at 152.
parties must enter the exchange voluntarily.\textsuperscript{31} If the transferor had a previously rightful claim in the thing, and that both the transferor and the transferee agreed to the transfer, the transferee acquires the right. Justice in transfer typically excludes theft, or coercive transactions. As we can see, the transfer of rights from a person who had already acquired that right is rather unproblematic. The issue, however, lies at the root of this process: how does one initially acquire a right, that is, when the thing is not previously owned by another person? Indeed, justice in transfer logically rests on the possibility of a first just acquisition, because not all things can come to be owned by transfer. Let's say you sold me an apple that I now possess, that is, I have a right in that apple. Before I had that right, you had it, and you had it because you bought it from someone else. If we follow all transactions regarding that right back to the first initial act of acquisition, it must be the case that someone got the apple by picking it up from the tree: that person did not get that right from someone else. Hence, if justice in holdings depends on what happened, on the history of the right, as Nozick claims,\textsuperscript{32} it must be possible to demonstrate how the first acquisition of a right is just. Therefore, Nozick's whole entitlement theory rests on the possibility of justice in acquisition.

Justice in acquisition must answer the following question: how can one's unilateral action bind everyone else? Remember, this argument still takes place in a hypothetical state of nature, because Nozick wants to show that individuals have pre-political rights that arise independently from the existence of a state, and therefore, that individuals have certain rights that cannot be interfered with, even by higher institutions such as governments. Those rights restrict the acceptable territory of action, and the restriction applies to everyone. That being the case, Nozick must show that it is possible for property rights—and not merely usufructuary rights—to arise independently from any conventions establishing a property system.\textsuperscript{33}

Nozick does not himself distinguish between usufructuary, or possessory, rights, and proprietary rights. I use the distinction as emphasized by Kant in \textit{The Metaphysics of Morals}. By

\textsuperscript{30} See \textit{ibid} at 153.
\textsuperscript{31} See \textit{ibid} at 262.
\textsuperscript{32} See \textit{ibid} at 152.
\textsuperscript{33} I will come back to the distinction between natural and conventional right in the next section. But for the purpose of this section, it is sufficient to say that I assume that a property right established by convention is dependent on that convention. If it is the case, the property is at least partly defined by the terms of the convention. For instance, proponents of conventionalist theories of property would argue that a property system cannot exist apart from some basic public institutions, which comprises a state's tax policies. Nozick must reject such a view, precisely because he thinks that the tax power is an illegitimate use of state power: property cannot depend on it.
usufructuary rights, Kant means rights to use that are restricted by the capacity of their holders to physically control the object of right.\textsuperscript{34} For instance, let's say I find a hammer on the ground in the state of nature, and decide to take it to build myself a shelter. While building my shelter, I put the hammer down while I go looking for some branches to build the roof. If, at the same moment, a passerby sees the hammer, and decides to take it to build her own shelter, I have no claim whatsoever against that passerby; the hammer is now rightfully hers, as long as she holds on to it. It was my hammer only insofar I physically controlled it; in other words, my right ceases from the moment I lose physical control of the thing.\textsuperscript{35} A usufructuary right, in the Kantian sense, is not even really a right in a thing. It is rather a derivative of my innate right to freedom that protects my bodily integrity against assaults and interferences from others. This right to be free from interferences extends to the things I physically control, because wresting me for the apple I hold in my hand is necessarily an assault on my person.\textsuperscript{36} In contrast, a property right is a right in a thing that endures over time, and that does not depend on actual physical control; it actually does not depend on my bodily integrity at all.\textsuperscript{37} For example, under the common law, if you enter my home to take a nap in my bed while I am away, you commit a wrong against me, even though you did not steal or break anything. You wrong me because I have a right in my home even though I am not in actual physical control of it. Kant speaks of “intelligible control”: I remain in control of the thing despite the fact I do not physically control it at the moment.\textsuperscript{38} He says: “something external would be mine if I may assume that I could be wronged by another’s use of a thing even though I am not in possession of it.”\textsuperscript{39} A property right is more robust than a possessory right: when I own a thing, you cannot rightfully take it, even though I am not there at the moment. Hence, my property right binds everyone in a manner that is different than a possessory right. In the case of a possessory right, our respective right to


\textsuperscript{35} Kant, supra note 34 at 41 [6:245]. See also Hodgson, supra note 34 at 58; Ripstein, \textit{Force & Freedom}, supra note 34 at 61ff; Gregor, supra note 34 at 773.

\textsuperscript{36} See Kant, supra note 34 at 41 [6:245]. See also Hodgson, supra note 34 at 60; Brian Tierney, “Kant on Property: The Problem of Permissive Law” (2001) 62:2 J Hist Ideas 301 at 303; Ripstein, \textit{Force & Freedom}, supra note 34 at 66ff.

\textsuperscript{37} Kant, supra note 34 at 41 [6:245].

\textsuperscript{38} See \textit{ibid} at 43 [6:249]. See also Weinrib, supra note 34 at 806; Hodgson, supra note 34 at 59.

\textsuperscript{39} See Kant, supra note 34 at 41 [6:245].
freedom compels us not to attack each other. In the case of a property right, however, the acquisition of a right is not reciprocal: I unilaterally bind everyone else by my act of appropriation.

The reason why I refer to Kant here—even though Nozick does not rely on Kant’s *Doctrine of Right* in his entitlement theory—is because I think it helps to understand the specific challenge Nozick is facing: it shows that not all kinds of interest in a thing are as robust as property interests. This, in turn, highlights the importance of providing the right kind of argument to support the existence of natural property rights: the threshold for showing that one has a possessory right in a thing is lower than for a property right, for the latter implies more than a mere right to respect one’s physical integrity. If Nozick wants to show that the state’s power to tax amounts to a violation of taxpayers’ property rights, then it must be the case that those taxpayers have a natural *property right*, and not merely a possessory right in their belongings. Unilateral acts of acquisition, however, raise a special difficulty with regard to Nozick’s conception of rights. As discussed above, Nozick holds that rights are moral side constraints that limit the means people can take to achieve their ends. However, individuals in the state of nature have a right to freedom, as I have mentioned in the previous section, which begs the question: is it possible that a unilateral act binds everyone else and restricts their rightful territory of action without their consent? Although Nozick does not refer to Kant to explain first acquisition, he faces the exact same problem Kant is struggling with when moving from innate to acquired rights. The innate right to freedom is conflicting here with the possibility to use that freedom to acquire things in a way that place constraints on others’ behaviour, so as to make that right durable in time.

As we can see, the principle of justice in acquisition requires a robust foundation to support the idea that individuals have natural property rights. Surprisingly, Nozick’s discussion of justice in acquisition is somehow understated, as if it were simply a matter of correctly interpreting Locke’s work. Indeed, Nozick starts his discussion of original acquisition by first considering Locke’s theory of labour-mixing. Locke’s theory of acquisition rests on the idea that a property right arises in a thing when it is mixed with one’s labour. The labourer, according to Locke, owns himself and thus owns his labour. When he picks berries, sows the land or harvests his crops, his work comes to be

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40 See *ibid* at 45 [6:246]. See also Weinrib, *supra* note 34 at 806; Hodgson, *supra* note 34 at 59; Ripstein, *Force & Freedom*, *supra* note 34 at 105; Gregor, *supra* note 34 at 77ff.
41 See Bader, *supra* note 8 at 37.
42 See Nozick, *supra* note 1 at 17ff.
intertwined with the land; the right in himself is somehow transferred to the land, which generates a property right in the land.\textsuperscript{43} Nozick is not satisfied with this solution, and rejects it right away.\textsuperscript{44} For one thing, the labour-mixing argument does not provide a solution to the lack of reciprocity that threatens the legitimacy of this first act of acquisition.\textsuperscript{45} Indeed, the obligation to respect the frontiers of his property right is imposed unilaterally by the labourer to everyone else, while the labourer is not correlative bound by a new set of obligations. Moreover, the exact extent of the right that mixing of land with labour gives rise to is indeterminate. As Nozick points out, the labour-mixing argument does not specify what portion of the resource becomes appropriated through the labour one has mixed it with. He adds: “[i]f a private astronaut clears a place on Mars, has he mixed his labour with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot? Which plot does an act bring under ownership?”\textsuperscript{46} If it is so indeterminate then, what is so special about labour that makes it a foundation of ownership? Nozick suspects the answer lies in the way labouring improves a resource and makes it more valuable. If it is the case, as Nozick sees right away, the labour-mixing argument cannot give rise to anything more than a right in the \textit{added value} one has produced.\textsuperscript{47} It cannot justify full ownership of the object. Nozick therefore rejects this theory of acquisition, that is too limited for his purpose. In addition to being a potential violation of others’ right not to be bound by obligations without their consent, the labour-mixing argument does not provide a clear and definite right to a specific object, but only to the added value intertwined with the object.

Leaving the labour-mixing argument behind, Nozick then turns to another aspect of Locke’s theory of acquisition: the “enough and as good” proviso, that states that appropriation is legitimate only “where there is enough, and as good, left in common for others.”\textsuperscript{48} Nozick sees, however, that a stringent construal of the terms “enough and as good” might severely limit, or even preclude a right to private property, for every single act of appropriation might retroactively be revoked once there are no resources left to acquire.\textsuperscript{49} Assuming that Locke could not have intended such a result,\textsuperscript{50}
Nozick argues that we should opt for a more lenient reading of the proviso, one that only requires that appropriation does not preclude the possibility for others to improve their situation. This way, Nozick may hold that even if there are no resources left to appropriate, it does not necessarily worsen the position of the person who can no longer appropriate, as long as she is in a better position than she would have been in the state of nature.\textsuperscript{51} As Christman sees it:

For Nozick, the rights of surrounding individuals, whatever their specification and scope, amount to “absolute side constraints” on the actions of others. In the acquisition of goods, the Lockean proviso of leaving enough and as good acts as a measure of the scope of those surrounding rights. It must be the case that none of my actions, whether these include acquisition of goods or not, can render the life prospects of those around me significantly worse than if I did not exist at all. If they do, then I can be rightly accused of violating their Lockean rights to be left alone.\textsuperscript{52}

Having rejected the labour condition, Nozick concludes that one is entitled to his holding as long as he appropriates in accordance with the revised proviso. The enough and as good proviso replaces the need for consent where an obligation is imposed on surrounding individuals through the unilateral act of will of a single person. The validity of the property right depends on the insurance that the surrounding individuals will not be placed in a situation worse than they would be absent the obligation created by the unilateral act of acquisition. In other words, the legitimacy of property rights rests on considerations of welfare for individuals who lose the possibility to use the object now subject to the dominion of the right holder.\textsuperscript{53} First acquisitions respecting the proviso solve the reciprocity issue unilateral acts of acquisition are facing, because no one could object to being placed in a better situation than he would otherwise be.

Because acts of unilateral acquisition made in accordance with the revised Lockean proviso generates just holdings, Nozick claims it is possible to acquire full, conclusive property rights in the state of nature.\textsuperscript{54} Because original acquisition is rightful even in the state of nature, then voluntary

\textsuperscript{50} See Nozick, \textit{supra} note 1 at 178.
\textsuperscript{51} See \textit{ibid} at 177. Many have criticized this condition. Christman accurately points out that Nozick does not explain why a person could “only insist on the level of welfare and opportunity that would have resulted had she been simply left alone” (Christman, \textit{Myth}, \textit{supra} note 5 at 62). Not only is this a highly indeterminate hypothetical, but Nozick does not provide any explanation as to why she could not insist on her level of welfare in an alternative system of property rights. In any case, the Lockean proviso does leave many questions unanswered.
\textsuperscript{52} See Christman, \textit{Myth}, \textit{supra} note 5 at 61.
\textsuperscript{53} See \textit{ibid} at 62; Bader, \textit{supra} note 8 at 39.
\textsuperscript{54} There is one caveat, however, to this general principle I will not address here, for it goes beyond the scope of this essay, but it is worth mentioning to see that Nozick did have this issue in mind when designing his entitlement theory. It
exchanges are also fully rightful: property rights may be transferred by contract, giving rise to fully conclusive rights. Property rights being conclusive entails that they act as absolute side constraints and cannot be interfered with to achieve some other means. This includes the taxation of wealth and transfers by the state to redistribute to the least well-off. Redistribution, claims Nozick, only upsets patterns of just holdings. This is the basis of the challenge Nozick presents to proponents of state redistribution through taxation. In the next section, I will examine the arguments that ground that challenge.

But before we look at the specifics of Nozick’s challenge, I just want to point out that, although Nozick is often portrayed as grounding his theory of property in a claim of self-ownership, I do not think that it is a correct interpretation of Nozick’s entitlement theory. Indeed, there is no mention of self-ownership itself in his justification of appropriation. Acquisition is not justified by a transfer of one’s ownership onto external things, but rather by something closer to first occupancy, as long as it satisfies the weak Lockean proviso. I do not find in the words Nozick chooses to describe the issue of acquisition of property and the justification of property a reference to a person’s self-ownership. The only reference to self-ownership comes up later, when Nozick exposes the terms of his challenge. However, as we will see, the challenge is based on showing the dynamics underlying justice in exchange, not justice in acquisition. Nozick says that one is free to use his talent and labour, a mere commodity among others available on the market. The idea is that we own our talent and labour, and that the talent can be exchanged against other things, exactly like we would do with any other things. But as I see it, Nozick does not invoke the ownership of one’s talent as the basis of the acquisition of a property right in an external thing. Rather, Nozick argues that the taxation amounts to denying a person’s self-ownership, because the state claims partial ownership in that person by taking something from her. Nozick’s self-ownership argument, therefore, only serves to show that labour is one’s talent or labour is one’s property, and that it can be exchanged in a way that produces a just entitlement in the thing received in return. But self-

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56 See Friedman, supra note 23 at 29ff.
ownership does not ground a justification for the acquisition of property rights in external things. With that in mind, let’s examine Nozick’s challenge.
4. Nozick’s Challenge

Nozick’s challenge consists in emphasizing the exhaustiveness of his entitlement theory, in order to show that redistribution upsets a just state of affairs. Nozick illustrates this through the Wilt Chamberlain example. Imagine an initial situation where everyone has exactly the same pool of resources—everyone starts with a $100 allowance, and they can decide to do whatever they want to do with that money. Among those people, there is Wilt Chamberlain, an extraordinary skillful basketball player. Chamberlain has spent a lot of time working to improve his skills, and now gets to play with a great basketball team. To compensate him for his work, Chamberlain asks people who want to go and see him play to pay him $5. On a Friday night, people decide they want to be entertained and that watching Chamberlain play basketball is the best way to do that. They accept to pay him the $5. Actually, a thousand individuals decide to do so. At the end of the night, Chamberlain has earned $5000, and everyone who decided to go to watch him play now has $95. Considering the end result, Nozick asks the following question: what is unfair with this situation? Everyone’s autonomy is respected, everyone was entitled to their initial holding, and the transfer was voluntary. The fact that Wilt Chamberlain ends up with a lot more than anyone else is irrelevant in determining whether the situation is just. What is important is whether the process of acquisition and transfer was just, that is, whether it respected the principles of justice in acquisition and transfer. The illustration is based on the assumption that those principles were complied with, therefore Chamberlain has a full property right in these $5000, a property right which amounts to an absolute side constraints on the actions of others. Following Nozick’s logic, taxing Chamberlain to redistribute to others is a plain violation of his rights.

Redistribution, Nozick argues, completely ignores one side of the transfer, that is, the taxpayer’s side. Proponents of state redistribution through taxation must account for the rights of the taxpayers in their property. Failing to do so, taxation of earnings from labour, says Nozick,

is on par with forced labour. […] Taking the earnings of \( n \) hours labour is like taking \( n \) hours from the person; it is like forcing the person to work \( n \) hours for another’s purpose. Others find the claim absurd. But even these latter, if they object to forced labour, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. But a system that takes five hours’ wages in taxes does not seem to them like one that
forces someone to work for five hours, since it offers the person a wider range of choice in activities than does taxation in kind with the particular labour specified. (But we can imagine a gradation of systems of forced labour, from one that specifies a particular activity, to one that gives a choice among two activities, to ..., and so on up.)

This rather incendiary statement suggests that if we acknowledge that individuals have a right to freedom, and a right to property, and that those rights amount to side constraints on the action of others, then taking part of someone’s property is both a violation of property rights, and of that person’s right to dispose of herself as she sees fit. It interferes with her autonomy and the rational pursuit of her ends: the state acts as if it partially owned the labour and talents of its citizens. This, contends Nozick, is the challenge proponents of redistribution face: how can the state’s power to tax earnings from labour and wealth be legitimate once we acknowledge a natural right to freedom and property? In this essay, I wish to reflect on this particular challenge, and specifically, on the conception of property that is presumed in Nozick’s argument against taxation.

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57 Nozick, supra note 1 at 169 [my emphasis].
1. What is a natural right?

In Chapter 1, I explained why Nozick was an interesting starting point to examine the relation between private holdings and regulatory powers of central governments through the lens of property theory. I also mentioned that the standpoint he undertakes—that of natural right theory—is of particular interest, because I believe that to respond properly to Nozick's claim against the legitimacy of the taxing power, we need to take seriously his assumptions. In this section, I want to briefly reflect on why a purely conventionalist conception of property, like that of Murphy and Nagel, fails to respond to an argument such as the one Nozick puts forward. My contention is that by taking natural rights theories seriously, we can seriously challenge Nozick's basic premises. But before I examine this issue, I will set out what I mean exactly by a "conventionalist," as opposed to a "natural rights" theory of ownership.

