

The Hamlyn Lectures 2011
THE RULE OF LAW AND THE MEASURE OF PROPERTY
Jeremy Waldron

LECTURE 1:
The Classical Lockean Picture and its Difficulties

1. *Lucas v. South Carolina Coastal Council* (1992)

I want to begin with a case. It is a 1992 decision of the Supreme Court of the United States. Some of you will know it—*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Like many American property cases, it concerns the application of what we call the “Takings Clause” of the Fifth Amendment. These lectures are not about American constitutional law and I won’t ask you to venture very far into the morass that constitutes American Takings Clause jurisprudence. It is a mess and, if only you knew how much of a mess, you would thank me for steering us away from this aspect of the case that I am about to set out.

But the facts in *Lucas v. South Carolina Coastal Council* are going to be very helpful for our discussion.

In 1986 a property developer called David Lucas paid \$975,000 for some oceanfront real estate on the Isle of Palms, which is a barrier island of the coast South Carolina, intending to develop it as residential property for resale. But his plans were thwarted by new environmental regulations established by state law intended to protect the coastline from erosion. Mr. Lucas knew at the time he bought the property that the general area was subject to some regulation under a 1972 federal statute and a 1977 statute of the South Carolina legislature. But his lots were not in what was defined as a “critical area” when he bought them, and so he did not need to apply for any special consent from the newly created South Carolina Coastal Council before beginning construction. However, things changed before he actually began construction. In 1988, responding to heightened concern about the state of the beaches expressed in the report of a blue-ribbon Commission investigating the matter, South Carolina enacted a new statute, which empowered the Council to draw a new set-back line, a new line in the sand, as it were, a line that was on the landward side of Mr. Lucas’s property. They did and the effect of it was to establish a more or less complete ban on the construction of any habitable improvements on that land beyond a small deck or a walkway.

So far as Lucas’s plans for development were concerned, this rendered his property worthless. So he sued under the 5th and Amendment,

which, as you know, prohibits the state from taking private property for public use without fair compensation. The case went all the way to the Supreme Court of the United States and in 1992, the Supreme Court held in Mr. Lucas's favor. The case was then remanded to the South Carolina courts which required the state to pay Mr. Lucas \$850,000 for the two lots, just slightly less than he had bought them for.

As I said, I do not intend to say very much more than this about the American takings clauses. Suffice to say that the *Lucas* decision represented something of a revival of the Supreme Court's willingness to condemn state regulations as takings.

But leaving aside the constitutional dimension, the facts in *Lucas* define an interesting issue for my purpose in this lecture, which is to consider the relation between property rights and the political ideal we call the Rule of Law. *Lucas* was just one case. But suppose that a legal system generates a number of confrontations like the confrontation in *Lucas v. South Carolina Coastal Council*—confrontations between private property rights on the one hand and environmental regulations on the other. Up and down the coastline, and in inland wetland areas as well, and on mountains whose tops could be removed to find lucrative seams of coal, property owners find themselves limited in what they can do with their land by duly enacted statutes and regulations, aimed at securing important public goods such as the preservation of beaches or the securing of an hospitable environment for birdlife, or the preservation of the aesthetic beauty of forests and mountains in an inland area.

2. The Rule of Law

Such confrontations can be characterized in all sorts of ways. So here's one question: what is the situation in these property and environmental regulation so far as the Rule of Law is concerned. Does the Rule of Law condemn these restrictions? Or does it recognize the environmental regulations as law also, and command that they too should be respected, upheld and complied with as part of our general respect for the law of the land?

The question is about the Rule of Law. You can't see it on my script, but you can see it on the handout. I always write "the Rule of Law" using a capital "R" and a capital "L" to distinguish it from a phrase that sounds the same, but is all in lower case: a rule of law like the rule against perpetuities or the rule that prohibits drunk driving or the rule that says that I have to file my taxes in the United States by midnight on April 15. Those are all rules of

law, but *the* Rule of Law (capital “R,” capital “L”) is one of the great values or principles of our political system.

The idea is that that the law should stand above every powerful person and agency in the land. The authority of government should be exercised within a constraining framework of public norms. It should be controlled by law, in contrast (as the great Victorian relic Albert Venn Dicey put it) in contrast “with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers.”¹ Moreover, the Rule of Law requires that ordinary people should have access to law, access in two senses: first that the law should be accessible, i.e. promulgated prospectively as public knowledge so that people can take it on board and calculate its impact on their actions and transactions; and secondly, that legal procedures should be available to ordinary people to protect them against abuses of public and private power. All this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of legal procedures.