Many authors have reflected upon the meaning given to "natural rights" and, unsurprisingly, they do not agree on the sense to confer to this notion, mostly because it refers to more than one idea at once.58 I do not wish here to examine the respective merits of these views, but only to work out a basic understanding of what "natural rights" means in order to understand what it entails, in the context of this essay, to undertake a natural rights theory of ownership.59 Bearing this objective in mind, I am taking up the most common elements found in those definitions, hoping to provide an understanding of it that is fairly uncontroversial.

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59 I reckon that the notion of 'right', its nature and its implications are very complicated questions, which have been written about extensively. Some even go as far as to call into question the relevancy of such a concept. Responding to such claims is way beyond the scope of this essay. For the purpose of my work, I take for granted that the concept of right is relevant, that it is meaningful, and that it is not specious.
Typically, natural rights are construed as moral rights, as opposed to legal or positive rights, conferred to individuals by virtue of their intrinsic characteristics. Rawls’s definition is particularly enlightening in that respect:

[Natural rights are] claims [which] depend solely on certain natural attributes the presence of which can be ascertained by natural reason pursuing common sense methods of inquiry. The existence of these attributes and the claims based upon them is established independently from social convention and legal norms. The propriety of the term “natural” is that it suggests the contrast between the rights identified by the theory of justice and the rights defined by law and custom. But more than this, the concept of natural rights includes the idea that these rights are assigned in the first instance to persons, and that they are given a special weight. Claims easily overridden for other values are not natural rights.

Natural rights are rights we are entitled to not because the state has enacted laws that happen to protect those interests, but because they are morally significant for the kind of being we are, and as such, they deserve protection. In other words, natural rights are those rights that everyone holds simply by reason of some features of their humanity, and those are not conditional on state’s positive or official recognition, or other institutional arrangements. In the tentatively uncontroversial use I will make of that term, there is no fundamental difference between natural and moral rights. I am leaving aside an understanding of natural rights conferred by natural laws, which springs from a teleological view of human nature in general, and therefore “natural rights” and “moral rights” are interchangeable in this essay.

60 See Bryan, supra note 5 at 570; Lawrence C Becker, Property rights: philosophic foundations (New York: Routledge, 2014) at 16; Christman, Myth, supra note 5 at 48–49.
62 See Waldron, supra note 4 at 138; Alan Gibbard, “Natural property rights” (1976) 10:1 Noûs 77 at 77.
63 Some natural rights proponents hold that a natural right is binding on the state (such as Nozick). Others conceives of natural rights as fundamental interests that must be given special weight, but that are not absolute and may be outweigh by other sorts of competing interests.
64 See Gibbard, supra note 62 at 77.
65 See Joel Feinberg, “In defence of moral rights” (1992) 12 Oxf J Leg Stud 149 at 153–54. The only way I would distinguish natural rights from moral rights for my present purpose is by differentiating those rights we have at birth, qua person, from that we acquire as moral persons. Natural rights are rights that do not require any action to be undertaken in order to acquire them. We just happen to have them at birth. I would qualify the right to freedom or to equality as such a natural right. In contrast, moral rights would be those rights that require some voluntary action, and that we do not have at birth, but that we can acquire and that are generally closely connected to rights we have simply by being a person. For instance, property rights could be said to be moral rights, rather than natural rights, in the sense that we do not own property at birth. We come to the world with a natural right to freedom, which can be said to ground a moral right to acquire property. I think however that the distinction is not of much practical guidance, especially because the expression ‘natural right to property’ is generally used. As such, I will use both terms interchangeably for the rest of this essay, unless mentioned otherwise.
There is also another sense conferred to ‘natural rights,’ which is associated with theories of the state of nature. From this point of view, natural rights are those pre-political rights individuals hold prior to the establishment of a civil society. Here, natural rights are understood more narrowly, for a right could be nonconventional but not pre-political, or conventional and pre-political. For the purpose of this essay, I will consider that a right is natural if it is not conventional, that is if it is independent or precedes the advent of a civil condition. Also note that, as Ben Bryan mentions, natural rights are not necessarily grounded in human nature per se; they could be seen as being conferred by divine command for instance. What a natural rights theory will consider to be a fundamental interest warranting protection largely depends on its view of morality or normativity. Therefore, what is meant by ‘natural’ can vary quite widely and can be rather ambiguous at time. It really is better understood in contrast with the notion of convention, or artifact. In simple terms, natural rights are rights that “we did not make up.”

A last note on natural rights theories: the implications of qualifying a right as natural are not straightforward. At the very least, it entails that these interests are important and should not be overlooked or ignored, and interfering with these interests requires a very good justification. This view of the implications of natural rights is weak, in the sense that it could allow for some right infringements, notably in cases where there is a conflict between two moral rights. A natural right, in that sense, would not necessarily ground a legal claim as such. Still, moral rights are fundamental claims; natural rights theories usually consider that it is at least to some extent binding on the state, and that a gross failure to enforce moral rights, or a refusal to recognize these moral rights, is an illegitimate use of state power. Some, like Nozick, go even further: they consider that natural rights cannot be violated under any circumstances, whatever the scope of the interference is. Natural right do not have less standing than positive rights. They are absolute side constraints, as I explained in

For instance, this view is most manifest in the work of John Locke, but it is also at work in the theories of other political philosophers such as Rousseau and Hobbes. On this point, see John Christman, “Can ownership be justified by natural rights?” (1986) 15:2 Phil Pub Aff 156 at 157ff ["Can ownership?"]

Christman gives the example of the right to due process, which cannot exist before a civil society is established, because law does not exist in the state of nature, but that is natural in the sense that it is a basic right all individuals are entitled to by reason of their humanity. See ibid at 158.

For instance, if some sort of convention is invoked apart from the establishment of a civil condition.

See Bryan, supra note 5 at 571.

See ibid at 571; Feinberg, supra note 65 at 151ff; H L A Hart, “Are there any natural rights?” (1955) 64:2 Phil Rev 175 at 175–77; For a completely different philosophical approach, but that sustains a similar claim, see also Leo Strauss, Natural right and history (Chicago: The University of Chicago Press, 1965) at 1–9.

On these two understandings of natural rights, see David A Lloyd Thomas, Routledge philosophy guidebook to Locke on government (London: Routledge, 1995) at 93–94. See also Waldron, supra note 4 at 138.
Chapter 1, and interferences with a moral interest cannot be justified. For the purpose of this essay, I will simply assume, without taking position, that a natural right entails absolute respect and binds the state, as well as any other individuals.\footnote{I will generally accept Nozick’s basic premises, because I want to show that the conclusion does not follow from the initial assumptions. Questioning those assumptions is a task that falls outside of the scope of this essay.}

By opposition, saying that rights are ‘conventional’ is meant to emphasize their artificial nature, that is, the fact that they flow from a social or legal convention and would not exist without it.\footnote{See Becker, supra note 60 at 16.} It is either used to distinguish natural from conventional rights, which is not contradictory with natural rights theories as such,\footnote{For instance, someone could say there is a natural right to freedom, but that other rights are conventional, such as a right to receive a tax credit.} or to reject the possibility of certain natural rights or all natural rights altogether; this is the view I will refer to as ‘conventionalist.’ The conventionalist take, contrary to the natural rights view, is putting forward a different kind of normative argument. At this level, it does not say whether a particular interest should or should not be protected; only, conventionalists do not think that an interest generates an absolute binding claim just because it is morally fundamental. The conventionalist view of rights is first and foremost a posture about the conditions of validity of “bindingness” if you will: unless the laws say so, you do not have a claim.\footnote{Famous figures of conventionalism are Hobbes, Bentham, and Kelsen, just to name a few. Conventionalism, in the sense I use that term, can be understood more generally as a form of legal positivism.} Conventionalism is about what is in fact a law, and what is not. The rightness (or morality) of positive rights, then, is a different issue.

Liam B. Murphy and Thomas Nagel are famously known for their conventionalist posture. In an essay provocatively entitled The Myth of Ownership, Murphy and Nagel specifically reject the idea of natural property rights.\footnote{While Murphy and Nagel plainly reject the possibility of natural property rights, they do not take position on whether natural rights are just altogether an illusion.} They say:

Private property is a legal convention, defined in part by the tax system. […] While the protection of some form of private property is an essential part of human freedom, the overall structure of the system of property rights should be determined largely on other grounds. […] There are no property rights antecedent to the tax structure. Property rights are the product of a set of laws and conventions, of which the tax system forms a part. Pretax income has no independent moral significance. It does not define something to which the taxpayer has a prepolitical or natural right, and which the government expropriates from the individual in levying taxes on it. […] Where our approach departs greatly from the standard mentality of
Murphy and Nagel consider that property rights are conventions, and while an important one, it cannot be used as a normative standard to evaluate the rightness of other legal conventions, such as the tax system. Murphy and Nagel’s primary targets are thinkers like Nozick, philosophers and economists alike, who argue against the legitimacy of the tax power on the ground that it is a violation of our property rights. In countering that view, they also hope to undercut a belief that is pervasive in the day-to-day political landscape of occidental societies, that is, the specious intuition that we are naturally entitled to our holdings, that when we earn our wages, they are ours, and that the mine and yours divide is not something that is “made up”, or conventional, or consented to by the state. This view, Murphy and Nagel say, is deeply ingrained in our political and moral culture, but it is unfortunately plainly mistaken. They compare this confusion to the misconstruing of traditional gender roles for natural endowments, because they have been normatively operative for so long that they now appear to us as inalterable, and thus, natural:

Most conventions, if they are sufficiently entrenched, acquire the appearance of natural norms; their conventionality becomes invisible. That is part of what gives them their strength, a strength they would lack if they were not internalized in that way. For another pervasive example, consider the conventions governing the different roles of men and women in any society. There may be good or bad reasons for their existence of such conventions, but it is essential, in evaluating them, to avoid the mistake of offering as a justification precisely those ostensibly “natural” rights or norms that are in fact just the psychological effects of internalizing the convention itself. If women are always treated as subordinate to men, the perception inevitably arises that submissiveness is a natural feminine trait and virtue, and this in turn is used to justify male dominance.

Property rights, just like gender roles, are conventions that have been mistaken for natural entitlements. Ownership is conventional, Murphy and Nagel say, because it entirely depends on “the framework provided by the government supported by taxes.” As such, it cannot be prepolitical, because it is an empty claim, so to speak, if we do not have the institutions that make the use of property rights possible. As such, it may well promote fundamental moral interests, but they are not

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77 Nagel & Murphy, supra note 2 at 8, 45, 74, 175 [my emphasis].
78 See ibid at 8–9. See also Bryan, supra note 5 at 574.
79 See Nagel & Murphy, supra note 2 at 9.
80 See Nagel & Murphy, supra note 2 at 8.
binding claims because they do so; property rights are enforceable titles only because we have collectively decided, through our central governments, to turn property into a binding institution with its own set of rules. And because property rights are conventional, their design is not unalterable. The structure of property rights will depend on various sorts of considerations, including matters of individual and collective justice.\footnote{See \textit{ibid} at 45.}

The conventionalist posture enables Murphy and Nagel to reframe the issue of the legitimacy of regulatory powers of central governments.\footnote{See \textit{ibid} at 8.} Because they reject the idea that property rights can impose moral constraints on taxation, taxation is simply not a problem of right violation in the first place. Indeed, it does not amount to an interference with the property rights individuals hold, but as another set of conventions placed on the same footing as the convention of ownership. In so doing, Murphy and Nagel propose a new angle to examine redistributive institutions without having to concede first that taxation is a form of right violation.

I am very sympathetic to the conclusion Murphy and Nagel reach regarding the legitimacy of the taxation power, and to their endeavour in general. However, I do not think that the reasons they give to reject natural rights theories of property in favour of a conventionalist theory are convincing. Their argument rests on the following premise: a concept defined by a system—here, the legal system—cannot be used to assess that system as if independent of it. As I mentioned earlier, Murphy and Nagel come to the conclusion that ownership is conventional because to function as it currently does, it depends on another legal institution: “the modern economy in which we earn our salaries, own our homes, bank accounts, retirement savings, and personal possessions, and in which we can use our resources to consume or invest, would be impossible without the framework provided by government supported by taxes.”\footnote{Concretely, I take that passage to mean that acquiring, using and alienating property require structures that cannot be set up by private interests, or if they can, will not be as efficient as if they had been established by a public will. For instance, earning wages depend on the safe and legitimate production of currency by the state; absent a national form of currency, the production of which requires some public fund, there will be no unified way to transact with each other through a single and nationally accepted currency. Another example: ownership would be a very chaotic institution absent a justice system to settle disputes.}

\section*{Notes}
\footnote{See \textit{ibid} at 45.}
\footnote{See \textit{ibid} at 8.}
conflicts regarding the boundaries of our respective rights. The judicial system, however, requires public funds to function, and absent a taxation system to finance it, the institution of ownership would not be operative.\textsuperscript{84} Therefore, Murphy and Nagel’s argument boils down to this: because ownership functionally depends on taxation, ownership cannot impose moral constraints on the tax system.

Even if we accept that legal ownership functionally depends on taxation, it does not entail, however, that there are no moral property rights.\textsuperscript{85} These are two separate conclusions. Indeed, one could argue that the legal right to property we know is conventional, but that there is nonetheless an unconventional, prepolitical right to property that is being disregarded by the state when it levies taxes. The fact that our property system rests on a taxation system is no evidence that there is no prepolitical right to privately own property. In other words, Murphy and Nagel never address the argument as to whether we have moral property rights that could be binding on the tax system without conventions being necessary.\textsuperscript{86} Murphy and Nagel might not have intended to provide a solid argument to reject natural rights theories and, in that sense, it is not necessarily a shortcoming on their part that their argument does not provide a response to Nozick’s challenge. What it shows, however, is that if we want to respond to Nozick, Murphy and Nagel’s starting point cannot be a path to follow.\textsuperscript{87} Starting from the claim that legal property rights are obviously conventional does not provide an argument as to why a natural right to ownership does not necessarily render a state’s taxing power illegitimate.\textsuperscript{88}

\textsuperscript{83} See \textit{ibid}.
\textsuperscript{84} Murphy and Nagel do not really discuss what their argument entails concretely, and this is my interpretation of what they might have in mind. On a closely related note, Murphy and Nagel explain how a government increases everyone’s level of welfare, and thus, makes it possible for us to live the live we live now:

> What sort of life would be led in the total absence of government? It would be wrong to imagine life roughly as it is now, with jobs, banks, houses, and cars, and lacking only the most obvious government services such as Social Security, the National Endowment for the Arts, and the police. The no-government world is Hobbes’s state of nature, which he aptly described as a war of all against all. And in such a state of affairs, there is little doubt that everyone’s level of welfare would be very low and - importantly - roughly equal. We cannot pretend that the differences in ability, personality, and inherited wealth that lead to great inequalities of welfare in an orderly market economy would have the same effect if there were no government to create and protect legal property rights and their value and to facilitate mutually beneficial exchanges.

\textit{(ibid} at 16–17).
\textsuperscript{85} See Penner, “Misled”, \textit{supra} note 4 at 88.
\textsuperscript{86} See Bryan, \textit{supra} note 5 at 572; Penner, “Misled”, \textit{supra} note 4 at 88ff.
\textsuperscript{87} See Bryan, \textit{supra} note 5 at 572.
\textsuperscript{88} See \textit{ibid} at 572.
The reason I wanted to contrast natural rights theories with conventionalist theories is that it throws light on the sort of argument one should provide to counter Nozick's claim about the legitimacy of the taxing power. My contention is that, to be convincing, one cannot start from the assumption that property rights do not act as moral side constraints, like Murphy and Nagel do. To counter Nozick's argument, then, one has to show that Nozick is not entitled to rely on the natural right to private property to impose moral constraints on the state. The most straightforward way to show that is by challenging Nozick's claim that there is a natural right to private property. As I have outlined in Chapter 1, Nozick's argument for private property is rather vague: he assumes that we have a right to private property in the state of nature, and he supposes that unilateral acquisition establishes a private property right as long as it respects the 'enough and as good proviso.' In other words, Nozick does not argue for a natural right to private property, he merely assumes there is one. Therefore, my objective in this essay is to challenge the idea that a natural right to private property is so obvious. In the next section, I will examine three foundations Nozick could possibly rely on to establish a natural right to private property—Locke’s labour-mixing argument, self-ownership, and Kant's freedom argument. I will argue that none of those arguments establish a natural right to private property. It is true, however, that this approach does not ground a conclusive argument against natural property right. Still, I believe it is enough to raise a serious challenge to Nozick's claim regarding property rights and their moral implications: if Nozick or his defenders want to challenge the liberal view that taxation falls within the legitimate scope of state action, they must show that there is a valid moral constraint that binds the state. If Nozickians cannot establish a valid right to private property that is not dependent upon a convention, their claim is seriously threatened. By showing that neither the labour-mixing argument, the self-ownership thesis, nor the freedom argument establish a natural right to private property, the burden of proof now shifts to Nozickians to show either that the demonstrations are flawed, or that there is a ground I have not examined here that do establish a natural right to private property. So, even though it is not conclusive, my strategy focuses on the premises of the libertarian doctrine, rather than on its conclusions, and thereby forces libertarians to justify them, in a way Murphy and Nagel's approach cannot.
2. Foundations for a Natural Property Right

The aim of this section is to examine a range of arguments advanced to ground a natural right to private property. Obviously, I cannot start to examine all natural right theories that have looked into the question of private property, so I decided to opt for those I believe are the most popular and pervasive in the literature, and those who relate most directly to Nozick's conceptual apparatus. The choice fell on the labour-mixing argument, as presented by Locke, the self-ownership thesis, and the freedom argument, as advanced by Kant. Before I examine their respective argument, I will explain why I think each of them is relevant for my purpose and how they relate to Nozick's challenge.

This section, as I said, is not meant to be an exhaustive review of all natural rights theories of private property. I chose three arguments justifying a moral right to private property that I found challenging, and that I thought should be carefully examined. I believe that these arguments cannot justify a moral right that amounts to the right to full liberal ownership Nozick suggests. Maybe there are other arguments that are deserving of attention in this debate, and I do not claim to have examined them all. In this regard, my endeavour should be construed as a challenge to proponents of the idea that it is possible to ground a right to full liberal ownership in a moral justification prior to any sort of convention. If their claim is true, there must be a way to establish how full liberal ownership is necessary from a moral perspective. My contention, however, is that all three arguments I present below fail (or show that it is not possible) to establish such an extensive private property right without any convention. In other words, this essay does not prove that natural right theories cannot ground a right to full liberal ownership, but I believe that it greatly challenges that contention.

Another note before we dive in. Other authors have undertaken a similar sort of endeavour. Christman, for instance, has devoted a lot of his writings to that very enterprise. The difference, however, between Christman and I, is that he uses the Honoreian strategy, as I call it. It starts from a conception of property understood as a bundle of rights. Roughly put, the bundle of rights theory considers that there is no single unifying idea behind the term “property” but an association of different relations with regard to others; for instance, Christman refers to the incidents of liberal
ownership as comprising “full (or nearly full) rights to possess, use, manage, alienate, transfer, and
gain income from property are granted to individuals.” The Honoreian strategy, therefore, is to
determine whether a natural right argument is convincing by verifying whether the argument
provides support for each of the incidents aforementioned. In my opinion, and for reasons I cannot
start to examine here, I do not find that the Honoreian conception of property is convincing, and I
think that the Honoreian strategy is not the best course of action for the purpose I pursue here.
First, the Honoreian strategy entails that we can provide an exhaustive and distinct definition for
each of these incidents, which I think can be misleading, and not particularly useful. For instance,
use (like consumption) can involve destruction, and so a certain sort of alienation; the line between
use and management is in many cases very blurry; and distinguishing possession from use is
somewhat of an artificial conundrum. Second, adopting the Honoreian strategy requires that we
find in the language of the authors I will examine clear references to these incidents, which is rarely
the case. For these reasons, and because I believe that property rights can be fully explained by a
single, common denominator, I will adopt a different strategy than that of Christman. Property
rights are, at the very least, a right to exclude others: otherwise, they would not be ‘private’. Penner
calls it the exclusionary thesis, which he describes in the following terms: “the right to property is a
right to exclude others from things which is grounded by the interest we have in the use of things.”
Although these notions are allegedly more complex than they first appear, I will start from the idea
that a right to property is at the very least a right to exclude others. My strategy will be the following:
I will examine whether the natural right arguments below succeed in establishing and justifying a
right to exclude others from a thing. In other words, a right to use is not enough, for use does not
have to be private; it could be common or joint, for instance. Rather, the right holder must detain
the exclusive use of the thing. In the next subsections, I will argue that the labour-mixing argument
does not establish more than a right to use, and that the self-ownership thesis does not justify, but
rather assume a right to exclude. Finally, I will outline Kant’s account of private property, and show
that Kant both establishes and justifies a right to exclude, but this right to exclude requires the
advent of a convention.

89 See Christman, Myth, supra note 5 at 15.
90 For an exhaustive and critical assessment and critics of the bundle of right conception of property, see generally James
92 See ibid at 68ff.
2.1. Locke’s labour-mixing and added-value theory

In Chapter 1, I have briefly mentioned Locke’s theory of labour-mixing when examining Nozick’s entitlement theory. Locke has played, as I said in Chapter 1, a significant role in Nozick’s work, and it seems like no coincidence, given Locke’s emphasis on natural rights as a means to set the boundaries of a legitimate government. Moreover, Locke’s theory of labour-mixing has had tremendous influence on Western political philosophy, and is still considered by some as one of the most powerful defences of a natural right to property. Considering that influence, I now wish to come back to Locke’s argument and examine his account in more details, to see what it entails when taken as a whole, rather than in parts, like Nozick does. My objective in this subsection is to show that the labour-mixing argument, either alone or paired with the Lockean provisos, cannot justify a right of exclusive use in a thing.

2.1.1. A Self-Ownership Theory?

A quick note before we dive in: it is interesting to note that Locke’s labour-mixing theory rests on an assumption of self-ownership and, in that respect, can be categorized as a particular kind of self-ownership theory of ownership. It is different from a general theory of self-ownership, however, in that Locke considers that a second condition—labour—is necessary to ground a claim of ownership. In that regard, Locke proposes a distinct argument from self-ownership theorists and this is why I wish to examine the labour-mixing theory on its own. I will examine more directly, in the next subsection, the idea of self-ownership in relation to a right to private property, but because of Locke’s common roots with self-ownership theorists, I believe that the discussion on the labour-

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93 See Alex Tuckness, Locke’s political philosophy, summer 2018 ed (2018); William Uzgalis, John Locke, summer 2018 ed (2018); Thomas, supra note 71 at 89ff; Gopal Sreenivasan, The limits of Lockean rights in property (New York: Oxford University Press, 1995) at 13.

94 Although, some, like Dunn, have argued that Locke cannot be relevant for contemporary concerns, for Locke’s discussion of property and political authority cannot be coherently restated in strictly secular terms. See John Dunn, The political thought of John Locke (Cambridge: Cambridge University Press, 1969), ch 8. I agree with Waldron and others who argue that it is not the case, but I will not directly argue this point in the context of this essay. See Waldron, supra note 4 at 141.

mixing theory will already make plain the default, or at least will highlight one aspect of the problems with theories of self-ownership. For now, I will focus on the labour-mixing argument _per se._

2.1.2. Some Context on Locke's _Two Treatises of Government_

As I mentioned at the beginning of this subsection, Locke is concerned with setting the rightful boundaries of the central government's powers. More precisely, Locke had been reading the work of Sir Robert Filmer, a staunch defender of the crown, who claimed that the only legitimate form of government is absolute monarchy. Because God had given the earth to Adam, and that monarchs were the rightful descendants of Adam, they had inherited an absolute right of dominion over land, resources and men. As Tully explains it:

Adam’s undifferentiated and unlimited power, termed interchangeably property and dominion, is the foundation of all types of government […]. Adam’s natural and private dominion was over all things and so “none of his posterity had any right to possess anything, but by his grant or permission, or by succession from him”. This is said to prove that all present title to dominion of any type “comes from the fatherhood”. Every present father and ruler is an essentially indistinguishable present descendant of one original archetype: Adam’s monarchy. Any right of authority, whether over things or people, is construed as a private property right of use, abuse and alienation.

Locke was eager to reject such a view of government that allowed for absolute and arbitrary power of the monarch over the rights and lives of his subjects. To counter Filmer’s contentions, Locke

98 Tully, _supra_ note 96 at 56 [emphasis in the original, references omitted].
99 I cannot start to examine the political and historical context in which Locke set to refute Filmer, as it goes beyond the purpose of this essay. But it may be worth mentioning that Locke wrote is _Two Treatises of Government_ during the exclusion crisis of 1679-1681. Locke was then a strong supporter of the Whigs, who sought to forge an alliance between the people of the country (artisans and farmers mostly) and the people of the city (merchants and tradesman) in order to support the advancement of trade (see Richard Ashcraft, _Locke’s Two Treatises of Government_ [London: Allen & Unwin, 1987] at 228). But to gain the support of both groups, the Whigs had to convince the gentry that their election would be no threat to their property rights; this was a crucial point of the campaign, especially because their political opponents were insisting on the risk the Whigs posed to the security of property rights, because they had been relying on the language of natural rights to push the idea of equality among men. Some supporters of the Whigs found a very strong appeal in this idea of innate equality, and thus the language of natural rights could not be abandoned so easily. The Whigs movement had thus developed a rhetoric intended to reconcile the idea of equality with that of the security of property rights (ibid at 255; Sreenivasan, _supra_ note 93 at 16). Allegedly, Locke was compelled to undertake this conceptual foundation as the basis of his refutation of Filmer, who had argued that if mankind had received the earth in common, there was no way in which individual could appropriate without violating the rights of others (Thomas, _supra_
has to show that there are legitimate constraints that bind the monarch and his legislative will, notably with regard to property rights. Influenced by the political thoughts of Hobbes, Grotius, Milton and Pufendorf, who had been extensively criticized by Filmer for their use of natural law doctrines, Locke’s challenge is twofold: he must first recast the language of natural rights in a way that answers Filmer’s claim that natural laws cannot ground a right to property, in order to explain why individuals may have rights the monarch cannot violate. But he must also avoid Hobbes’s conclusion that individuals, by (tacitly) agreeing to exit the state of nature, have surrendered their natural right to self-preservation to the sovereign, who now has full authority to determine the scope and extent of individual rights. Locke’s task is thus to show how natural rights are preserved in civil society. Locke’s theory of property rights is therefore integrated in a broader discussion regarding the limits of legitimate political authority.

2.1.3. Locke on Property

For the reasons I just mentioned, Locke is concerned to reconcile natural property rights with the idea that men are born equal. The first sentences of his chapter on property are cast in the following terms:

Whether we consider natural reason, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence: or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah, and his sons, it is very clear, that God […] has given the earth to the children of men: given it to mankind in common. […] But I shall endeavour to shew, how men might come to have property in several parts of that which
God gave to mankind in common, and that without any express compact of all the commoners.

Locke tells us that both reason and scriptures command the same starting point: the earth was given to mankind in common to ensure their survival. The difficult task Locke has set to himself is to explain how private property can flow from an initial common endowment, and to explain it without having recourse to consent, that is, as the basis of legitimate private appropriation. Indeed, resorting to compact means to renounce to the idea that rights have boundaries set independently from political authority and conventions. There must be a way to establish the possibility of property rights in the state of nature, prior to any convention between the commoners, that can act as moral side constraints on political authority. Therefore, Locke’s very first step in justifying natural property rights is to show that common possession of the earth is not inconsistent with individual appropriation.

The answer to that question depends largely on how the original community of goods is depicted in the first place. As Waldron suggests, if we are talking about a positive community of rights, whose inhabitants are “conceived to have an inseverable, inalienable, and imprescriptible claim-right in common with the rest of mankind to the use of each and every resource,” then Locke is unlikely to succeed in providing a solution to his problem without appealing to consent. Certainly, if no one has the standing to exclude others, no one can claim a property right. Moreover, it does not seem to fit with Locke’s remark to the effect that labour “excludes the common right of other men.” It must be the case that Locke conceived of that “common right” as something that does not preclude private acquisition. Understood as a negative community of rights, the idea of original community would entail that everyone is at liberty to use the resources of the earth without having a property right as such in those resources. This view is not, at first sight, incompatible with private acts of acquisition. However, Locke’s comments regarding men’s natural right to self-preservation, which derives from the fundamental law of God, indicates that the

107 See Thomas, supra note 71 at 91–93; Waldron, supra note 4 at 148; Sreenivasan, supra note 93 at 32ff; Christman, “Can ownership?”, supra note 66 at 159; Becker, supra note 60 at 35ff.
108 See Waldron, supra note 4 at 148ff.
109 See ibid at 149.
110 Which Locke seems to see, as his comments in para II.28, II.32 seem to suggest (Locke, supra note 43). See also Waldron, supra note 4 at 149.
111 See supra note 43, para II.27 [my emphasis]. See also Waldron, supra note 4 at 156.
112 See Waldron, supra note 4 at 154–55.
113 See Locke, supra note 43, para II.25.
original community is not a space completely devoid of rights either. Indeed, self-preservation would entitle a person to make use of the fruits of the earth to insure her sustenance.\textsuperscript{115} Considering that a negative community of goods does not on its face precludes the possibility of first acquisition, the second step in Locke’s endeavour is precisely to show how acts of initial acquisition can be made consistent with this innate right to self-preservation.\textsuperscript{116}


A brief note on this right to self-preservation. The right to self-preservation stems from what Locke calls a fundamental law of nature. Locke tells us: “the state of nature has a Law of Nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions”.\textsuperscript{117} The law of nature is part of God’s will.\textsuperscript{118} As creatures of God, we are all equally the products of its workmanship.\textsuperscript{119} This, according to Locke, explains the innate equality of men,\textsuperscript{120} but also the obligation they have to respect the moral laws of nature. Although a state of “perfect freedom”,\textsuperscript{121} the state of nature is not a state of complete licence: the commoners—who owe their life to God—cannot do what they please with the life they have been trusted with. They have the duty to preserve that life, and as much as possible, preserve that of others:

\begin{quote}
all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another’s pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another [...] Every one, as he is bound to preserve himself, and not to quit his station willfully, so by the like reason, when his on preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind [...] .\textsuperscript{122}
\end{quote}

\textsuperscript{114} See \textit{ibid}, para II.16. On this point, see also Snyder, \textit{supra note} 96 at 733ff.
\textsuperscript{115} See Waldron, \textit{supra note} 4 at 155ff; Thomas, \textit{supra note} 71 at 100ff; Christman, \textit{Myth, supra note} 5 at 167ff; Snyder, \textit{supra note} 96 at 730ff.
\textsuperscript{116} In secular terms, it could be reframed strictly as a natural or moral right to self-preservation as dictated by reason, without having to appeal to the laws of God.
\textsuperscript{117} See Locke, \textit{supra note} 43, para II.6.
\textsuperscript{118} See \textit{ibid}, para II.4-II.5. See also Snyder, \textit{supra note} 96 at 730.
\textsuperscript{119} Locke, \textit{supra note} 43, para II.6.
\textsuperscript{120} See Snyder, \textit{supra note} 102 at 730.
\textsuperscript{121} Locke, \textit{supra note} 43, para II.4.
\textsuperscript{122} \textit{Ibid}, para II.6.
Locke is very clear on that point: God wills peace and preservation of mankind, and we have no standing, in the order of things, to refuse to others (and ourselves) sustenance and preservation; we have initially no political authority over others in that regard. All we have is a moral duty to ensure our survival, and that of others when possible, which turns into the correlative right to self-preservation. This right to self-preservation is thus the corollary of a moral duty to preserve ourselves and others.

I wanted to highlight this right to self-preservation because some authors construe self-preservation as the foundation of Locke’s argument for private property. Snyder, for instance, argues that the right to self-preservation logically entails a justification of private property. Snyder rests his argument on the following passage:

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion exclusive of the rest of mankind, in any of them, as they are thus is their natural state: yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular man. The fruit, or venison, which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his, i.e. part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.

Snyder’s argument goes as follows: if a commoner has the right to ensure her subsistence, she must not be precluded from taking what is given to mankind in common. Therefore, if she has a right to ensure her subsistence, she has the right to appropriate privately the resources she finds in the state of nature. Let’s think of it this way: if she was to violate the common right of men when she picks an apple and eats it, how could she rightfully ensure her preservation? She must, in some way, be allowed to appropriate food, which entails that it is taken out of the common, for it cannot be used by the rest of the commoners anymore; when she eats her apple, it becomes hers, and hers only. The fundamental law of nature, says Snyder, by imposing a duty of self-preservation, cannot preclude

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123 See ibid, para II.7, II.16.
124 See ibid at II.4. See also Snyder, supra note 96 at 730.
125 See Snyder, supra note 96 at 730.
126 See ibid at 734ff.
the exclusive appropriation of things; would it be otherwise, the duty would be impossible to fulfill. Hence, the right of self-preservation supposes private property.