The Rule of Law is a hugely important ideal in our tradition and has been for millennia. It is sometimes said that Dicey in 1885 was the first jurist to use the phrase “the Rule of Law.” I don’t think that’s true, except in the most pedantic sense of the exact grammatical construction. John Adams and other American revolutionaries explicitly contrasted the rule of law with the rule of men, and indeed Aristotle used almost exactly those terms (only in Greek) in Book III of the *Politics* more than 2300 years ago. I am not going to get hung up on the exact phrase; the point is that, whether it’s in the form of a slogan, a paragraph, or a treatise, and whether it’s in English, Greek or German, the ideals and concerns that the phrase connotes for us have resonated in our tradition for centuries—beginning with Aristotle, proceeding through the medieval theorists like Sir John Fortescue who sought to distinguish lawful from despotic forms of kingship, through the early modern period in the work of John Locke, James Harrington, and (oddly enough) Niccolo Machiavelli, in the Enlightenment in the writings of Montesquieu and others, in the American tradition in *The Federalist* and even more forcefully in *The Anti-Federalist Papers*, and, in the modern era, in Britain in the writings of Dicey, Hayek, Oakeshott, Raz, and Finnis, and in America in the writings of Fuller, Dworkin, and Rawls.

There is a tremendous amount there, and quite a lot of controversy about what the Rule of Law actually requires, and what aspects of law it

¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth edition of 1915 (Indianapolis: Liberty Classics, 1982), 110 (my emphasis).

privileges. Law is many things, after all: for some the Common Law is the epitome of legality; for others, the Rule of Law connotes the impartial application of a clearly drafted public statute, for others still the Rule of Law is epitomized by a stable constitution that has been embedded for centuries in the politics of a country and the consciousness of its people. And people's estimation of the importance of the Rule of Law sometimes depends on which paradigm of law we are talking about. When Aristotle contrasted the Rule of Law with the rule of men, he ventured the opinion that "a man may be a safer ruler than the written law, but not safer than the customary law." And centuries later, in our own era, F.A. Hayek was at pains to distinguish the rule of law from the rule of legislation, identifying the former with something more like the evolutionary development of the common law, something less constructive, less susceptible to human control, less *positivist* than the enactment of statutes.

Plainly, these positions are going to be relevant to what we are considering today in this lecture. Because look at *Lucas v Carolina Coastal Council*. On the one hand, you have a property right developed presumably in accordance with the common law that South Carolina shares with many other jurisdictions—a property right defined by common law and circulating according to market principles. On the other hand, you have an environmental determination, made by an administrative body, pursuant to a state statute: a rule that exists as law because it occurred to some South Carolina legislators that it might be a good idea to protect the beaches of the barrier islands from erosion. These are two different kinds of law—common law versus statutory regulation—and we may want to ask whether our conception of the Rule of Law privileges one kind of law rather than the other.

I am not going to try to settle any of this with an a priori definition of the Rule of Law. I want to leave it contestable, and present everything I say in these lectures as a contribution—my contribution—to that contestation.

3. Rule-of-Law indices

The fact that the Rule of Law is a controversial idea doesn't stop various agencies around the world from trying to measure it in different societies. The World Bank maintains a "Rule of Law" index for the nations of the earth, alongside other governance indicators such as control of corruption, absence of violence and so on. So for example, for 2008, a ranking was produced which placed countries like Canada, Norway, and New Zealand at the top of the Rule of Law League and Zimbabwe and Afghanistan at the

bottom with -1.81 and -2.01 respectively. (For what it's worth, the UK scored just a little higher than the United States, and stands about six places below New Zealand.)²

So here's another way of asking our question. Should we expect a country's score on one of these Rule of Law indexes to go up or down depending on how much legislation there is of the kind that was at issue in *Lucas v. Carolina Coastal Council*? We might expect the indexes to be sensitive to this sort of thing, since they are supposed to be useful to investors who might be bringing money to invest in enterprises in the subject country and want to know how far their investments will be affected or limited by social or environmental legislation. According to Harvard economics professor Robert Barro,

The general idea of these indexes is to gauge the attractiveness of a country's investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights.³

Barro adds that "the willingness of customers to pay substantial amounts for this information is perhaps some testament to their validity."⁴ But perhaps for this very reason we should be nervous about the integrity of these indexes, if they are skewed too much weight to the protection of investors' interests. Not everyone supports the Rule of Law or cares about it; but is it really supposed to be biased in exactly this way?

4. The constellation of our values

The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free markets and private property, and we want them to be governed in accordance with the Rule of Law. But constellations can deceive us. The juxtaposition of stars in a constellation is not necessarily indicative of their proximity to one another. Their apparent proximity may just be an artifact of where they present themselves in our visual field—the sky, as we call it,

² Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, "Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008" available at <http://ssrn.com/abstract=1424591>

³ R Barro, "Determinants of Democracy," (1999) 107 *Journal of Political Economy* S158, at S173.

⁴ *Ibid.*

which for us is basically two-dimensional even though in astronomical fact it reaches in a third dimension away from us almost to infinity.⁵

And so too in the constellation of our ideals. We think of democracy and the Rule of Law or human rights and the Rule of Law as close, even overlapping ideals. But it may be important to maintain a sense of the distance between them. There are multiple ways in which we evaluate social and political systems, multiple ways in which social and political structures may respond to or excite our concerns, and unless we buy into a very general holism—something like the position put forward in Ronald Dworkin’s new book, *Justice for Hedgehogs*, in which all our ideals, however scattered, come down more or less to the self-same thing—there is not a lot to be gained by collapsing any one of them into any of the others.