The problem with Snyder's argument, however, is that he conflates a right to use with a right to exclude, or a right to exclusive use. The case of food makes it harder, I believe, to see how these rights are not necessarily coextensive. I may have a right to use an apple even though I do not have a right to exclude others from it, although it is undeniable that others are de facto excluded from the apple once I have eaten it. The fact, however, that you cannot appropriate the apple anymore (because I consumed it) does not necessarily entail that I had a property right in it: this would be to confuse a fact with a norm. The distinction is more obvious when we use a category of things other than food. For instance, let's say I privately own a piece of land and I let you grow tomatoes on a little parcel of my land. In that case, you have a right to use the land, but not a right to exclude me from it. At most, you have a right to exclude others from your vegetable patch. But it might not even be the case: if I allow others to walk on my land, you may not have a right to exclude those persons who have the same right as you do to use the land. Here, you're right to use the land is disconnected from a right to exclude people from it. The right to use and to exclude are therefore not necessarily coextensive. More importantly, exclusion is not necessarily a matter of right. Let's say for instance I own a house, and you decide to burn it down because you are angry at me. In doing so, you effectively exclude me from it, because I cannot use my house anymore, but that does not entail you had a property right in my house. It merely shows that, because of your actions, I can no longer use my house, or exclude others from it. In other words, the fact you exclude someone from something does not mean you had a right to it in the first place. Snyder's argument, I believe, falls prey to this conceptual confusion. All the right to self-preservation establishes is that I cannot be excluded from using all resources that are necessary to my survival. It is true, indeed, that the right to self-preservation entails that I cannot be precluded from using the things I find in the state of nature, because otherwise I would be violating the fundamental law of nature that requires that I provide for myself. And it is also true that once I have eaten the food I have found in the state of

127 Locke, supra note 43, para II.26 [my emphasis].
128 See Waldron, supra note 4 at 168–69; Penner, Idea, supra note 91 at 188–90.
129 See Waldron, supra note 4 at 168ff.
130 I will get back to this point in subsection 2.3, but roughly put, Kant distinguishes an innate right to bodily integrity from a an acquired right to property, which makes the distinction easier in the case of food. When I consume the apple, you cannot reach down my throat to take it back. This is true even though I do not have a property right in the apple, because in doing so, you would violate my bodily integrity (rather than my property right). See below, subsection 2.3.
nature, I have factually excluded others from using it, in that others cannot use those things anymore to ensure their preservation. But the fact that I can use resources for my survival, and that using often means consuming in the cases relevant to preservation, does not mean I have a right to exclude people from those resources. In that sense, the right to self-preservation does not logically entail a moral right to exclude others, nor even a right of exclusive use. To ensure my preservation, I only need not to be excluded from some of the resources necessary to my survival. As long as I can use, I do not need to exclude, and use does not require that I be the only one using a particular thing if it can support multiple users. For instance, we could both use the same natural shelter made by some tree branches in order to protect us from the rain; my survival does not depend on you not being allowed to access that shelter. As Waldron says: “Private enclosure and cultivation by individuals for individuals are certainly not necessary to be made useful to humans.” The only thing the right to self-preservation could imply, with regard to ownership, is that it may provide a claim-right against one’s ownership in some specific cases. If there is no resource left for me to access and that my survival is endangered, you might have to let me pick the apples that grow on your land. But this begs the very question it was supposed to answer in the first place: how does one acquire a right to exclude others from a thing in the state of nature? The right to self-preservation might be an exception to this right to exclude in some cases, but it certainly does not come close to establish a right to private property.

2.1.5. The Labour-Mixing Argument

Since the right to self-preservation does not seem to ground, in itself, anything close to a right to exclusive use, or to exclude, Locke must have had a separate argument to support the claim that men have property rights arising in the state of nature. I believe it is the role Locke attributes to the labour-mixing theory. Locke says:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and

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131 See Waldron, supra note 60 at 169.
132 See Waldron, supra note 4 at 169ff.
133 See Thomas, supra note 71 at 102.
joined to it something that is his own and thereby makes it his property. It being by him
removed from the common state nature hath placed it in, it hath by this labour something
annexed to it, that excludes the common right of other men: for this labour being the
unquestionable property of the labourer, no man but he can have a right to what that is once
joined to, at least where there is enough, and as good, left in common for others.\(^{134}\)

Locke’s argument here seems to be the following: because we have a right in our body,\(^{135}\) and to the
work we produce by using the force and energy of our body, we must own the object on which
labour has been spent, that is, we have a right to exclude the common right of others from that
thing. Quite literally, the object is taken out of its common state. But why labour exactly? It seems it
cannot just be because something it is mixed with something else. It must be that what is mixed has
some sort of normative significance that should result in a form of normative recognition. What is
so special about labour that it generates a right to exclude others? Locke provides two
interconnected arguments that support his claim.\(^{136}\) First, labour produces value.\(^{137}\) In fact, labour is
responsible for pretty much all the value that is useful to us and our preservation. Locke says:

[I]et any one consider what the difference is between an acre of and planted with tobacco
or sugar, sown with wheat or barley, and an acre of the same land lying in common, without
any husbandry upon it, and he will find, that the improvement of labour makes the far
greater part of the value. I think it will be but a very modest computation to say, that of the
products of the earth useful to the life of man nine tenths are the effects of labour: nay, if
we will rightly estimate things as they come to our use, and cast up the several expenses
about them, what in them is purely owing to nature, and what to labour, we shall find, that in
most of them ninety-nine hundredths are wholly to be put on the account of labour.\(^{138}\)

You may be able, without much work, to pick up some acorns, maybe a couple of fruits, and a drink
of water, but the rest must be laboured on in order to be useful to men’s preservation. For instance,
hunting, cropping, constructing the ladder necessary to pick the apples from the higher branches of

\(^{134}\) Locke, supra note 43, para II.27 [my emphasis].
\(^{135}\) Or, at least, no one else has a higher claim to it than himself. The extent of the self-ownership thesis Locke puts
forward is ambiguous. Because we are the creature of God, we do not have a complete license with regard to the use of
our body. For instance, Locke does not consider that we have a right to commit suicide, because it would be contrary to
the duty of self-preservation we owe to God. In that respect, some have said that we are in a relation of trust with God
regarding our body (and our life). In any case, there might be some ambiguity with respect to the nature of the self-
ownership thesis Locke relies on, but it is clear no one else has a right to our body, except for God. Waldron and Tully
interpret it as Locke saying that we do not own our bodies, but rather our actions. Although it is clear that we possess
our actions in some sense (Locke says: “every man has a property in his own person; this no body has any right to but
himself” [ibid, para II.27]), it is equivocal whether Locke sees that right as a property right \textit{per se}, which would technically
differentiate Locke’s view from what we typically understand as a self-ownership thesis. On this point, see Waldron,
supra note 60 at 177ff; Tully, supra note 102 at 104ff.
\(^{136}\) See Thomas, supra note 77 at 100.
\(^{137}\) See Locke, supra note 43, para II.36.
\(^{138}\) \textit{Ibid}, para II.40 [my emphasis].
the trees, or the bow and knife used to kill and butcher the animals, all of this requires some work.

Labour makes the resources of nature valuable to men.\(^{139}\) The argument that labour increases the value of the resources needed for survival also connects back to the right, and duty, of self-preservation. Locke seems to see in labour a divine command,\(^{140}\) that is made necessary by the scarcity of goods found in the wilderness. God did not intend for us to just barely survive, but to 'be fruitful, and multiply, and replenish the earth',\(^{141}\) and also to provide for the preservation of others.\(^{142}\) Hence, preservation is closely tied to labour: “God gave the world to men in common; but since he gave it to them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it).”\(^{143}\) Labour, in other words, by increasing the value and usefulness of resources available to men, fulfills the fundamental law of nature that requires men to see to their survival. Without labour, there would not be enough for mankind to survive.

The second argument Locke supplies in favour of labour as a proper foundation for natural property right as to do with desert, or reward.\(^{144}\) Locke tells us:

\begin{quote}
He that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour: if he did, it is plain be desired the benefit of another's pains, which he had no right to, and not the ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his industry could reach to.\(^{145}\)
\end{quote}

That labour is a divine command and that it increases the value of resources necessary to men's survival does not mean it is a fun and easy task. Indeed, the state of nature might be full of resources, but that does not mean it is the garden of Eden, where the food is always ripe and grows without the help of men.\(^{146}\) In Locke's state of nature, labour is toilsome, and hard, and requires

\begin{footnotes}
\item 139 See Thomas, supra note 71 at 120ff; Waldron, supra note 4 at 169ff; Christman, “Can Ownership?” supra note 66 at 160ff.
\item 140 On this point, see Snyder, supra note 96 at 739ff.
\item 141 Locke, supra note 43, para I.33. See also Waldron, supra note 4 at 169.
\item 142 Locke, supra note 43, para II.6.
\item 143 Ibid, para II.34 [my emphasis].
\item 144 See Snyder, supra note 96 at 738ff; Waldron, supra note 4 at 170ff; Becker, supra note 60 at 35ff; Christman, “Can Ownership?” supra note 66 at 161.
\item 145 Locke, supra note 43, para II.34 [my emphasis].
\item 146 See Penner, Idea, supra note 91 at 192.
\end{footnotes}
efforts. It is only fair that the industrious (literally) reaps the benefits he has sown. Were it not the case, the commoners would spend all their time protecting their goods against the interferences and the thefts, rather than labouring. This would not be a productive state of affairs. It must be the case, says Locke, that the one who has worked gets the right to enjoy the fruits of his labour. For the only difference between the labourer and the rest of the commoners is that one has put some effort, and the other did not. Both had the same opportunity to choose a parcel of land, till it, plow it, and cultivate it, until the crops are ready to be harvested; but one has taken advantage of that opportunity, whereas the other chose not to. From that perspective, Locke says, it must be that the industrious reaps the benefits of her work, and not the indolent. Property is the reward that comes after drudgery.

To recap briefly what I have said so far, Locke claims that labour gives rise to a property right, because labour increases the usefulness of the resources given in common to mankind, and because this increase in value should benefit the person who has toiled for it. This is what makes labour special enough to generate a property right that would allow the labourer to exclude the common rights of others. The property right, as I said, arises from a combination of two premises: self-ownership and labour-mixing. Locke, however, subjects private appropriation to two additional conditions: the spoilage proviso, and the enough and as good condition I mentioned earlier. I will examine these conditions in turn.

2.1.6. Limits on Appropriation: the Spoilage Proviso

The spoilage proviso connects back to the duty of preservation that lies at the core of the fundamental law of nature. Locke says:

It will perhaps be objected to this, that if gathering the acorns, or other fruits of the earth, makes a right to them, then any one may engross as much as he will. To which I answer, not so. The same law of nature, that does by this means give us property, does also bind that property too. God has given us all things richly [...] is the voice of reason confirmed by

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148 See Becker, *supra* note 60 at 35ff.
149 See Locke, *supra* note 43, para II.27. See also Christman, *Myth*, supra note 5 at 50ff; Waldron, *supra* note 4 at 177ff; Thomas, *supra* note 71 at 97ff.
inspiration. But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.\textsuperscript{151}

Labour alone does not justify unlimited accumulation.\textsuperscript{152} The reason for that, as Locke mentions, is that the fundamental law of nature constrains the natural institution of property. In other words, property is directed toward a goal, that of preservation. Labour improves the common stock and, as such, entitles the labourer to the fruits of his work. But if the labourer has gathered more than he could use, it does not matter whether he improved the resources by his labour, for the goods will perish before they can be used for his preservation. Spoilage cancels labour, in terms of rights. Locke insists:

\begin{quote}
But if they perished, in his possession, without their due use; if the fruits rotted, or the venison putrified, before he could spend it, he offended against the common law of nature, and was liable to be punished; he invaded his neighbour's share, for he had no right, farther than his use called for any of them, and they might serve to afford him conveniences of life.\textsuperscript{153}
\end{quote}

Even though the labourer owns his labour, and has toiled on his crop, if the results of his efforts end up being wasted, the labourer has no claim over those goods.\textsuperscript{154} Resources must not be wasted, and this proviso includes land: it must be put to some (productive) use.\textsuperscript{155} Interestingly, the limit Locke places on the amount appropriated is less a quantitative than a qualitative limit: if the labourer manages to gather a large number of nuts, much larger than he could consume right away, but he can nonetheless store them for several months without spoiling them, then the labourer does not violate the spoilage proviso.\textsuperscript{156} I believe that this feature of the proviso sheds light on Locke's conception of (moral) ownership: while it is not meant as an egalitarian device, Locke's property does not serve pure, egoistic individual interest either. Property is a moral concept that fits into a particular moral system: that of self-preservation, and preservation of others. Without convention, property is limited by that objective.

\textsuperscript{151} Ibid, para II.31 [my emphasis].
\textsuperscript{152} See Christman, “Can Ownership?”, supra note 66 at 161.
\textsuperscript{153} See Locke, supra note 43, para II.37.
\textsuperscript{154} See Christman, supra note 66 at 161; Waldron, supra note 4 at 207.
\textsuperscript{155} Locke, supra note 43, para II.38. See also Waldron, supra note 4 at 207ff, who characterizes the notion of 'use', and 'productive use' quite broadly.
\textsuperscript{156} Locke, supra note 43, para II.46. See also Snyder, supra note 96 at 739; Waldron, supra note 4 at 207ff.
The spoilage proviso, however, is often construed as a negligible condition, because of Locke’s comments on money.\textsuperscript{157} This discussion arises as Locke considers barter as a way to avoid spoilage. For instance, a labourer has produced tomatoes in excess of what he can possibly consume before they go bad. Locke contends that nonperishable goods were introduced as a way to facilitate barter, because those goods could be kept without fear of spoiling. And progressively:

\[\text{T]hus came in the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life.}\textsuperscript{158}

And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.\textsuperscript{158}

The spoilage proviso would thereby be rendered irrelevant by the introduction of money, or at least, if the condition did put an indirect quantitative limit on appropriation, money effectively raised that threshold to a point where it is not anymore a concern.\textsuperscript{159} But I think it is important to emphasize that Locke clearly sees money as a conventional institution.\textsuperscript{160} It is by the “tacit agreement of men” that money is introduced.\textsuperscript{161} Although we are still in a pre-political state, I interpret this specification as expanding the scope of property rights beyond its natural territory.\textsuperscript{162} The introduction of money, and its effects on the spoilage proviso, fall outside of a natural theory of right—at least for our purpose. A natural right, as I discussed in s.1, must be understood as independent from any sort of convention. Because it goes beyond the scope of this essay, and that I am interested specifically by the argument Locke provides for a natural property right, I will not examine further the consequences Locke attributes to the introduction of money, such as the scarcity of land due to unequal labour force that can be stored in an exchange value.\textsuperscript{163} In my opinion, the spoilage proviso is relevant for understanding the tenet of Locke’s conception of natural property: labour does not justify unrestricted accumulation.

\textsuperscript{157} See e.g. Thomas, supra note 71 at 103ff. For a more nuanced view on this issue, see Sreenivasan, supra note 93 at 35ff.
\textsuperscript{158} Locke, supra note 43, para II.47-48 [my emphasis].
\textsuperscript{159} See Waldron, supra note 4 at 209.
\textsuperscript{160} See Locke, supra note 43, para II.36, II.47. On this point, see Christman, “Can Ownership?” supra note 66 at 161ff; Penner, supra note 91 at 195.
\textsuperscript{161} Locke, supra note 43, para II.36.
\textsuperscript{163} See Penner, Idea, supra note 91 at 192.
2.1.7. Limits on Appropriation: the “Enough and as Good” Proviso

With regard to the “enough and as good” proviso, the conditions it imposes also seem to bear on the possibility of private appropriation.\(^{164}\) Remember Locke’s challenge: he has to explain how a private right to property arises from a state of original community, without resorting to a convention that would make the content of the right contingent on said agreement. The “enough and as good” proviso, I believe, works as an acceptability clause in the absence of compact.\(^{165}\) Locke makes sure, through that condition, that private appropriation cannot be (morally) objected to because it does not hurt anyone.\(^{166}\) If you cultivate a parcel of land, I am not barred thereof from that possibility myself, because there are still enough and as good land left to cultivate: my preservation is not threatened by your act of acquisition. Locke says: “the property of labour should be able to overbalance the community of land: for it is labour indeed that puts the difference of value on every thing”.\(^{167}\) He insists:

To which let me add, that he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provision serving to the support of human life, produced by one acre of enclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common. And therefore he that encloses land, and has a greater plenty of the conveniences of life from ten acres, than he could have from an hundred left to nature, may truly be said to give ninety acres to mankind: for his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common.\(^{168}\)

Locke is crystal clear on this point: labour is useful to the rest of the commoners because the labourer takes less of the common resources he would have were it not for his labour.\(^{169}\) In other words, the labourer does not take anything away from the commoners. Therefore, appropriation cannot be challenged by the commoners, for their preservation benefits from the private acts of the labourer. On the contrary, considering we have a duty to survive and preserve ourselves,\(^{170}\) the legitimacy of private ownership would be greatly challenged if some people could not, because of

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164 See Sreenivasan, supra note 99 at 34ff; Thomas, supra note 77 at 101ff; Christman, “Can ownership?”, supra note 72 at 161ff. Contra Waldron, supra note 4 at 209ff.
165 See Locke, supra note 43, para II.33. See also Thomas, supra note 71 at 101ff; Sreenivasan, supra note 93 at 35ff.
166 Locke, supra note 43, para II.33: “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left”.
167 Ibid, para II.40.
168 See ibid, para II.37.
169 See Penner, Idea, supra note 91 at 192.
the prior appropriation of others, see to their needs. The “enough and as good” proviso, in that regard, serves as a limit on individual appropriation and ensures that all commoners have an equal opportunity to fulfill their duty of self-preservation, at least in the state of nature.

That being said, there is a lot of ambiguity as to what this limit entails. Sreenivasan clearly put his finger on the problem:

It is not clear, for example, whether what the [enough and as good] proviso requires appropriators to leave behind for others is enough and as good as the others had before or merely as what they take themselves. Nor is it clear whether what has to be left behind for others has to be left in kind, that is, whether one has to leave enough and as good land behind if one is labouring on land.171

The reader will maybe remember that Nozick, in his reinterpretation of the Lockean proviso, has considered and rejected this possibility.172 Locke, Nozick says, could not have intended for the “enough and as good” proviso to impose a limitation in kind on appropriation. After having rejected labour-mixing as a proper foundation for acquiring a property right, Nozick adopts a more lenient interpretation of the “enough and as good” proviso, which he then sets as a general norm of first acquisition. Regarding the interpretation of the proviso itself, I believe it is not unreasonable to think that Locke did intend for some sort of limit to constrain private appropriation, at least in the state of nature, and that this relates to the importance he attaches to the fundamental law of nature and the duty of self-preservation that binds the inhabitants of the state of nature. But whatever one's interpretation of the “enough and as good” proviso, it is unquestioned that Locke did not intend it as a norm of acquisition. Indeed, the “enough and as good” proviso cannot establish how one gets a property right: it only sets an additional condition, tackled onto the norm of first acquisition,173 that must be satisfied for an act of acquisition to bind others. Nozick, I believe, conflates the actual act establishing acquisition with this additional, justificatory condition. The distinction, however, is important, because both sets of conditions warrant their own justification. But are these justifications sufficient to account for a natural property right? In the next section, I will examine the outcome of Locke's framework for property right.

170 See Thomas, supra note 71 at 101; Sreenivasan, supra note 93 at 36.
171 Sreenivasan, supra note 93 at 34.
172 See above, Chapter 1, subsection 1.4.
173 In Locke's case, the norm of acquisition is the labour-mixing/added-value argument.
2.1.8. What Lockean Property Rights?

In this subsection, I have outlined the basic ideas behind Locke’s theory of natural property rights. Now, I wish to examine whether the argument is successful in establishing a right to full, liberal ownership that would act as a moral side constraint on the political authority of the state. I do not claim, however, that this was the gist of Locke’s project in designing a justification for natural property rights and so I am not saying whether Locke’s argument is successful with regard to the task he has set himself. Rather, I am interested in finding out whether the labour-mixing argument can ground the sort of claim Nozick puts forward. I do not think so. More specifically, I will contend that, as a matter of natural right, Locke’s labour-mixing approach fails to establish a right to exclude or a right to exclusive use, which lies at the core of a right to private property. The labour-mixing argument, I believe, only gives rise to a right to use, which is far from sufficient to ground a moral right to full, liberal ownership.

In Locke’s account, labour is morally significant because it ensures the preservation—a natural duty—of the labourer herself, but also of the rest of the commoners. Labour, he says, increases the value of the common resources, and because this increase in value is toilsome, the one who labours should be the one who gets to enjoy the benefits. So it is not just because labour is mixed with raw materials, and that labour is ours, that it is normatively important: it is because labour produces moral effects that are desirable from a certain normative standpoint, that is, that of the state of nature subjected to the fundamental law of nature. The issue, however, is that the labour-mixing/added-value argument does not logically entail a right to exclusive use or even a right to exclude others from the underlying resource. Let’s take the example of land. Genevieve has worked relentlessly for a year to grow cabbages, onions, and squashes. Before he started labouring that area, the land was unproductive, and nothing ever grew on it. Now, it produces enough to feed Genevieve and her family. Because he owns himself, Genevieve is also the rightful owner of his work. From these moral premises, what should Genevieve get exactly? Does the fact he has laboured on a land and that the labour is valuable should entitle him to preclude Guillaume from doing the exact same thing? What gives Genevieve the exclusive use of that crop, especially if Guillaume using the land does not preclude Genevieve from getting the benefits of his work? The fact that labour is valuable, and that the labour is Genevieve’s, does not seem to entail that he gets to be the only one to use that land. At most, it gives him an exclusive right to the onions, cabbages, and
squashes he cultivated during the year. But even then: what gives Genevieve the exclusive right to the underlying resources to which his labour was mixed with? For even if labour ought to account for more than ninety percent of the value of a thing, what gives the labourer the right to the remaining ten percent? More precisely, what gives Genevieve the right to exclude Guillaume from those remaining ten percent? Such a conclusion would have to be based on the presumption that there is no value in the raw resource, so much so that there is virtually no difference between owning the labour and owning the thing. But that is just plainly false, even more so when we move from a state of abundance to a state of scarcity: raw resources have at least the value that it allows one to ground, and materialize the value of his labour in a way that would not be possible without resources. The labour-mixing/added-value argument, however, gives the labourer a right to his labour, because (1) he owns his labour, and (2) labour is valuable for everyone and should be rewarded. The reward is for the labour, not for anything beyond that, or at least, an additional justification should be provided to support that claim. So on what grounds could Genevieve exclude Guillaume from the land he has laboured on?

The example raises two distinct objections: (1) the labour-mixing/added-value argument does not explain why the property rights that arise from labour should be private (or exclusive); and (2) even if it could give rise to a private property right, the argument only accounts for a right in the value added to the things through labour, which supposes that they could be easily distinguished for practical matters. These arguments become even more powerful when we take the two provisos into account. The spoilage proviso precludes appropriation that would lead to waste; and the enough and as good proviso limits acts of appropriation that would endanger others’ right of self-preservation. In both cases, there is a concern about the effect of excluding others from resources. Therefore, it seems to confirm that the right that labour gives rise to is primarily a right not to be excluded from some resources, and a right to use the fruits produced by one’s work. This argument is close to the one I formulated against Snyder’s interpretation. It is not a coincidence: Locke’s theory is so thoroughly intertwined with a concern for preservation (and thus need), at least in the stage prior to the introduction of money, that it becomes very difficult to isolate property from it. As a result, the argument does not seem to yield a property right robust enough to exclude others. For this is precisely the intention behind the labour-mixing/added-value argument: if one appropriates, nobody

174 See Penner, Idea, supra note 91 at 192.
175 See Christman, Myth, supra note 5 at 54.
has the right to interfere with that entitlement. But I do not think the argument is successful; or at least, the burden has now shifted to its proponents to show how it explains why the rest of the commoners are excluded from a claim to the underlying resources—especially when resources are scarce. In other words, the labour-mixing argument fails to provide an account of first acquisition that would explain why someone could put the rest of mankind under the obligation to refrain from using that resource ever again. Besides, I believe the objections remain powerful even though we isolate them from the moral background that is characteristic of Locke’s account: the labour-mixing/added-value argument does not, at first sight, bridge the gap between a right to the addition and a right to the underlying thing, and it does not explain why the right to the underlying thing should be an exclusive, rather than a joint right. In that respect, it seems like the labour-mixing/added-value argument is greatly challenged: it is not at all clear that it grounds more than a right of use, and by implication, labour does not seem to justify why individuals should be able to put others under an obligation to keep off from their things.¹⁷⁶

¹⁷⁶ See Tully, supra note 96 at 61; 121–124; Waldron, supra note 4 at 209ff. See also Sreenivasan, supra note 93 at 96ff, who concludes that the concept of property in Locke is limited to use, although the concept of use, in light of the Honoreian incidents, is ambiguous. I don’t think, however, it is necessary to adopt a Honoreian conception of property to arrive at Sreenivasan’s conclusion.
2.2. Self-Ownership Thesis: From Incorporation to Identification

It might be objected that the argument for natural property right I presented in the previous section is too specific to Locke’s moral background, and/or do not pay sufficient attention to the self-ownership premise that grounds the right to external things. Because self-ownership theories are also quite influential in natural rights theories, and that it plays a role in Nozick’s objection against redistributive taxation (although it does not ground the justification for private property per se), I believe it is important to look more closely at how self-ownership can be put to use in justifying a moral right to private property. However, I believe it suffers from similar defects than the labour-mixing/added-value theory. My account will therefore be quite brief, because it does, as I will try to show, overlap with the argument I presented in the previous section. In this subsection, I will first outline two generic arguments a self-ownership theorist could advance in support of a natural property right, the incorporation thesis and the identification thesis. I will then explain how both these versions of the self-ownership thesis fail to justify a right to exclude others from a thing.

2.2.1. A Property Right to our Body

In Chapter 1, I outlined Nozick’s conception of rights. The person, Nozick says, is a singular and autonomous moral agent. Because of its moral features, personality warrants respect, and protection: individuals have rights that act as moral side constraints on the actions of others. In other words, humans possess an ability to “form a conception of the life they want to pursue and to make choices in pursuit of that conception”, and this characteristic entitles its holder to protection against interferences that would impede the exercise of that moral ability. In the first instance, this would include a right of exclusive use, and a right to exclude others from using my body parts. Our corporeal existence is indeed of paramount importance in the execution of our moral abilities. Without a body, there is no moral agency. But this is not to say that the body is our moral will. The moral agent has a body, which is indivisible, yet distinct from the person’s moral individuality. The inextricable relation between the existence of the mind and the body, however, entails that we ought to have complete and absolute power over our body. The body is the condition sine qua none for

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177 Nozick, supra note 1 at 48.
acting in the world, that is, exercising our ability to make plans. If we do not have unfettered control over the way we use, but also over who gets to use our body, our moral agency is dramatically compromised.

This complete control over our body is conceptually undistinguishable from a right to private property. The person is the only one who gets to decide how and to what end her body will be put to use. She gets to exclude others from interfering with it or using it. Self-ownership, in the first instance, protects bodily integrity, notably against utilitarian rationales justifying the use of your body part for the greater good.\footnote{178 See Waldron, supra note 4 at 399.} Some, like Nozick, even go as far as saying that this complete licence, that is only bound by the reciprocate rights of others over their own body, entails a right to alienate its own moral agency, for instance, by committing suicide or by selling oneself into slavery.\footnote{179 See Nozick, supra note 1 at 331.}

That is to say, there are no conceptual distinction between the way a person owns her body parts and the way a slaveholder owns his chattel slave. This, amount to a complete protection of one’s bodily integrity, and thus of her moral agency, because it gives her the ground to object to interferences, and to act autonomously and freely within a certain scope, that is, as long as she respects the reciprocate rights of others not to be harmed or interfered with. As Waldron puts it, “I own myself is to say that nobody but me has the right to dispose/have rights to do these things (though I must not harm others in doing so; that is, I must not exercise my self-ownership in a way which violates theirs), and those rights are exclusive of anyone else’s privilege in this regard, for they are correlative to others’ duties to refrain from interfering with what, in this sense, I own.”\footnote{180 Waldron, supra note 4 at Waldron, 398. See also Cohen, Self-Ownership, supra note 95 at 68; Tristan Rogers, “Self-ownership, world-ownership, and initial acquisition” (2010) 2:36 Libert Pap 1 at 3.} In other words, my autonomy and my freedom are respected when we conceive of my body as a thing I privately own.

2.2.2. A Property Right in External Things Derived from Self-Ownership

Essentially, the self-ownership argument for property rights in external things (other than my body) extends the property right we have in our body onto external things. There are different ways to back that move. One would be to say that there is no conceptual difference between body parts
and external things: they both are means to our moral agency. This is the thesis Wheeler puts forward.\(^\text{181}\) He uses the example of food to argue that an external thing can be incorporated so as to become indissociable from our body: the apple I eat is degraded into molecules that my body uses to regenerate vessels and tissues. The apple is now part of me, and in the same way I own myself, I now own that apple.\(^\text{182}\) This argument, says Wheeler, casts a doubt on the distinction between things and bodies.\(^\text{183}\) Through certain processes, things can become extension of our bodies. For instance, nobody would object that my prosthetic leg, attached to my hip through a complex surgical intervention, is no less mine than my other natural leg. If a leg dealer was to come and steal my prosthetic leg while I was asleep, we would still consider this intrusion as a severe interference with my bodily integrity. That would be true even if I had removed my prosthetic leg and placed it on the side of my bed, so that the leg dealer did not cause me any pain by stealing it away. Then, if it is the case that a body part subject to self-ownership can be unnatural, and separated from my body, the difference between my body and any other external things starts to fade away. He uses another example to illustrate his point:

In the same way, turtles and snails have shelters which grow as parts of their bodies. We genetically defective humans have designed artificial shells with pleasant features lacking in the nicest turtle shells. In principle, nothing morally distinguishes my mansion from an artificial arm several times defter and stronger than any natural arm. Since nothing morally distinguishes such an artificial arm from a natural arm, my mansion is, at least morally speaking, a part of me. (The physical and emotional damage to me at its removal may be as intense as that I feel when I’ve lost a finger).\(^\text{184}\)

Appropriating an external thing to use as a means is no different than incorporating molecules into our bodily tissues. There is in both cases a process of incorporation, and that process is sufficiently analogous to subject the things to the same kinds of rights, that is full ownership rights.

Another way to derive property rights in external things from the claim that we own our body parts is to say that our body includes what we do with it, that is, our talents, powers, abilities, and so on. Because these capacities are mediated through our body, they are considered as things we own in the same manner as body parts. For instance, the slaver who kidnaps me and forces me to work on his field does not cause me any less harm than the leg dealer who steals my leg away to sell

\(^{182}\) See \textit{ibid} at 179.
\(^{183}\) See \textit{ibid} at 179.
\(^{184}\) See \textit{ibid} at 179.
to legless persons. In that respect, self-ownership protects bodily integrity in the same manner it protects our liberty to act through our body against interferences. If it is true that I own my capacities and abilities and labour in the same way I own my body parts, then there is no reason I should not own the product of my capacities and abilities and labour. Taking from me the thing I produce through my talents is no less problematic, goes the argument, then taking away my body parts, or forcing me to work.\textsuperscript{185} There is a process of psychological appropriation that creates a transfer from the property rights over one’s body to the things created, whether or not it produces a valuable addition to the resource.\textsuperscript{186} Finally, this argument can be used to support the conclusion that because our talents and abilities are such an important part of our moral personality, the resources that are necessary for expressing those talents and abilities cannot be put off-limits.\textsuperscript{187}

In one case, there is no conceptual difference between my body and other external things I have appropriated (the incorporation thesis); in the other case, the property rights I have in my capacities and talents extend, through a process of identification, to the things I create (the identification thesis). In both cases, the self-ownership thesis is put forward to ground a right to private property in external things.

2.2.3. Bridging the Gap?

But does it? I fail to see how self-ownership could establish that, because in both cases, the claim starts from the assumption that it is justified. In other words, how does self-ownership justifies a right to exclude others from external things? In both cases, the self-ownership thesis does not bridge the gap between the right I have in my body, and the right I have in external things. I will examine that claim with respect to both the incorporation and the identification theses.

\textsuperscript{184} Ibid at 181.
\textsuperscript{185} I believe this line of argument is somewhat distinct from the Lockean self-ownership thesis. In Locke’s account, the right is due to an important degree to the fact that labour adds value to the thing and that it should be rewarded. Rather, the self-ownership thesis claims that a property right arises from an identification between labour, or talent, and the thing it produces. It is that identification, and not the addition of value (which should be rewarded) that gives rise to the property right. There is no element of desert here.
\textsuperscript{186} See Becker, supra note 60 at 49.
\textsuperscript{187} See Waldron, supra note 4 at 399ff.
In the case of the incorporation thesis, the problem is that it supposes the very thing it is meant to establish. Let’s take for granted that I own myself, in a way that I have full private property rights in my body parts, and that once I rightfully appropriate a house, it is mine in the same manner that I own my leg. How does that explain that I have a right to a specific external thing? The fact I own my leg certainly does not explain why and how I come to have a property right in my house. What transpires from that example is that the incorporation process is not meant to explain how one acquires a specific right to a thing, but simply to illustrate that the rights I have in external things should not be conceptually different than the rights I have in my body parts. Yet it does suppose that I can acquire privately and exclusively external things in the same way I have or acquire rights to my body. In other words, Wheeler supposes that we have a right to external things before we incorporate them, which is what he needs to demonstrate. Wheeler says, I have a private property right in the apple because eating an apple makes it conceptually identical to my body, which I privately own. But again, the fact I eat an apple and that the rest of mankind can no longer use it, or appropriate it, or exclude me from it, because it is being degraded in my stomach into particles that are incorporated to my organism, bears no logical relation to the claim that I had a property right to the apple before I eat it: it would still be the case that reaching down my throat to take the apple back would violate my bodily integrity, even if I had taken the apple from you in the first place. I may have consumed the apple without having a right to exclude you, yet, my use factually excludes you nonetheless. How exactly do I acquire the right to exclude you from a thing that is not my body? This question is explicitly left aside by Wheeler, who assumes that what is in the world is there to be taken and that taking from that pool of external resources does not violate the rights of others. Unfortunately, this is precisely what needs to be established: the fact that I have full property rights in my body does not explain why I can acquire an external thing in the first place, and why this acquisition would allow me to have rights similar to the ones I have in my body, that is, rights to exclude others from it. This, in turn, casts some doubts on Wheeler’s identification of body parts with external things: external things are those things that do not necessarily have to be mine and that could, in fact, be someone else’s. That house may be very well suited to my needs, and I may like it very much, but there is nothing in the house that is so intrinsically attached to me that it could not be someone else’s property. In contrast, my body—although parts of it are not essential to my survival or to my identity, and could be essential to the survival of someone else’s—is still intrinsically mine because my bodily existence is, as I have said, a necessary condition of my moral

188 See Wheeler, supra note 180 at 171–72, 180.
agency, *unlike the house*. Therefore, it might be that incorporation of an apple makes it no different than my body, but it certainly is not the case, factually, that I incorporate a house in a way that it becomes *factually* indistinguishable from my body so that I should be entitled to the same set of private property rights I have with regard to my body; and Wheeler does not provide us with an argument as to why it should be considered indistinguishable from a moral perspective. In that respect, the incorporation thesis fails to establish why self-ownership grounds rightful private appropriation rather than, literally, anything else.