5. A Separation Thesis

This is a point we owe to a very influential 1977 article by Joseph Raz, where Raz insisted on analytic grounds that “the Rule of Law” should not be regarded as not the name of all good things:

the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. ... A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.⁶

That indicates a sort of separation thesis as between the Rule of Law and our other political values like human rights or democracy.

Of course there may be overlaps. For example: though a society may respect the Rule of Law while scoring low in its human rights record, it can’t ignore all human rights, because some rights require exactly what the Rule

⁵ Stars may appear close enough to one another to be grouped into a single formation—the Southern Cross or whatever—yet that’s just the way they seem. It’s a matter of their placement in what is in effect a two dimensional visual field, and the apparent proximity of (say) Mimosa and Gacrux in the Cross formation—the giant blue star at the left hand beam and the cool red giant at the top of the cross—belies the fact that the latter (a cool red giant) is much closer to earth than the former (88 light years as opposed to 353 light years away).

⁶ Raz cite.

of Law requires. Articles 7 through 11 of the Universal Declaration are a case in point, with their prohibitions on arbitrary arrest and retroactive law and their requirements of equality before the law and the entitlement of each person “to a fair and public hearing by an independent and impartial tribunal, in the determination of ... any criminal charge against him.” This does not imply that the Rule of Law and human rights amount to the same thing; what it means is that codes of human rights are one of the ways in which we uphold some of the most important requirements of the Rule of Law.

Our inquiry is about the relation between the Rule of Law and one other star in the constellation—our ideal of economic freedom and by implication private property. Are these distinct ideals—relatively distant from one another in the constellation—capturing quite different concerns about the way we run our society? Do they do work for one another—as we saw human rights doing work for the Rule of Law—so that the Rule of Law for example is one of the ways we protect economic freedom? Or vice versa? A suggestion to that effect was made by Alexis de Tocqueville. Tocqueville argued that the wide distribution of property rights helped sustain a fondness for and an awareness of the importance of law among Americans at the beginning of the nineteenth century. There were suggestions of a similar kind in the twentieth century as well. In 1991, James W. Ely gave a book that he’d written about the constitutional protection of property the title “*The Guardian of every other Right*”—adapting (shall we say misappropriating?) an observation made by James Madison about the right to freedom of the press.⁷

Even if the separation thesis is true, we know that traditional conceptions of Rule of Law emphasize legal constancy as something to be valued, and presumably private property rights, being legal rights, are to have the benefit of the same constancy or stability, argued for under the auspices of the Rule of Law, as any legal rights. And this is not an inconsiderable point. (I will explore between property and legal security tomorrow in much more detail in the second lecture in this series at the University of Warwick.) Predictability is often cited as a Rule of Law virtue. Though in his book, *The Rule of Law*, Lord Bingham gives little or no privilege to property as such, he does insist as a very first principle that “[t]he law must be ... so far as possible intelligible, clear and predictable.” And he indicates that one of the most important things that people need from

⁷ James Madison, Report on the Virginia Resolutions Jan. 1800 Writings 6:385—401. But check out the quote from some Virginian in Ely’s book.

the law that governs them is predictability in the conduct of their lives and businesses. Bingham quoted Lord Mansfield:

In all mercantile transactions the great object should be certainty: ... it is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.⁸

and he went on to observe in his own voice that “[n]o one would choose to do business, ... involving large sums of money, in a country where parties’ rights and obligations were undecided.”⁹ So all that might operate as a general matter, even if the separation thesis is correct.

But we might not want to go very far beyond that. In defense of the separation thesis, we might cite the many canonical figures in the Rule of Law literature who seemed to have had no interest in making a connection. Aristotle, who wrote extensively about both topics, said nothing about any connection. Nor did Albert Venn Dicey make a connection with property except obliquely in a reference to “goods” in his first principle of the Rule of Law:

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

Nor did Lon Fuller. Nor did Joseph Raz. Nor did Tom Bingham, in his book, *The Rule of Law.*, except with a brief passage on the implications of Article One of the first Protocol to the European Convention of Human Rights.¹⁰

On the other hand, an association between the Rule of Law and the principle of private property is not unfamiliar or preposterous as would be, for example, a suggestion that the Rule of Law required government support for the performing arts or a more powerful and effective military. It is familiar the vernacular use that is made of this ideal, just maybe not in the narrowly focused philosophic literature. I think it is incumbent on us to explore the implications of the vernacular use of the Rule of Law. For this ideal is not the property of the analytic philosophers and it is certainly not

⁸ *Vallejo v. Wheeler* (1774) 1 Cowp. 143, 153; cited by Bingham at p. 38.

⁹ Bingham, p. 38.

¹⁰ Lord Bingham did briefly mention the protection of property rights under the First Protocol (Article 1) of ECHR and he said he thought that this “prohibits the arbitrary confiscation of people’s property ... without compensation.” He added that “[t]he treatment of white farmers in Zimbabwe would be the most obvious violation.”¹⁰ But Bingham also indicated the importance of acknowledging the necessity in some circumstances of overriding property rights for the benefit of the community as a whole: “It may be necessary to control the way I use my land to prevent my factory polluting the atmosphere or the local river. ... But all this must be done pursuant to law, as the rule of law requires.” (pp. 82-3)

our job as jurists to go round reproaching laymen for not using the idea the idea in the way that (I don't know) Joseph Raz uses it.

I mentioned Aristotle, Dicey, Fuller, Raz and Tom Bingham as Rule-of-Law thinkers who have not really pursued this connection with property. But there *are* others who have insisted—and insisted quite heavily—on the connection we are interested in. The latter part of this lecture will be devoted to John Locke, whose account is one of the most extensive. But, closer to our modern interests, we should also mention Friedrich Hayek, whose work since *The Road to Serfdom* has concentrated on the special threat that socialist administration and appeals to social justice pose to the Rule of Law—and that seems to implicate private property at least indirectly. And others have said something similar. Ronald Cass of Boston University says that “[a] critical aspect of the commitment to the rule of law is the definition and protection of property rights.”

“the degree to which the society is bound by law, is committed to processes that allow property rights to be secure under legal rules that will be applied predictably and not subject to the whims of particular individuals, matters. The commitment to such processes is the essence of the rule of law.”¹¹

And I don't forget my NYU colleague Richard Epstein, who has written extensively on these matters, and whose work has moved from pursuing the Rule of Law and the ideal of a free, private property-based economy as parallel pillars of a free society—complementing one another, and perhaps (as they used to say in working class areas, taking in one another's washing), without necessarily margining into a single ideal—to a more aggressive account in his most recent writing that suggests that an analytic separation of the two ideals may leave the Rule of Law impoverished, oddly isolated from our real formal and procedural concerns about contemporary public administration. The case Epstein makes is a powerful one and it deserves our consideration—all the more so because Epstein actually concedes the conceptual point that “[a]nalytically, the rule of law is, of course, a separate conception from private property and personal liberty,”¹² but provides good reasons for thinking that these analytical strictures should perhaps not be the end of the matter. He says “a close connection” between the Rule of Law and private property “can ... be established empirically by showing ... that the cumulative demands of the

¹¹ Cass, pp. 1, 2.

¹² Richard Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law*, manuscript p. 14.

modern social democratic state require a range of administrative compromises and shortcuts that will eventually gut the rule of law in practice, even if it honors it in theory.”¹³ (I am very grateful to Professor Epstein for making his recent book manuscript, *Design for Liberty: Private Property, Public Administration, and the Rule of Law*—now, as I understand, in press—available to me.) A lot of what I am doing in these lectures can be seen as a response to Epstein’s extraordinarily rich, provocative, and influential ideas.

6. Negative and affirmative strategies

What Epstein suggests are two strategies for developing a link between the Rule of Law and private property. The connection can be pursued negatively, under the auspices of a more general Rule of Law attack on the kind of unstable, inconstant and often frankly discretionary regulation that threatens property as a matter of fact, and the sort of public administration that goes with it. Or it can be pursued more affirmatively in terms of a special and explicit connection between private property and the Rule of Law so that private property is one of the things that the Rule of Law aims to promote just as it aims to promote prospectivity or natural justice.

Most of what I’ll be saying in these lectures is about the affirmative strategy. But Epstein’s negative strategy is an interesting one. Since Dicey the Rule of Law has been associated with a critique of discretionary administration and since, on many views, it is discretionary administration that poses the greatest threat to private property, it may be that enforcing this general doctrine of legality in governance is all that one needs to do. It is a little bit like Lon Fuller’s famous argument that if we rigorously follow the formal principles he calls the internal morality of law we will find it much harder to violate external or substantive morality. Fuller thought it was no accident that the Nazi’s had to violated all sorts of formal principles of legality to pursue their racist and murderous aims; and analogously it may be thought to be no accident that those who challenge private property tend to use methods of governance at odds with the formal and procedural principles of the Rule of Law.

The more affirmative strategy is to develop and justify a substantive conception of the Rule of Law that explicitly embraces the principle of private property. In the end I am skeptical about that, but it can’t be ruled out, not out of hand. So I will give it a run for its money in tomorrow’s lecture.

¹³ Epstein manuscript, p. 16.

7. Rule of law and rule by law

But today I want to consider a slightly different move. Some conservative commentators, particularly in the United States, draw a distinction between the Rule of Law and what they call rule *by* law. Let me explain this, because I think it's important.