The identification thesis falls prey to the same kinds of problems, for it presupposes the very problem it is meant to address. Indeed, the identification thesis does not examine how one acquires the right to the external thing in the first place. Let me rephrase the argument:

1. I have a moral right to myself and my body and my actions, which is very similar in scope and substance to a right to private property. I can exclude others from using my body and my actions, and I have the exclusive authority to decide how this being will be used.
2. If I have a right over myself and my actions, I have a similar right over the things I produced through my actions because I identify to those things as being produced by me.
3. Therefore, I have a private property right in the things I have produced, which entails a right to exclude others from using it, and an exclusive right to decide what will be done with the thing.

There is, in this argument, a proposition that is not supported by any reasons: that one is at liberty to take the resources found in the state of nature, and exclude others from it (through some specific acts) without violating anyone’s right. While this assumption is not outright wrong, it needs to be justified. But in itself, the identification thesis *cannot* explain why depriving others from the possibility to externalize their talents and capacities on this particular object is legitimate, nor can it explain why my act of taking should bind others to keep from using the thing I took. The identification thesis starts a step too late, which means that it ignores the following problem: how is the claim to the external thing justified in the first place? Why is it that can I take a tree, cut it down and build a chair out of it, and exclude you from the wood? The identification thesis merely says that *once* I have taken a thing and laboured on it, I develop a sense of identification with the thing that generates a right to the thing similar to the right I have in my own person. Although this does
not mean that the identification thesis cannot play a role in establishing a moral right to private property, it requires an additional set of arguments that the identification claim is not designed to provide.

What I have tried to show in this section is that both versions of the self-ownership thesis fail to bridge the gap between the first act of acquisition and a right to exclude others. In other words, starting from the premise that I have private property rights over myself does not seem to get us anywhere in showing that we ought to have private property rights in external things. Besides, it seems like the idea of having property rights over myself and my body could be restated in much simpler terms: the idea that we have a moral right to be free. Free against interferences of others, free of using my body parts, my labour, my talents as I see fit. In the next subsection, I will examine how this idea of freedom, at least as it unfolds in Kant’s philosophy of law, offers a more fruitful standpoint to address the issue of unilateral acquisition that self-ownership is unable to explain. The issue is the following: how one is entitled to take something out of the state of nature and put the rests of the world under an obligation to keep away from that thing? Freedom, I believe, both establishes why we should have a right to exclude others from a thing (which the labour-mixing argument fails to show), and justifies how this right to exclude should bind others. However, as we will see, even if the idea of freedom offers more practical guidance to examine this question than the self-ownership thesis or the labour-mixing argument, it does not seem like it can, by itself, ground a natural right to private property: putting others under an obligation to comply with one’s unilateral act of acquisition requires a convention to be legitimate.
2.3. Kant on Freedom and Property

Many authors have approached the question of a natural right to property through the idea of freedom. I will focus on Kant’s account, however, because I think it is the most interesting for my purposes. First of all, Nozick explicitly relies on Kant’s ethics to ground his theory of natural rights; however, Kant arrives at the conclusion that taxation (or some form of redistribution) is not only required, but necessary in order for private property to come about. In my opinion, Kant offers a compelling solution for reconciling property rights with powers of central government, like taxation. Second, Kant places the issue of unilateral acquisition at the core of his account of property rights. Because the problem that poses unilateral acquisition in the state of nature was not successfully addressed, neither in Locke’s account or in the self-ownership thesis, it will be a valuable addition to my review of natural right arguments for private property. In this subsection, I will first outline Kant’s account of the problem of private property; I will then expose how the concept of freedom, in Kant’s view, entails a contradiction that is resolved by exiting the state of nature, and resorting to conventions to establish conclusive rights to private property.

2.3.1. Right and Virtue

In *The Metaphysics of Morals*, Kant defines the law as “[t]he sum of those laws for which an external lawgiving is possible”. Kant’s investigative project in this part aims at showing that the law is a coherent and systematic enterprise, and that such a claim can be shown on the basis of reason alone, independently from empirical experience. This is Kant’s version of the state of nature: prior to any actual positive enactment by the legislator, it is possible to understand, on the basis of reason, the demands of morality on us from the standpoint of right. But because law is characterized by

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189 Kant, * supra* note 34 at 26 [6:229]. Numbers in square brackets (i.e., [volume:page number]) refer to the citation from the Berlin Academy Edition (standard German edition) of this work.

190 *Ibid* at 26 [6:230].

191 See *ibid* at 37 [6:242]:

The highest division of natural right cannot be the division (sometimes made) into natural and social right; it must instead be the division into natural and civil right, the former of which is called private right and the latter public right. For a state of nature is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but not civil society (which secures what is mine or yours by public laws). This is why right in a state of nature is called private right.
norms capable of external enforcement, the coherence of the law must be made explicit without any reference to the ethical sphere. Hence, Kant has set for himself the immense task of showing that right, properly understood, a priori constitutes the organizing concept structuring the law as a system. The concept of right is a normative standard, what Kant calls a “universal criterion”\(^{192}\) to determine and assess whether a particular rule is a law dictated by reason. Kant defines the concept of right in the following terms: “Right is […] the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”\(^{193}\) In other words, given that individuals have a moral capacity for freedom, and accordingly, that they can act in the world and so impact the life of other moral agents,\(^{194}\) there must be a logical way to harmonize everyone’s freedom with everyone else’s. Right, in other words, has to do with the coordination of free moral agents’ interactions through their wilful actions, irrespective of their wishes, needs or motives.

### 2.3.2. Freedom, Equality and Bodily Integrity

Now, Kant’s task is to explain how this notion of right, the coexistence of everyone’s freedom, structures our legal relations. The first step is to rephrase the concept of right into a normative standard for the imposition of legal obligations.\(^{195}\) Kant says: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”\(^{196}\) This is the Universal Principle of Right. This, in turn, provides us with the first functional definition of a right, understood as an entitlement: agents are entitled to exercise those actions that can coexist with everyone’s freedom in accordance with a universal law.\(^{197}\) In Kant’s words: “If then my action […] generally can coexist with the freedom of everyone in accordance with a universal law, whoever

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\(^{192}\) Ibid at 26 [6:229].

\(^{193}\) Ibid at 27 [6:230].

\(^{194}\) See Tierney, supra note 36 at 302.

\(^{195}\) See Gregor, supra note 34 at 760.

\(^{196}\) Kant, supra note 34 at 27 [6:230] [emphasis in the original].

\(^{197}\) A right, as an entitlement or a capacity to put someone else under an obligation, is thus a direct implication of what is right (as opposed to what is wrong), in the specific context of the juridical domain. See Gregor, supra note 34 at 772.
hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law.”  

Although this is simply an implication of the postulate of the Universal Principle of Right, this enables Kant to take the definition of right one step further. Because the hindrance of an action that is consistent with everyone’s freedom is a wrong, than the concept of right necessarily involves the right to use coercion in order to thwart behaviours or actions that prevent someone from acting in a way that is right. Kant says: “if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right.”

Right, as the normative standard for the coexistence of freedoms, involves the reciprocal use of coercion that is directed at preserving everyone’s freedom.

If we take a step back, it is possible to discern more precisely the contours of the notion of freedom that is at the core of Kant’s philosophy of right. Freedom is not about having the resources needed to pursue some ends, whatever they may be. Neither is it about having the power to do everything you wish for. Freedom is the possibility to be in the world and to act in it without being hindered by others. As a free, autonomous being, I have the moral faculty to set for myself the ends I wish to pursue. I may decide to spend the next ten minutes trying to reach and grab an apple to satisfy my hunger; I may also decide to devote my life to cultivating my wisdom. Those ends are mine, in the most intimate sense, for I am the only person who can impose those ends on myself. Being free is being independent from the will of others, from the ends they set for themselves, for our actions manifest our purposiveness and no one else may interfere with that. This also connects with the requirements of right highlighted above: freedom is not about wishes, or need, and it is inherently relational. Talking about freedom or right in the case of a man on a desert island makes no sense at all for Kant: freedom can only be hindered by the wilful actions of another agent, not by nature. The fact I stand on a piece of land where there is abundant resources is not hindering the freedom of my neighbour; freedom is at stake only if I use my resources in a way that infringes on

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198 Kant, supra note 34 at 27 [6:231].
199 Ibid at 28 [6:231] [emphasis in the original].
200 See ibid at 28 [6:232]. See also Gregor, supra note 34 at 772.
201 See Ripstein, Force & Freedom, supra note 34 at 32ff.
202 See ibid at 33; Gregor, supra note 34 at 772; Sage, supra note 34 at 120.
his ability to use his land.\textsuperscript{203} For Kant, freedom is construed as a purely negative concept, in the words of Isaiah Berlin\textsuperscript{204}: I am free when I am unhindered in the rightful exercise of my purposiveness. It is also inherently non-instrumental: freedom is an absolute interest, in the sense that it cannot be weighed against other interests, such as wealth, need, or wishes.\textsuperscript{205}

Once it is clear that freedom means being unhindered by others’ purposes, the next step is to determine what kinds of actions are rightful, that is, what kind of actions can (and must) coexist with everyone’s freedom in accordance with a universal law. Kant divides rights into two categories: innate and acquired rights. These two rights are distinct on the basis that “[a]n innate right […] belongs to everyone by nature, independently of any act that would establish a right [whereas] an acquired right is that for which such an act is required.”\textsuperscript{206} Basically, moral agents have rights merely by virtue of their existence, but innate right only covers so much. Additional rights can be acquired—for instance, contractual rights or property rights—but agents are not born with those rights: individuals must fulfill some acts or conditions in order to be vested with such “acquired” rights.

So what exactly is comprised within the category of innate right? Kant is very clear on this: “There is only one innate right”, and given the postulate of the Universal Principle of Right, it is quite straightforward: the only innate right we have is freedom.\textsuperscript{207} Therefore, we recognize that human beings have a right to express their capacity for purposiveness in the world. This right is first manifest in a right to bodily integrity: it is original—no act is needed to acquire a right in one’s own body, and it is innate because one has it merely by virtue of its existence. The body being a prerequisite condition of being, it cannot be distinguished from the will of its holder. Hence, another person cannot appropriate the body of another: it would be to constrain that person (and his body) to someone else’s choice.\textsuperscript{208} As Ripstein interprets it:

\begin{itemize}
\item \textsuperscript{203} See Ripstein, \textit{Force & Freedom}, supra note 34 at 33; Gregor, supra note 34 at 772; Sage, supra note 34 at 120; Hodgson, supra note 34 at 58.
\item \textsuperscript{204} See Isaiah Berlin, “Two Concepts of Liberty” in \textit{Four Essays on Liberty} (London: Oxford University Press, 1969). See also Sage, supra note 34 at 120.
\item \textsuperscript{205} See Ripstein, \textit{Force & Freedom}, supra note 34 at 34.
\item \textsuperscript{206} Kant, supra note 34 at 33 [6:237].
\item \textsuperscript{207} Ibid at 34 [6:237]. Ripstein, \textit{Force & Freedom}, supra note 34 at 35; Weinrib, supra note 34 at 803.
\item \textsuperscript{208} Kant, supra note 34 at 34 [6:237]. See also Weinrib, supra note 34 at 804; Ripstein, \textit{Force & Freedom}, supra note 34 at 36; Gregor, supra note 34 at 774.
\end{itemize}
The right to equal freedom [...] is just the right that no person be the master of another. The idea of being your own master is also equivalent to an idea of equality, since no one has, simply by birth, either the right to command others or the duty to obey them. So the right to equality does not, on its own, require that people be treated in the same way in some respects, such as welfare or resources, but only that no person is the master of another.\textsuperscript{209}

Each having this exact same innate right to freedom implies that we are all, from the standpoint of right, equal.\textsuperscript{210} Everyone's right to freedom constrains everyone else's right to freedom equally.\textsuperscript{211}

The most important implication of the innate right to freedom lies in the possibility to physically possess external things. External things, as opposed to internal things, are those objects that can be appropriated, that is, that are not subject to innate right.\textsuperscript{212} Hence, the body is off-limit, but everything else—being external to the body—is “up for grabs”.\textsuperscript{213} While I do not innately have a right in those external things, the object I physically hold is protected by my right to freedom. If I hold an apple in my hand, you cannot take it from me, for you would be interfering with my body. As long as I hold it, I possess the apple, because my interest in the apple is protected by my innate right to freedom.\textsuperscript{214} But as soon as I put it down, you can come and grab it without me having anything to protest against: it is now as much yours as it was mine during the time I was holding it. The innate right to freedom, therefore, protects my body, and allows me to act as long as my actions can coexist with the freedom of everyone else, but the protection it confers me stops right there.

2.3.3. Original Acquisition and the Incompleteness of Property Rights

The issue with innate right is precisely that my interaction with the external world is legally limited, that is, protected only to the extent of what I can physically hold on to. Considering I am an agent with purposes, how can I possibly be engaged in the pursuit of my ends if I have no way to ensure that I can have means available to me for my projects?\textsuperscript{215} This raises two main issues: first, I

\textsuperscript{209} Ripstein, Force & Freedom, supra note 34 at 36-37.
\textsuperscript{210} Kant, supra note 34 at 34 [6:237].
\textsuperscript{211} See Sage, supra note 34 at 121; Gregor, supra note 34 at 774.
\textsuperscript{212} Kant, supra note 34 at 34 [6:231]; 41 [6:245]. See also Ripstein, Force & Freedom, supra note 34 at 58; Hodgson, supra note 34 at 59.
\textsuperscript{213} Kant, supra note 34 at 34 [6:237]. See also Gregor, supra note 34 at 774; Ripstein, Force & Freedom, supra note 34 at 60; Sage, supra note 34 at 121; Weinrib, supra note 34 at 804; Hodgson, supra note 34 at 58-59.
\textsuperscript{214} See also Kant, supra note 34 at 34 [6:237].
\textsuperscript{215} See Hodgson, supra note 34 at 58; Weinrib, supra note 34 at 805; Ripstein, Force & Freedom, supra note 34 at 61ff; Gregor, supra note 34 at 773.
cannot possess more objects than I can physically hold; second, I cannot use my means in sequence or at different times, for when I put my object down, someone else might rightfully pick it up. Let’s say I want to cook a pie. I need apples, flour, a pan, a knife, and an oven. The problem is that I can never hold on to all those items at the same time. Worse, if someone picked up the flour and walked away with it to cook his own cake while I was cutting up my apples, I could not even complain about it: as long as he holds on to the flour and that he has not wrestled the flour from me, he rightfully possesses it. Because innate right only protects my bodily integrity, it cannot secure durable rights in external things: all possessory rights at this point derive from the right to bodily integrity. 

Put differently, the innate right to freedom does not ground property rights. This, according to Kant, unjustifiably constrains my external freedom: mere usufructuary rights unduly restrict my ability to pursue my projects to the place I occupy at a certain time and with the objects I can keep under my physical control during the completion of my project. And this is a problem for a moral agent with purposes: it must be that a moral agent can pursue projects.

Because the capacity to pursue ends rests on having durable property rights in external means, Kant must show that it is possible to have a right to something even though I am not physically holding it: “something external would be mine only if I may assume that I could be wronged by another’s use of a thing even though I am not in possession of it.” This is where the concept of “intelligible” or “noumenal” possession comes into play: there must be a different way in which I am in possession of a thing if it is possible to be wronged without me holding it in my hands. But how is this possible? The Universal Principle of Right cannot help us here, at least not directly. We saw why earlier: one cannot be wronged by someone else’s use of an object she does not hold in her hands. This is why Kant introduces at this stage the Postulate of Practical Reason: “It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would in itself (objectively) have to belong to no one (res nullius) is contrary to rights.” Kant’s point here is that to say that, consistent with the Universal Principle of Right, the innate right of humanity in one’s own person is what limits everyone else’s freedom. Accordingly,

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216 See Kant, supra note 34 at 41 [6:245]. See also Hodgson, supra note 34 at 59; Ripstein, Force & Freedom, supra note 34 at 67.
217 See Hodgson, supra note 34 at 60; Tierney, supra note 36 at 303; Ripstein, Force & Freedom, supra note 34 at 66ff.
218 See ibid at 67.
219 Kant, supra note 34 at 41 [6:245] [emphasis in the original].
220 See ibid. See also Gregor, supra note 34 at 773ff; Tierney, supra note 36 at 303.
221 Kant, supra note 34 at 45 [6:246] [emphasis in the original].
those things that do not have an innate right of humanity should not place constraints on our behaviour: this would be contrary to the Universal Principle of Right. If it is the case, an external object that cannot be subjected to my capacity for choice or my purposiveness is a contradiction in itself. This also connects back to the idea that as a moral agent having purposes, my capacity for choice cannot be juridically constrained by arbitrary features: the fact I can only hold one apple at a time should not limit my capacity to choose what I want to do with the fruit. The question, therefore, is how to acquire property rights—rights in external things that last even though I am not in physical possession of them—in a way that is consistent with everyone’s freedom?

This is maybe the most difficult challenge Kant’s doctrine of right faces, for the core concept of Kant’s philosophy seems to be in contradiction with itself here. One the one hand, freedom seems to require that I be able to acquire property rights in external things, because mere usufructuary rights unduly limit my capacity for purposiveness. This means that I must be able to acquire a thing in a way that binds everyone else, allowing me to exclude them from my thing and forcing them not to infringe on my property right. On the other hand, this appears to be in plain contradiction with the Universal Principle of Right. Remember, innate right to freedom means being unhindered by others’ purposes and, because everyone has this right innately, than moral agents have innate equality, which Kant defines as “independence from being bound by others to more than one can in turn bind them.” How then can acquisition be made reciprocal so as to be consistent with everyone’s freedom and innate equality?