These conservative thinkers are willing to concede that the administrative enforcement of a duly enacted environmental statute in the *Lucas* case represents rule by law. The environmentalists are politically in the ascendant in South Carolina. But instead of just dictatorially *imposing* their ecological preferences for the integrity of the beaches on the barrier islands, they have had the decency to at least go to the trouble of getting the South Carolina legislature to enact a statute, and they have proceeded rigorously to make regulations in the proper form under the powers conferred in that statute. That's rule by law—rule by these men (and women) using law—and it is certainly better than a Mugabe-style invasion of property that has no legal credentials at all.

Still, rule by law—say these commentators—is not the same as the Rule of Law, where in fact law itself governs a situation, or is supposed to govern a situation, without the help of people, environmentalists, legislators, or anyone else.

Now, you may ask, well how is that supposed to happen? After all, all law is made by people and interpreted by people and applied by people. It can no more rule us by itself, without human assistance, than (in Hobbes's image) a cannon can dominate us without an iron-monger to cast it and an artilleryman to load and fire it.¹⁴

The commentators I am discussing may acknowledge the ontological point. But, undeterred, what they say is that there is a real sense in which the operation of a system of private property represents law itself governing a situation. Nobody in authority had to decide that David Lucas shall be in charge of these residential lots on Beachwood East in the Isle of Palms. That property circulated into his hands as a result of a series of individual transactions all conducted in which the rulers, the authorities played no part. The market transactions took place under the auspices and within the framework of the law of property, which is part of the common law of South Carolina, and which has *evolved* impersonally to where it is today not as the product of anyone's legislation or decisions. It is the ascendancy of common law that enables us to say that law rules here rather than any

¹⁴ Quoted in Harrington

politician; by contrast, the ascendancy of the environmental legislation seems to represent the rule of men, albeit men ruling by statutory means.

I don't mean that common law property rights are unrestricted. They may or may not be. But they are a matter of private law. The restrictions emerge without official interference either. They emerge in the form of restrictive covenants, or in terms of common law principles of nuisance. Their emergence or their application to any particular piece of real estate is not the result of any ruler's decision.

8. Public Law and Private Law

Plainly the distinction between The Rule of Law and rule by law implicates or rests on a differentiation between the way that private law operates and the way public law operates. And as far as I can tell, either these commentators want to associate the Rule of Law more or less exclusively with the former; or they want to associate themselves with the doctrine propounded by Montesquieu in Book 26, Ch. 15, of *The Spirit of the Laws* that we should keep the two apart and “[t]hat we should not regulate by the Principles of political Law those Things which depend on the Principles of civil Law.”¹⁵ “Civil law”—Montesquieu's word for what we are calling private law—is, he said, “the Palladium of property,” and it should be allowed to operate according to its own principles, not burdened with the principles of public or political regulation.

So there you have it. Environmental regulation is the work of human hands—a gift of the state to the beaches, the mountaintops or the birds who revel in the wetland habitat – but property rights are not. Property rights come from the bottom up.

And this is a theme that my colleague Epstein also insists upon. Property rights are not the gift of the state; they have legal standing quite apart from human rule. “No system of property rights,” says Epstein, “rests on the premise that the state may bestow or deny rights in things to private persons on whatever terms it sees fit.” Rather, he says, “the correct starting point is the Lockean position that property rights come from the bottom up.”¹⁶ And on Epstein's account, it is precisely misapprehensions about this point that have brought us to the courtroom in cases like *Lucas v. South Carolina*

¹⁵ Equally Montesquieu says we shouldn't decide public matters by civil law analogies e.g. succession by inheritance etc. “he order of succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in view the welfare and preservation of the kingdom.

¹⁶ Epstein. 98

Coastal Council, “invert[ing] the relationship between individual rights and political power.

The classical liberal theory sees limited government as a means to defend the fundamental rights of property ... The modern democratic state, by contrast, defines itself in opposition to any theory of natural law that posits these individual “pre-political” entitlements as existing prior to the creation of the state. Instead, property rights are arbitrary assemblages of rights that the state creates for its own instrumental purposes, and which it can undo almost at will for the same instrumental ends.¹⁷

To see the proper relation, then, between the Rule of Law and private ownership we have to be prepared to turn the tables on the modern administrative state and go back to something like a Lockean account of the constraining force of property. That’s Epstein’s position (or one of his positions).

9. John Locke and the “bottom-up” conception of (pre-public) property rights

Well we might as well confront this position head-on, and that’s the title of this lecture: “The Classical Lockean Picture and its Difficulties.” As some of you know, John Locke and all his works is very much my obsession. If I were to go on *Mastermind*, Locke would be there as my special subject, in the way other people have as their special subject, the relationship between Frodo and Gollum, or MacDonald’s happy meals over the decades. This whole series of lectures brings together my modern interest in the Rule of Law with themes of Lockean property that I really haven’t pursued since my doctoral work in the late 1970s and 1980s.

Locke, as you know, explained property as a natural right; he saw property rights as rights that could be generated and sustained by labor and exchange, without benefit of the edicts of any positive law. Property was generated, as Epstein puts it, from the bottom up, and all we needed from positive law—when we set up a legal system to overcome certain difficulties in the state of nature—all we ever needed from the legal system was private law to recognize and accommodate the existence and circulation of property rights that were already well-established. “The reason why men enter into society,” says Locke, “is the preservation of their Property,” and that, as he said, presupposes that people already have property and property is neither the work nor the plaything of public law.

¹⁷ Epstein 65-66

Well, I am a Lockean but I am not convinced. In these lectures, I am in quest of an open-eyed clear-headed view of these matters—of the relation between the Rule of Law and private property—and I don't find that in Locke's account nor do I find it in the work of twentieth-century political philosophers like Robert Nozick, who built upon Locke's account.

So, in the last part of the lecture, I want to develop two lines of critical thought about the Lockean project and its relation to the issue we are considering.

First, I want to consider whether we can possibly accord any credence, in the 21st century, -- or indeed whether it was ever possible to accord any credence—to Locke on what Epstein calls the bottom-up, private law, origins of property. And secondly, I want to consider the tensions in Locke's political and constitutional theory that arise from the juxtaposition of formal and substantive elements in his conception of the Rule of Law.

Let me begin with the basic credibility of the private law account. Many years ago, I was asked to give a talk on Locke and Nozick, and their view of property, to a conference of Federated Farmers in New Zealand. The framers, who are politically very influential there, were facing a number of irksome environmental statutes and they wanted some philosophical vindication of their rights to their land as Lockean natural rights, or prepolitical Nozickian historic entitlements.

I told them I didn't think it was possible. The Lockean account or anything like it is simply implausible - historically - as an account of the origin of current rights over land in New Zealand. Locke's has it that property rights in their origin are independent of government and law. But consider: the history—the chain of title—of a typical New Zealand farm.

In 2011, a farmer—we'll call him John Gardner—is in possession and very annoyed about the environmentalists. Now Gardner has farmed this land for many years. He purchased it in 1992 from a public trustee, a Mr. Dworkin, who has taken it over when the previous farmer, name of Hart, went into bankruptcy in 1985. Hart had inherited the farm from his father Goodhart, when Goodhart died intestate in 1972. Goodhart had purchased it in 1930 for a song from a company that had held it in trust after it had been farmed for a couple of generations by the Austin family. Austin in turn had bought the land in an auction sponsored by the Bank of New Zealand (which in those days was wholly owned government enterprise), the bank having foreclosed on a feckless settler, called Bentham in 1890. Bentham purchased it at a bargain price from a man called Blackstone

in the 1880s who had held, first the leasehold and then the freehold from the colonial government since 1865, the colonial government having in turn bought it from a Maori tribe in whose collective possession it had been for some centuries.

Now you can say many things about this story, besides the fact that I think it is typical. But one thing you cannot say is that property rights in this farm originated in the labor of a Lockean individual before the institution of government or civil society. There are fragments or strings of Nozickian historical entitlement here and there—with the land passing by sale, purchase, and inheritance between individuals. But mostly the land seems to have been governed by social, public and legal arrangements from start to finish. It was used and cultivated first by a collective group, its original Maori owners, and then transferred by them, - whether by respectable or dubious transactions is something NZ tribunals are currently trying to assess - to the colonial government as part of that government's right of pre-emption and its policy of encouraging white settlement and family farming in New Zealand. The conversion from indigenous tribal property to government property to leasehold property on the government's terms to individual freehold is something that was supervised by the state purportedly in the public interest at every stage; and at every stage modifications to the conveyancing laws, and the ability to alienate government leaseholds, and modifications to the law of trusts and bankruptcy, and the laws of inheritance, family provision, and intestacy—these were all developed not by some inexorable logic endogenous to private law or natural law, but by statute and by judge-made law oriented explicitly to the needs of Aotearoa/New Zealand as an economy and to what was for a long time a public commitment to the diffusion of property and broad economic equality.

So if farmer Gardner were to oppose the imposition of some environmental legislation, affecting his farm, on the grounds that this was a public law interference with private law rights that had never been at the mercy of government in this way, we would have to say that claim would be fatuous. Or at least its grounding would be fatuous. There might be many things to be said for or against the environmental legislation; but the property right that allegedly opposes it seems to have been throughout its entire history as much an artifact of public as the environmental statute itself. If the property right is to be set up against the environmental legislation, it is as one artifact of public law versus another, not as an entirely different sort of right whose posture in this conflict is entirely a

matter of the rule of (private law) and has nothing to do with the legislative rule of men.

The New Zealand case is fairly clear-cut owing to the very prominent role of public authorities, both in regard to native ownership, in regard to the institution and distribution of modern property rights, and the continuing role of institutions like the Public Trustee etc. But I suspect that a similar tale can be told in most legal systems, with variations no doubt, but in ways that undermine the myth that modern property rights can trace their standing to anything remotely like a Lockean individualist provenance.