There is two ways to acquire something: by contract and by original acquisition. If I enter into a contract with my neighbour to obtain a property right in his apple in exchange for $2, the acquisition is reciprocal: he gives me the apple, and I give him the money. Moreover, the situation of third parties does not change and the same obligation applies to them: they still have to keep off the tree, only, the obligation is toward me instead of my neighbour. The problem is that all property rights cannot derive from contract, because contract presupposes prior ownership. If we regress all the way down to the first exchange, that person could not have acquired her right through exchange. Therefore, acquisition by contract rests on the possibility of rightful original, unilateral acquisition. How to unilaterally acquire an external thing is rather straightforward. Acquisition, Kant says,

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222 See Weinrib, supra note 34 at 805–06.
223 See ibid at 806; Hodgson, supra note 34 at 67.
requires an act of apprehension—control—that must be public, so that everyone are informed of “my act of choice to exclude everyone else from it.” The issue does not lie in the acquisition itself, but in its legitimacy: unilateral acquisition is not reciprocal. My act of choice binds you without you imposing any obligation on me. If I pick up an apple on the ground, you must respect my right, that is, you must keep off my apple even though I am not in physical possession of it, consistent with the Postulate of Practical Reason. You cannot use my things, even though your use may not affect my actual choices at all: if you come into my house while I am at work, take a nap in my bed, and leave before I come back without me noticing, you are still wronging me. How come then one person can bind unilaterally everyone else, without being reciprocally bounded? As we can see, the original acquisition of property rights creates tension between different facets of freedom, which leaves the system of private rights fundamentally deficient in the state of nature.

Unilateral acts of acquisition are not the only problem with private rights in the state of nature. In the state of nature, rights’ boundaries are at best indeterminate. The reason is that control does not provide clear guidelines to determine the extent of one’s property right. For instance, if I have a tree on my land, but that the branches, full of fruits, fall over your land, there might be disagreement over who is the owner of the fruits. But unless there are conventions to draw a line in those borderline cases, the scope of these rights will remain inherently indeterminate. In other words, reason does not dictate clear content regarding the boundaries of rights. The formalism of the state of nature cannot overcome the indeterminacy issue. This, in turn, causes another problem: remember that the concept of right implies an authorization to coerce. However, the Universal Principle of Right specifies that an action is right only if it can coexist with everyone’s freedom. How are we to know whether one’s use of coercion is rightful or plainly unlawful, if there is no way to know with certainty what is the scope of one’s right? The indeterminacy issue becomes an assurance problem: the legitimacy to use coercion, at least in the state of nature, can never be ascertained.

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224 Kant, supra note 34 at 34 [6:237-238].
225 Ibid at 52 [6:258]. See also Ripstein, Force & Freedom, supra note 34 at 105; Baynes, supra note 45 at 440.
226 See Ripstein, Force & Freedom, supra note 34 at 152ff; Hodgson, supra note 34 at 69.
227 See Kant, supra note 34 at 41 [6:245].
228 See Hodgson, supra note 34 at 75.
This leaves us with the following problem: although we can justify the need for private property rights prior to any form of convention, the state of nature only yields provisional property rights. Indeed, the way property rights are acquired is in direct conflict with the innate right to freedom that individuals hold. Freedom is in contradiction with itself. So, how exactly property rights can be made conclusive? The solution, says Kant, is simple: we must exit the state of nature.

2.3.4. The Civil Condition and the Coming of Age of Conclusive Property Rights

The problem with natural rights is that they ultimately rest on a unilateral act that is inconsistent with everyone’s freedom. Kant’s solution is elegantly straightforward: if a unilateral act of choice cannot ground rights that impose obligations on others, then the creation of rights requires an act that is not unilateral. Put differently, people who are put under a new obligation must recognize the legitimacy of the unilateral act beforehand. This, Kant says, is possible only if we leave the state of nature to enter the civil condition, or “the condition of public right.” And so Kant tells us, “From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributed justice.” The Postulate of Public Right specifies that leaving the state of nature is actually an obligation from the standpoint of right: it is “necessary as a duty.” It is a duty because it is the only way to reconcile the Universal Principle of Right with the Postulate of Practical Reason. On the one hand, the Universal Principle of Right provides that an action is right if it is consistent with everyone’s freedom; on the other hand, we have reached the conclusion that property is a requirement of freedom, as a means to exercise fully one’s capacity for choice. However, we have shown that property rests on a problematic assertion of right that is incompatible with everyone’s freedom. The state solves this

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229 See Kant, supra note 34 at 49-50 [6:255-256]. See generally Ripstein, Force & Freedom, supra note 34 at 164ff; Weinrib, supra note 34 at 807ff; Rafeeq Hasan, “The provisionality of property rights in Kant’s Doctrine of Right” (2018) Can J Philos 1 at 9ff; Hodgson, supra note 34 at 64.
230 Kant, supra note 34 at 49-51 [6:256-257].
231 ibid at 50 [6:256].
232 ibid at 93 [6:306] [emphasis in the original].
233 ibid at 93 [6:307].
234 ibid at 57 [6:264].
235 See Tierney, supra note 36 at 306.
problem: it realizes the condition of reciprocity lacking in the state of nature by implementing institutions that provide a third party that is not a private person. Rather, the third party is the will of the people, that animates the state, and that defines its scope. Private rights, including the innate right to freedom, must be protected by the state, which must use its power to bring about the rightful condition under which these rights can be exercised lawfully.

For instance, the state cannot just ignore property: as we have seen, it is a defining moment in the actualization of one’s freedom. In the state of nature, rights may have been provisional, but they were still formally right. The state must therefore implement a property system, with laws setting the details of rightful appropriation, defining the notion of control, and specifying the frontiers of the right such control gives rise to. It must also provide the people with an institution for solving disputes arising from conflict of rights: a third, neutral party that does not act in her capacity as a private person, but as a representative of the common will, adjudicate disputes between private persons according to the positive laws given by the state. This, in turn, renders the use of coercion conclusively rightful: because the scope of rights is ascertained in a way that is reciprocal, for the state and its actions are consented to by the people, the indeterminacy and the assurance problems go away. The use of coercion does not rest on the private choice of individuals, but on its being consistent with the laws given by the state. The same goes for original acquisition of property. Because the system of property allows everyone to bind each other, the unilateral act is not unilateral anymore: it is assented to by all members of the civil condition, and thus the acquisition of property does not contradict innate equality. Everybody has the power to do the same, and by entering the civil condition, everyone accepts to be bound by anyone who would choose to do so. Hence, the institution of a property system by the state is the only viable way to conform with the Universal Principle of Right, while at the same time acknowledging that moral agents must exist in the world and act within it.

While the state’s mandate is public and thus constrained by its mandate to bring about a rightful condition, the state’s power rests on its capacity to maintain that condition. Kant is notoriously laconic with regard to the implications of such a task. But one thing that he does

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236 See Hodgson, supra note 34 at 76; Ripstein, Force & Freedom, supra note 34 at 196ff.
237 See generally Hasan, supra note 228.
238 See Ripstein, Force & Freedom, supra note 34 at 192.
explicitly refer to is the state’s duty to support the poor by taxing the wealthy.\textsuperscript{239} One way to interpret this duty is that the people entering the civil condition must be ensured that they are not trapped in a system where rights are conclusive and can rightfully coerce them, but where the possibility of acquisition and therefore of exercising their purposiveness is nil or dependent on the good will of others.\textsuperscript{240} For instance, if everything has been acquired, and that some individuals are left with absolutely no resources, which would also prevent them from acquiring by contract, since they would have nothing to trade for. Then, a system that would allow such an outcome would in effect violate the innate equality of persons. It is worth recalling the details of the definition of innate equality: it is the “independence from being bound by others to more than one can in turn bind them.”\textsuperscript{241} Without any possibility to acquire external rights, individuals would have to depend on others in a way that is contrary to their innate equality. The state being bound by its mandate to preserve the rightful condition therefore has the duty to ensure that its citizens’ innate equality is preserved, and one way to do that is through taxation.\textsuperscript{242}

In Kant’s view, the private is incomplete without the public. More precisely, we may be able to understand a system of private right without reference to the state, but it can never be legitimate or consistent with everyone’s freedom without the civil condition. Hence, the corrective view of justice presupposes and requires a distributive view of justice. Indeed, the rationale for property rights is strictly corrective in its nature: the acquisition of property does not rest on need or wish, but on exercise of freedom that manifests a moral faculty for purposiveness. But redistribution is required for this rationale to be consistent, and for freedom not to be in tension with itself.

2.3.5. What Kantian Property Rights?

But does Kant establish a natural right to private property? The question is tricky, because the argument for justifying a right to private property holds in the state of nature: freedom requires that moral agent have the possibility to exclude others from external things. But an actual right to

\textsuperscript{239} Kant, supra note 34 at 109 [6:326].
\textsuperscript{240} See Ripstein, Force & Freedom, supra note 34 at 277ff; Weinrib, supra note 34 at 811ff.
\textsuperscript{241} Kant, supra note 34 at 34 [6:237-238].
\textsuperscript{242} This is also consistent with the duty of rightful honour, that derives from the Universal Principle of Right. On the duty of rightful honour, see Ripstein, Force & Freedom, supra note 34 at 36ff. On the relation between rightful honour and the duty to support the poor, see Weinrib, supra note 34 at 811ff.
private property cannot be acquired in the state of nature without violating others’ innate right to freedom. Property rights can only be provisional in the state of nature, and can never be legitimately enforced. In other words, the idea of private property exists in the state of nature, but can never be realized without conventions. For our purpose, we must therefore determine whether a provisional right to private property is enough to place the state under an obligation not to interfere with that entitlement.

In order to place the state under a moral constraint, the right must legitimately bind others prior to entering a convention; otherwise, the convention will take precedence. But without conventions, as I have said before, the idea of property rights that Kant derives from freedom cannot yield enforceable rights. Let’s say for instance that Lucie discovers a field; she is the first one to get there. She decides to cultivate the land, and plant rows of tomatoes and cabbages that clearly delineate the portion Lucie wishes to appropriate. Lucie controls the crop: she has erected electric fences (assuming such a thing exists in the state of nature) that completely surrounds the cultivated area, and prevents anyone from getting in. Here, we can assume that the boundaries of Lucie’s property right are well defined and public. Nonetheless, Lucie faces a legitimacy problem: even though she was the first one to get there, and her decision to appropriate is public, on what grounds can she restrict everyone else’s freedom and place them under an obligation to keep off? It is important to frame the issue correctly here. As I have said earlier, freedom is not about having all the means we need to carry out our plans: freedom is the state of being independent of the will of others. When Lucie appropriates a patch of land, the issue is not that Manish cannot appropriate it anymore, and cannot use that patch of land as a means to his own ends. Rather, the issue lies in the fact that Lucie unilaterally imposes an obligation on Manish without his consent. On the basis of her unilateral act, Lucie claims the right to exclude Manish from the crop of land she has acquired: she claims the right to interfere with some of Manish’s actions. This, in turn, is in plain conflict with Manish’s innate right to be unhindered in his actions. This problem, I believe, raises at the very least a massive doubt that those alleged entitlements constrain the state: the convention is what makes the right conclusive. It is what makes the right binding on others. Indeed, the convention grounds all future acts of acquisition in an omnilateral act of consent. Public authority is required to make the
acquisition of external things binding on others. As Ripstein puts it, “a form of public authorization on behalf of everyone is required to underwrite private appropriation.”

This argument seems to impose only one obligation on the state: that of not prohibiting private appropriation. The postulate of private right still holds: appropriation cannot be impossible. The state must therefore authorize at least some form of private appropriation. But it is not at all clear that the state is bound by acts of appropriation that precede the convention, for the convention establishes the condition under which an act of appropriation is valid. Hence, it might be that fencing her crop was not enough for Lucie to appropriate it. Accordingly, she would not have met the requirements to allow her to exclude others from her land, because those terms are strictly dependent on the convention. As I have mentioned earlier, property rights are indeterminate in the state of nature: the postulate of private right does not provide rights with clear content; indeterminacy, in turn, leads to an assurance problem. The substance of those rights, therefore, is arbitrary, or artificial: they could (and in fact do) differ from a convention to another. In other words, it is not important how a particular convention fills in the blank, it only matters that it does provide rights with clear content.

This, I believe, suggests that the state is not bound by the provisional rights of the state of nature. Kant’s freedom argument does not entitle Nozick to suggest that taxation is an infringement on property rights, because those rights are only binding given they meet the stipulations of the convention. As I have said before, the state is required to use its public power to maintain that convention. If we say that public funding is necessary to preserve the civil condition, which is far from a stretch, taxation can no longer be framed as an abridgement of property rights. On the contrary: taxation stands as a necessary condition of their very existence. Nozickians now have the burden of proof to show how freedom-based argument could yield conclusive property rights in the state of nature, but in any case, the argument I just provided seriously challenges that view, as I will further discuss in Chapter 3.

243 See Ripstein, Force & Freedom, supra note 34 at 156.
244 See ibid at 154.
Chapter 3
Back to Nozick

1. Challenging Nozick

In Chapter 2, I have attempted to do two things: explain why it is important to take seriously Nozick's natural rights assumption, and then challenge that assumption. Although the demonstration is not conclusive, for I did not survey all possible grounds for establishing a natural right to property, I believe that the labour-mixing, self-ownership, and freedom arguments are three of the most notorious grounds used to establish a natural right to private property. I have shown that it is at least plausible that these arguments do not yield the outcome Nozick wants. If that is the case, I believe it is fair to say that Nozick's claim is in serious danger. In this section, I wish to go over Nozick's argument again and specifically show how the work I did in Chapter 2 threatens Nozick's challenge, as outlined in Chapter 1.

Nozick's argument, in a nutshell, is that taxation is on par with forced labour: when the state compels its citizens to give them a portion of their earnings or of their capital, it amounts to a claim of partial ownership in their labour or property. This, according to Nozick, is a clear abridgement of citizens' property right, and right to freedom, for the state restricts individuals' preferences by penalizing some activities and not others. Nozick thus believes that redistribution of resources in the form of taxation not only upsets patterns of liberties, but infringes individuals' right to freedom and their property rights in their labour and in the fruits of their work; this is the point he wants to drive home through the Wilt Chamberlain example. Rather, distribution should not be interfered with, as long as it respects the principles of justice in transfer and in acquisition. Nozick does not tell us exactly what needs to be done for an act of acquisition to result in a valid property claim. Only, the acquisition must satisfy the revised Lockean proviso, that is, the act of appropriation is valid if everyone is better off than they would otherwise have been absent the possibility of private acquisition. If those conditions are met, property rights are moral side constraints that the state is not allowed to violate under any circumstances.
Does that argument hold? As I have tried to emphasize in Chapter 2, I believe that Nozick’s argument is gravely threatened by his theory of acquisition. Nozick’s attack on taxation, depicted as a claim of partial ownership in people’s labour, might seem very powerful at first sight, but the incendiary statement conceals deeper conceptual problems in Nozick’s account of ownership. Nozick’s claim boils down to this: the state cannot tax because we have natural rights, a right to freedom and a right to private property, that act as absolute moral constraints on the behaviour of others. As we can see, Nozick focuses more on the effects of his thesis rather than on its premises. The Wilt Chamberlain example, for instance, assumes that the starting point is fair, that is, that people have justly acquired their initial holdings. For our purposes, that hypothesis does not show anything, for it supposes the very problem it is meant to address: why and how do we have property rights that put such robust constraints on the state?

The only hint of an answer lies in Nozick’s discussion of the revised “enough and as good” proviso. Does this requirement entitle Nozick to claim we have natural property right the state is not allowed to interfere with? I do not think so. In its weakened form, the “enough and as good” proviso requires that appropriation does not preclude the possibility for others to improve their situation. In Chapter 2, section 2, I have mentioned that it is probably more faithful to Locke’s thought to interpret the “enough and as good” more stringently. But regardless of how we interpret it, the “enough and as good” proviso cannot by itself justify, nor establish a right to private property. The proviso does not explain why a particular act gives rise to a property right, rather than something else. Why exactly does making sure that appropriation does not preclude the possibility for others to improve their situation establish a private property right? Appropriation could lead to usufructuary rights, or joint ownership: there is nothing here that tells why meeting the “enough and as good” requirement is a necessary condition of private ownership. The “enough and as good” proviso acts as an acceptability clause—the appropriation is rightful only if it does not preclude others from appropriating. But the proviso itself does not establish a right to private property (it could be anything else): it only works as a justification for imposing an obligation on others, but it does not establish that this obligation is necessarily that of private ownership. Rather, as we saw in Locke’s account, the “enough and as good” proviso is an additional requirement that tackles onto

245 See Nozick, supra note 1 at 169–70.
246 See ibid at 176.
the actual argument for private property. In Locke’s case, it is the labour-mixing/added-value argument, but I have tried to explain why, in Chapter 2, section 2.1, the argument fails to establish a right to private property. Besides, Nozick also rejects it: he does not see how this can establish a private property right in the underlying resource.\textsuperscript{247} But Nozick is mistaken to believe that the “enough and as good” proviso can structurally replace the labour-mixing/added-value argument: the labour-mixing aimed at establishing a right to private property, while the “enough and as good” proviso was meant to justify that right. So, on what ground can Nozick rely to establish a right to private property in the state of nature?