And all this is without even considering the respectability or integrity of the various links in the chain. In Locke's story, particularly in Nozick's version of Locke's story, the importance of respecting a current property right presupposes that it is the culmination of an unbroken series of consensual transactions stretching back to the dawn of time. The entitlement is historically based; and of course this means that its legitimacy is at the mercy of history. But what if, when you delve back through the archives, you find a fraudulent transaction in the early twentieth century or an instance of outright theft or expropriation in the nineteenth? Then, by the logic of John Locke's approach, the current land is stolen property - it's as though you bought a car from a man who bought it from a man who stole it from its owner. That defect in the title infects every subsequent step. Or if it doesn't—if we apply some doctrine of positive law that allows historical defects to be washed out by passage of time or by certain forms of uncontested registration of title, then once again we must give up any sense that the property right emerges from the nightmare of fraud and injustice blinking in the sunlight of the 21st century purely as an artifact of bottom-up private law. No: it emerges as a an artifact of the interaction of public law and private law—a sort of fugue-like relation between them -- and once again there seems no reason why other forms of interaction—such as regulation or restrictions on use—should not also be orchestrated in this way. And by the way, Nozick fully recognized this. He articulated the structure of a Lockean historical entitlement, not because he believed that such a theory vindicated contemporary property-holdings in the United States but because he wanted to understand what justice in these matters would be like, in the unlikely event it existed. Bob Nozick was actually too honorable a man to be much use to the triumphant Right in the 1980s and 1990s. He was never prepared to say that a Lockean theory legitimized contemporary disparities of wealth in the United States. On the contrary, he thought it undeniable that contemporary holdings in America would be

condemned as unjust by any remotely plausible conception of historical entitlement.

People get very uncomfortable about all this. As Blackstone put it in the *Commentaries*, we get intoxicated with the idea of property—our property—but

we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.

But that's what I think we have to do, to get a clear-headed and honest sense of the relation between private property and the Rule of Law.

10. The tension between formal and substantive elements in Locke's account of the Rule of Law

Many critics will want to leave the matter there. But I would like to hammer one more nail into the Lockean coffin. John Locke is one of our earliest theorists of the Rule of Law, in the account he gives in Ch. 7 of the *Second Treatise* on the importance of equality before the law and the repudiation of absolutism, in the account he gives in Chapter 12 of the relation between the Rule of Law and the separation of powers, and above all in his extensive discussion in Ch. 11 of the formal limits on legislatures.

It is the last of these that I want to focus on. In Locke's discussion of the Rule of Law, what we are told over and over again is the importance of governance through "established standing Laws, promulgated and known to the People." Locke uses these Rule-of-Law phrases over and over again: "established standing Laws," "declared and received Laws," "settled, known Law, received and allowed by common consent [throughout the community] to be the Standard of Right and Wrong."

The contrast is with rule by "extemporary Arbitrary Decrees" or "undetermined Resolutions." "The Legislative, or Supream Authority," we are told, "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees...." It must rule through "established standing Laws, promulgated and [made]known to the People."

Now, "arbitrary" is a weasel word. It means many different things. When Locke is distinguishing the rule of settled standing laws from arbitrary decrees, it is not the oppressive sense of "arbitrary" that he has in mind. In this context, something is arbitrary because it is extemporary: there is no notice of it; the ruler just figures it out as he goes along. It is the arbitrariness of unpredictability, not knowing what you can rely on, being subject, as

Locke put it, to someone's "sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justify their actions." And so it is an arbitrariness that may be associated not just with an oppressive ruler, but even with one who is trying as hard as he can to figure out and apply the law of nature.

You see, in Locke's story, one of the things that people wanted to get away from in state of nature, was being subject to others' incalculable opinions – even when those others were thinking as hard and as rigorously as they could about the law of nature. For the Law of Nature was "unwritten, and so no where to be found but in the minds of Men," and in the mind of each person it depended on the particular path of reasoning that he took. Locke was an opponent of innate ideas; people had to figure this stuff out for themselves; and if they figured it out for themselves what you would have in the first instance was a plethora of different results of that figuring. Your figuring might be different from mine, and since this was not just a philosophical exercise, but one which was supposed to determine our individual rights, it might turn out that your view of the relation between your property and my property and your property and my interests, might be quite different from my view of the matter and quite different from the view of the next person I came across.

The whole point of moving to a situation of positive law was to introduce some predictability into this natural law picture. But then that's why we want settled standing laws, publicly promulgated, -- laws that can stand in the name of us all -- rather than rulers who just try to figure out for themselves what the natural law requires.

Unless we have a body of settled, standing, promulgated positive laws known in advance to everyone—"stated Rules of Right and Property to secure their Peace and Quiet ...[so] that ... the People may know their Duty, and be safe and secure within the limits of the Law"—unless we have that, we are no better off than we would be in the state of nature, where there was no telling whose natural law reasoning we would find ourselves at the mercy of.

So far, so good. It is a powerful and compelling case for the rule of positive law. But having set out this constraint on governance, which we recognize instantly as a Rule of Law constraint, Locke immediately goes on to complicate matters—in fact, to screw things up—by adding to it a substantive principle of respect for private property.

The Supream Power cannot take from any Man any part of his Property without his own consent.

And this, it seems, is supposed to be a limit on legislatures—that is a substantive limit on what they may enact even when they are complying with the formal constraints of stability and promulgation. They must rule by settled standing laws, known and publicized in advance, but not by settled standing rules that take away the property of the people.

Now Locke acknowledges, as any sensible person must that government has to have the power of “the regulating of Property between the Subjects one amongst another” and also that since government is costly, “every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it.” Those matters as we know are likely to be controversial—particularly as to the line between regulation and takings—and so they need to be determined too by settled standing laws, not by anyone’s “unrestrain’d, and till that moment unknown Wills.”

But there is a more fundamental difficulty. The picture we are being sold has property rights being determined prepolitically and those are the ones that are to be respected in principle by the legislature under this substantive constraint. But though Locke gives us his own interesting theory of the prepolitical generation of property rights, it is itself far from an uncontroversial theory. People in our day, as in his day, disagree about the rival claims of labor and occupancy, they disagree about the background of common ownership, they disagree about the provisos, about the introduction of money and the possibility of exchange, they disagree about how much anyone may appropriate by labor and how sensitive his appropriation must be to the impact on others. Above all they disagree about the claims of welfare, need, and charity, on goods that others claim to have appropriated. We disagree about all that—in ways that were made evident, for example, in the debates about Nozick’s book, in the 1970s and in the subsequent literature on property. And Locke and his contemporaries disagreed about all of this, and carried on disagreeing, even after Locke produced a remarkably interesting account. And he knew, and signaled in a number of places that he knew, just how controversial this stuff was.

By insisting therefore that positive law is subject to this substantive constraint rooted in the moral reality of prepolitical property rights, Locke is subjecting the legislature to a discipline of uncertainty. The natural right of property is controversial; and so the administration of any substantive constraint of the rule of law along these lines is going to be controversial. This is particularly problematic inasmuch as Locke associates the substantive property constraint with the classic natural law position which holds that enactments violating the laws of nature has no validity. But this means that some people—who (say) disagree with Locke about the claims of

labor over occupancy—will disagree with him about which rules of property and right are valid and which are not. And similarly for those who disagree with him about the provisos, or about charity, or about money. In the state of nature, there is no telling whose reasoning on these matters one will be at the mercy of: one may be at the mercy of a John Locke or one may be at the mercy of a Samuel Pufendorf with a quite different theory. And the move to civil society offers no help in this regard, since settled standing laws are now unsettled by a substantive constraint that ties them into these controversies.

In tomorrow's discussion, I will be asking whether we can justify moving from a purely formal/procedural approach to the Rule of Law to *add in* a substantive conception. Can that addition be justified? But the upshot of this last discussion today seems to be that, whatever the justification for the additional substantive constraint, what it does is *destabilize* the other elements of the Rule of Law. So we may find ourselves having to choose a stable conception of the Rule of Law which is mainly formal and procedural in character and an unstable one, with an element of substantive controversy added in.

There is a way out of this, but it won't be attractive to most latter day Lockeanes. James Tully in a book published in 1980,¹⁸ argued that Locke's substantive Rule-of-Law principle protected private property only in the sense of positive-law rights already established by legislation. It was not supposed to protect natural law rights which, as Tully and I agree, are inherently controversial (even on Locke's own account). It was supposed to protect property inasmuch as property was already established by positive law.

When I was younger I wrote my dissertation on Locke and published several articles attacking Tully's interpretation. I still think it is wrong, but I won't go into that now. The point is that Tully's maneuver saves the coherence of the position, but only by abandoning the claim that, for legal purposes, property is determined bottom up on a private law basis in a way that is independent of legislation. On Tully's account, the property rights that are protected are themselves artifacts of public law. They are then clear, well-known and stable; and they are no longer at the mercy of natural law controversies. But the price of that deliverance is that the property rights in question, being the offspring of legislation, can have very little power and status to set up against legislation (of the environmental kind). Property is no longer privileged as a special or primeval form of law. It is just one set of

¹⁸ James Tully, *A Discourse on Property: John Locke and his Adversaries*.

laws among others. And we judge it, in its relation to public policy, and in its relation to other laws, without assuming its untouchability.

And that, it seems to me is the counsel of wisdom. It is better in the end to evaluate laws on their own merits—and to make whatever case can be made about the exigencies of market economy untrammelled by too much regulation – better to take that case directly, rather than muddy the waters by pretending that some laws have transcendent status under the auspices of the Rule of Law and that other laws—like environmental regulations—barely qualify for legal respect at all.