As I mentioned in Chapter 1, section 3, I do not believe that Nozick grounds his entitlement theory in a self-ownership claim. His challenge, however, rests on the idea that we do own our person and our labour: taxing labour is wrong because it is equivalent to depriving the taxpayer from a portion of her property in herself: taxation is a form of expropriation.\textsuperscript{248} So, can self-ownership save Nozick’s theory of entitlement? Again, I do not think so. As I have tried to show in Chapter 2, self-ownership starts from the assumption that private property is justified, and that the right we have in our body automatically transfers to external things. Both the incorporation and the identification theses suppose we are at liberty to appropriate things that are external and thereby, that we have the right to unilaterally put others under an obligation to respect that entitlement. Simply saying that we own our body, and thus what we incorporate or what we identify to through our actions, does not explain why we are entitled to place others under an obligation they have not consented to. Here, it may well be true that we own our labour force and accordingly, that it is wrong to force someone to labour. But self-ownership does not establish why you get the right to exclude others from the fruits of your labour, just because you own your labour force. This ties back to the objection I raised against the labour-mixing argument in Chapter 2. Besides, \textit{pace Nozick}, taking part of the value one produced is not the same thing as forcing him to work. Taxation, in that respect, is not expropriation: it does not confiscate your property right in your work, or your capital.\textsuperscript{249} It does not take your thing, or your control, away. It is true that taxation supposes property (or some entitlement to value), but what it takes away from you is not your exclusive right to control the property (here, labour, capital, etc.): taxation levies value, in the form of money. On this point, Penner says:

\textsuperscript{247} See \textit{ibid} at 174.
\textsuperscript{248} See Penner, “Misled”, \textit{supra} note 4 at 83ff.
There is all the difference in the world between (1) a demand of a specific asset you hold (including, provisionally following Nozick, your power to confer benefits on others by acting for them in a particular way [“labouring”]), or a demand of one of two, three, or however many assets you hold, and (2) a demand for a certain amount of value. In the first place, the demand of a particular asset is not a demand for value, but just a demand for that asset. Of course if something is an asset at all it will have value (though not all property does, it should be noted, which is why we have the concept “rubbish”). In fact, a claim to expropriate a particular asset is not a claim for some measure of value at all, but a claim for a specific thing because of some use that can be made of it, and it alone.\textsuperscript{250}

If taxing and taking are two different things, so that levying part of the value of the product of your work is not the same thing as forcing you to work, and that self-ownership does not establish an exclusive right to the product of your labour, it seems like Nozick is at pain to show there is a moral constraint that prevents the government from taxing its citizens. On this point, Waldron reaches the same conclusion through a different argument: being the owner of your talents does not directly entitle you to the benefits that flow from exercising those capacities, because the particular benefits you reap depend on a system of cooperation that you are not responsible for.\textsuperscript{251} In other words, the system of cooperation—which rests on conventions—is what enables people to benefit from their particular assets. You can play the piano in the state of nature, but without the convention of money, some engineers erecting a concert hall, and someone building you a piano, you will have a hard time reaping the benefit of your talent in the way that is relevant to Nozick. Waldron’s point, I believe, is that a right to value does not lie at the core of your property right. This, in turn, reinforces the distinction between taxation and expropriation. Although Nozick’s claim that taxation is on par with forced labour might seem powerful at first sight, it rests on the undemonstrated claim that you have a moral right to all conventionally set value that flows from the exercise of your property right. The self-ownership thesis, however, is unable to show that you have an exclusive right beyond your talent, or your labour.

Finally, could a natural right to freedom explain why we should not be excluded from things we made? Again, I think the argument fails. As I have outlined in Chapter 2, Kant’s freedom-based argument shows that private rights cannot be conclusive absent a civil condition. Nozick struggles to show there is a moral obligation that pre-exists and thus binds the state. If property rights require a

\textsuperscript{249} See \textit{ibid} at 84ff.
\textsuperscript{250} \textit{Ibid} at 85 [reference omitted].
\textsuperscript{251} See Waldron, \textit{supra} note 4 at 403ff.
convention to legitimately impose an obligation on others, then it is plausible to say that the terms of the convention establish the conditions and boundaries of those rights. And taxation might just be one of those requirements that must be respected in order to acquire valid private entitlements, like Murphy and Nagel claim.\(^{252}\) Taxation of earnings, then, is not on par with forced labour: it does not force people to work, and it does not give the state a right to force them to work and give up the products of their labour.\(^{253}\) In that respect, it is not an interference with one's innate right to freedom and bodily integrity, as Kant would say. It is merely a condition of acquisition and transfer that is stipulated conventionally, and which builds on considerations of individual and collective justice. In other words, if you want to appropriate X (earnings; capital; etc.), you must satisfy some requirements, including that of contributing to the regulatory functions of your central government. Some might disagree that those considerations of collective and individual justice are fairly expressed in the principle of taxation, or in a particular tax policy. But that is not my point. My only contention is that Nozick does not show that the principle of taxation is thwarted by moral constraints that arise prior to the existence of a convention: taxation does not abridge a natural property right, it just forms part of the convention that stipulates its conditions of acquisition.

I have tried to show in Chapter 2 that the most notorious natural right grounds are not available to Nozick: he rejects the labour-mixing/added-value argument, which fails anyway to establish a right of use that would be exclusive; the self-ownership thesis does not justify why a property right in oneself ought to result in a private property right in external things; and Kant's freedom argument does not establish a right to private property that is conclusive before the advent of a convention. As I have said, it is up to Nozickians to show that there is another ground for establishing and justifying a right to private property that would be conclusive prior to a convention. But I take that my demonstration seriously threatens that possibility. Because he fails to establish a natural right to property, I argued here that Nozick is not entitled to say that taxation is an illegitimate use of state public power. Now, I believe that Nozick's challenge is significantly undermined. But is there anything left to it?

\(^{252}\) Nagel & Murphy, \textit{supra} note 2 at 45.

\(^{253}\) See Penner, \textit{“Misled”}, \textit{supra} note 4 at 84ff.
2. What is left of Nozick’s challenge?

Although Nozick’s challenge is seriously threatened by his failure to provide a plausible account of a natural right to private property, I believe that Nozick has accurately identified a critical frailty in some accounts of property that attempt to reconcile regulatory powers of the state with the institution of private ownership: these accounts can hardly impose limits on state action, which can lead to a dramatic reduction of private authority in certain cases. Nozick puts forward a robust concept of private ownership, one that is not liable to infringements. Why is it so important for him to erect an impervious sphere of private authority? Clearly, Nozick is concerned about preserving a sphere of individual moral autonomy, one that is not subject to another’s will. He asks: what is the legitimate territory of state action? Where does the power held by private persons stop, and where does the power held by public authority start? Citizens grant the state immense powers to regulate and maintain the institutions necessary to the civil condition. Intuitively, however, it seems like such significant power does not bestow on the state an absolute and non-reviewable authority to do whatever it wants. I believe that few would dispute that public authority should not stand as a licence to subvert private authority altogether. The actual delimitations of legitimate state action, however, are far more contentious. Nozick’s view of private ownership’s boundaries as an absolute constraint on state action is one way to draw the line, one that has been vigorously criticized. Others have proposed accounts of property that aim at overcoming the apparent contradictions between the respective territories of public and private authorities. The Kantian approach and the conventionalist account, for instance, both consider public authority as a prerequisite of the institution of ownership, which makes the boundaries of private ownership dependent upon the specifications of a particular convention. Accordingly, regulatory powers of the state are argued not to abridge property rights, because the boundaries of private ownership depend and are moulded by public authority.

254 See e.g. Lawrence Davis, “Nozick’s Entitlement Theory” in Paul, supra note 5, 344; Fried, supra note 5; Nagel, supra note 19; Otsuka, supra note 5; Thomas M Scanlon, “Nozick on Rights, Liberty, and Property” in Paul, supra note 5, 107; Scheffler, supra note 21.

Although I am very sympathetic to the idea that regulatory powers should not be treated as infringement of property rights, I believe, however, that this strategy is vulnerable to the point Nozick wants to make: these accounts of property struggle to impose appropriate restraints on state actions. In order to legitimate state powers, like taxation and some form of expropriation, these revised boundaries of private ownership might fail to treat as illegitimate situations that we would intuitively think to be infringements on one’s property right.

For instance, the Kantian account of property that I have outlined in Chapter 2 makes private rights dependent upon the civil condition, where the state acts in a public capacity and for public reasons to maintain the civil condition. In that account, private rights are not delegated by the state, because they are rationally deduced apart from the existence of a convention. In the Kantian account, private rights are claims individuals have against other private individuals. But the state is not any other private individual: it is the public, omnilateral will that makes all other private rights reciprocal and thus legitimate. Public authority is a requirement for private authority over external things to be rightful. For that reason, private authority does not limit the actions of the state, as long as those actions are taken for valid public reasons. Ripstein says: “property is a restriction on the ways in which private persons may treat each other. As such, it is not a restriction on what the state may do. […] [S]tates may compel their citizens to restrict the ways in which they use what they have—compel them to participate in mandatory schemes of cooperation […]” The issue with such a view, however, is that the broad notion of “public purpose” may encompass practically anything, and thus lead to a significant reduction of the sphere of private right, exactly like Nozick feared. For instance, we would tend to think as problematic a state that would expropriate all the inhabitants of a region, even though it is required for public purpose. Similarly, it would seem at least questionable that the state could tax earnings or capital at a 100% rate, even though it could be shown that the decision rests on valid public reasons. In other words, if private ownership is subordinate to the needs of the civil condition, it cannot be used to impose limits on state action.

Murphy and Nagel’s purely conventionalist account, I believe, faces a similar problem. Murphy and Nagel believe that ownership is purely conventional, for the exercise of property rights depends on the prior existence of institutions, such as taxation, market and money. Put in other

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257 Nagel & Murphy, supra note 2 at 8.
terms, ownership has no independent reality outside of conventions. Ownership can be whatever the state wants it to be, which seems to suppose that any content could fill up the positive concept of property.\textsuperscript{258} Indeed, they say that, but for the existence of the state, there can be no private property.\textsuperscript{259} This, in turn, entails that the concept of ownership cannot be used as an evaluative standard in determining the actions of the state with regard to the allocation of resources.\textsuperscript{260} While they do personally acknowledge the importance of private property in fostering human freedom,\textsuperscript{261} their argument opens the door to the legitimation of a complete negation of ownership by the state.\textsuperscript{262} Allegedly, this is not their intention, but their argument unmistakably leads there. As Gaus accurately puts it, “[t]here is, in this way of thinking, no Archimedean point outside of the state's determinations of your property rights (or any other rights?) from which to criticize the state's legislation, in particular its revenue legislation, as taking away what is yours, for its decisions determine what is yours.”\textsuperscript{263} Murphy and Nagel, I believe, are at pain to show why ownership should be preserved in a meaningful way. As a result, these accounts of ownership are ill-equipped to resist and tackle consequentialist arguments, which can lead as far as to call into question the very concept of private ownership.\textsuperscript{264} Similarly to the Kantian account, the conventionalist view of ownership seems unable to act as a form of limits on state action with regard to the territory of private authority.

Some might accept this outcome.\textsuperscript{265} I do not think, however, that it is appealing. Providing an account of property goes beyond the scope of this essay, but I believe that a good account of ownership must provide some form of practical guidance and explain some of our most basic intuitions. This, in turn, illustrates how Nozick's challenge, although it rests on unsupported premises, still needs to be acknowledged: accounts of property should help us in drawing a line between rightful and unrightful state actions regarding the territory of private authority. Even though there might not be a natural right to property, it does not mean that ownership does not serve an important moral or political interest. It might well be that private authority must defer to

\textsuperscript{258} See Penner, “Misled”, \textit{supra} note 4 at 88ff; Gerald Gaus, \textit{The order of public reason: a theory of freedom and morality in a diverse and bounded world} (Cambridge: Cambridge University Press, 2011) at 510ff.

\textsuperscript{259} See Nagel & Murphy, \textit{supra} note 2 at 8.

\textsuperscript{260} See James Penner, “The State Duty to Support the Poor in Kant's Doctrine of Right” (2010) 12 BJPIR 88 at 88.

\textsuperscript{261} See Nagel & Murphy, \textit{supra} note 2 at 8.

\textsuperscript{262} On this point, see Penner, “Misled”, \textit{supra} note 4 at 88ff. See also Bryan, \textit{supra} note 5 at 572ff.

\textsuperscript{263} Gaus, \textit{supra} note 257 at 510.

\textsuperscript{264} See Penner, “Misled”, \textit{supra} note 4 at 88ff; Gaus, \textit{supra} note 257 at 510.

\textsuperscript{265} For instance, Ripstein is well aware of this conclusion, and accepts it as unproblematic.
public authority in some circumstances, but it must also be the case that public authority must respect the boundaries of private authority. This, in my opinion, is the role of a theory of property: to provide an appealing account of what sorts of limits private ownership imposes on public authority. And I believe that Nozick’s challenge, although it fails to provide such an account, is still relevant to understand the relationship between private and public authority through the foundational concept of ownership.
Conclusion

In this essay, my main objective was to cast doubt on Nozick’s argument against the legitimacy of taxation—what I have called Nozick’s challenge. I suggested that Nozick’s claim was thwarted by his account of property, especially his theory of first acquisition. Indeed, Nozick’s strategy to impose constraints on state actions is to claim that there is a natural right to private property that preexists the state. Because the right to private property precedes the advent of the civil condition, Nozick argues that the state’s rightful territory of authority cannot trespass the bounds of private ownership. In Chapter 2, I have defined “natural right” as a sort of claim we have against others not because the state has enacted laws that happen to protect those interests, but because they are morally significant for the kind of being we are. I believe, however, that such a pre-conventional right to property does not exist, which greatly threatens Nozick’s challenge. To support my claim, I suggested examining three possible foundations for a natural right to private property in order to assess whether one of these can sustain a natural right to private property. Because Nozick does not expand how a right to property arises in the state of nature, I decided to examine how this argument could possibly be grounded. This approach, although it cannot be conclusive given that I cannot survey all possible grounds for a natural right to private property, raises a sufficient doubt to threaten the challenge Nozick raises: Nozickians must now show that a pre-conventional right to property exists, and that it binds the state. Instead of taking for granted the conventional nature of property rights, like Murphy and Nagel do, this strategy allows me to take Nozick’s premises seriously, and to expose their structural weaknesses.

I selected the arguments on the basis of their correspondence with Nozick’s conceptual apparatus, and their general notoriety in natural rights literature. For these reasons, I chose to examine Locke’s labour-mixing/added-value argument, the self-ownership thesis, and Kant’s freedom-based argument for private property. In examining whether these foundations could ground a right to private property, I assessed whether these arguments could both establish and justify a right of exclusive use or at least a right to exclude. Locke’s labour-mixing argument, I argued, fails to establish a right to exclude in the underlying resource, especially when we put the

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266 See Waldron, supra note 4 at 138; Gibbard, supra note 62 at 77.
labour-mixing argument back in its context. For its part, the self-ownership thesis presumes the right to exclude: it fails to justify why it is the case that we can legitimately impose an obligation on others in the state of nature. Finally, Kant’s freedom-based argument justifies the necessity of a right to exclude others from things, but establishing a right to exclude requires the advent of a civil condition or, in other terms, a convention. This overview, I contend, shows that Nozick’s range of options to establish and justify a pre-conventional right to private property are fairly limited. In Chapter 3, I reviewed Nozick’s challenge in light of the arguments I put forward in Chapter 2. I contended that Nozick is not entitled to rely on any of these grounds to support his claim. This, I believe, greatly threaten Nozick’s challenge: if Nozick cannot show that there is a valid constraint on state actions, then taxation is not prima facie an illegitimate use of public power.

Does that mean that Nozick’s Anarchy, State and Utopia should be thrown away and forgotten? I do not think so. We should bear in mind Nozick’s challenge when assessing or coming up with an account of property. Although ownership is often treated as the paradigmatic case of strictly private interests, Nozick perfectly grasps the public matters raised by private rights as he put ownership back at the core of redistributive justice considerations. This teaches us that an account of property cannot do without a proper assessment of public and private frontiers, and must provide practical guidance in drawing the line between legitimate, and illegitimate uses of public power. Many existing accounts of property, however, either fail to provide a clear answer to this question, or altogether ignore it. This, I believe, confirms that Nozick is still relevant to this debate, for his work is a vivid reminder that public authority cannot do without private authority. Only, Nozick was wrong to think that this was a one-way street. But this is just another reason for refining our conception of property in a way that truly grasps its frontiers.
Bibliography

MONOGRAPHS


Bader, Ralf M. *Robert Nozick* (New York: Continuum, 2010).


Friedman, Mark D. *Nozick’s Libertarian Project: An Elaboration and Defense* (London: Continuum, 2010).


W.W. Norton, 1999).


Murphy, Mark C. Natural Law in Jurisprudence and Politics (Cambridge: Cambridge University Press, 2006).


Tully, James. *A discourse on property: John Locke and his adversaries* (Cambridge: Cambridge University Press, 1982).


**ARTICLES**


———. “The rule of law and the measure of property”.


