



# The Lockean ‘Enough-and-as-Good’ Proviso: An Internal Critique

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## Abstract

A private property account is central to a liberal theory of justice. Much of the appeal of the Lockean theory stems from its account of the so-called ‘enough-and-as-good’ proviso, a principle which aims to specify each employable person’s fair share of the earth’s material resources. I argue that to date Lockeans have failed to show how the proviso can be applied without thereby undermining a guiding intuition in Lockean theory. This guiding intuition is that by interacting in accordance with the proviso persons interact as free and equal, or as reciprocally subject to the ‘laws of nature’ rather than as subject to one another’s arbitrary will. Because Locke’s own and contemporary Lockean conceptions of the proviso subject some persons to some other persons’ arbitrary will, the proviso so conceived cannot function as it should, namely as a principle that restricts interacting persons’ actions reciprocally and thereby enables Lockean freedom under law.

## Keywords

Locke, the proviso, private property, A. John Simmons, Robert Nozick, Gopal Sreenivasan

## 1. Introduction

A private property account is central in a liberal theory of justice. Liberals need such an account since without private property it is impossible to set and pursue ends of one’s own in the world, or to be free. Much of the appeal of the Lockean theory stems from its account of the so-called ‘enough-and-as-good’ proviso (hereafter: ‘the proviso’), which aims to specify each able-bodied person’s fair share of the earth’s material resources. The proviso is an appealing feature of the Lockean account in part because it opens up the possibility of arguing for both a natural executive right (each person’s right unilaterally to enforce the principles of justice) and a strong voluntarist conception of political obligations (each person’s actual consent is necessary for the establishment of civil society). Individuals can be seen as

having a natural executive right only if it is possible to give an account of how private individuals rightfully interact in the state of nature, namely by giving an account of the principles of justice they should enforce, if necessary, in this pre-state condition. Central to any Lockean justification of this possibility lies its account of the proviso, since this is the proposed principle of justice able-bodied<sup>1</sup> individuals apply when they rightfully appropriate private property in the state of nature. Hence, if the Lockean account of the proviso is successful, then Lockeans have provided two essential parts of their theory of justice: first, an attractive, liberal account of private property in terms of individuals' right to appropriate, and second, important evidence for the claims that there is a natural executive right and that strong voluntarism is the liberal ideal of political obligations. The success of the proviso for the latter is of crucial importance, because only if private individuals in principle can realize justice on their own in the state of nature can they have a natural executive right, and only if they have a natural executive right is their actual consent necessary to establish civil society (strong voluntarism as the ideal of political obligations). In this paper, I argue that up until now Lockeans have failed to give us a successful conception of the proviso. Consequently, they have also failed to justify the natural executive right, which undermines their claim that strong voluntarism is the liberal ideal of political obligations.

According to Locke, the state of nature is “a *State of perfect Freedom* to order their Actions... within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Men... [and also] A *State also of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another... and [no] Subordination or Subjection” (II: 4, Cf. I: 67 and II: 3, 6f, 54f, 61, 87).<sup>2</sup> In order to ensure the possibility of justice in the state of nature, a claim central to any Lockean position, there must be a way to specify the proviso without undermining these guiding intuitions concerning how ‘the laws of nature’, or Lockean principles of justice, secure individuals' equality and freedom. In particular, there must be a way of explaining how interacting in accordance with the proviso enables

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<sup>1</sup> As will become clear below, an exception here is Michael Otsuka's conception of the proviso, since it aims to make the proviso cover the private property rights also of disabled persons.

<sup>2</sup> Here and for the remainder of this paper, I cite the first and the second of Locke's *Two Treatises of Government* using the notation (I: 67) or (II: 7) to refer to the treatise and paragraph number. John Locke, *Two Treatises of Government*, ed. P. Laslett, (Cambridge: Cambridge University Press, 1988).

able-bodied persons to interact equally and freely, namely as reciprocally subject to the 'laws of nature' rather than as subject to some particular person's 'arbitrary will'. The core critical claim of this paper is that so far Lockeans have failed to provide such an explanation. I argue that the various proposals provided by Locke and the Lockeans regarding how we should understand the proviso turn out neither to be reciprocal restrictions upon persons' actions nor to involve an absence of subjection. Instead, the restrictions subject different particular persons unequally and involve subjecting some particular persons to the 'arbitrary will' of others.<sup>3</sup>

## 2. Lockean Conceptions of the Proviso

Rather than engaging the rich literature concerning the correct interpretation of Locke's own proviso, I simply give a brief outline that aims to avoid textual controversies. I then move directly to an evaluation of the proviso's ability to capture a set of reasonable restrictions on private property acquisition among a group of interacting persons. At this point it is necessary to introduce some more controversial assumptions, which serve to limit the scope of the analysis. More specifically, I assume that Locke intends to give a strong interpretation of the proviso, meaning that labour on one's fair share of natural resources is seen as giving rise to 'fixed' property in these natural resources or, subsequently, in the values created from them. The identification of the problems arising when Locke's proviso is read in this way sets the stage for discussing contemporary Lockean accounts of the proviso, according to which the commitment to fixed property is softened in various ways.

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<sup>3</sup> Throughout the discussion, I assume away Locke's main 'inconveniences' of the state of nature. I suppose that all persons who live in a territory *really do* want to interact in a normatively correct manner in the Lockean sense. People are assumed to follow their impartial reason and not their 'brutish passions' and 'bias' when interpreting, applying, and enforcing the laws of nature. This makes it easier to see why it appears impossible even for individuals acting on the best of Lockean reasons to make sure that the principles of private property appropriation they enforce are non-arbitrary in the sense that they restrict reciprocally and do not involve the subordination of some to the arbitrary will of others. It is because this is impossible even for virtuous people that I conclude that individuals who enforce Locke's own version of the proviso, or contemporary versions thereof, necessarily wrong one another in so doing. Only such an ideal argument can possibly undermine the Lockean defence of the natural executive right and the proposal of strong voluntarism as the liberal ideal of political obligations.

Most contemporary Lockean follow Nozick in focusing on problems related to Locke's proviso under conditions of scarcity. Before engaging their solutions to this problem, however, I argue that contemporary Lockeans need to pay attention to a separate problem in Locke's account. This is the problem of envisioning how the proviso should be applied once we have introduced not only scarcity, but also trade into the analysis. Since contemporary Lockeans so far have not recognized this additional problem arising with the introduction of trade, the remainder of the paper focuses only on their conceptions of the proviso under conditions of scarcity. I start with the provisos defended by Nozick<sup>4</sup> and Simmons,<sup>5</sup> according to which the proviso does not give everyone a right to land. Against these positions, I argue that rather than specifying restrictions concerning private property appropriation that enable Lockean freedom and equality under laws, the contents of their proposed provisos restrict different individuals unequally and they involve subjecting some persons' freedom to the arbitrary will of others.

Since Nozick's and Simmons' solutions are riddled by such problems, I proceed to the positions defended by Sreenivasan<sup>6</sup> and Otsuka.<sup>7</sup> They argue that everyone should have a right to land, but that the amount of land should be determined by its 'welfare potential', which in turn is determined by the markets. I argue that though these conceptions appear more plausible with regard to envisioning equality, they actually do not solve the problems they set out to solve. Also these positions end up having the content of the rights of some individuals determined by the arbitrary wills of some other individuals. And since the only way to justify that such restrictions should regulate actual interactions goes through the interacting individuals' actual consent, they are not individually enforceable. But if Sreenivasan's and Otsuka's provisos are not individually enforceable, then the claims that there can be a natural executive right and that strong voluntarism is the liberal ideal of political obligations are undermined.

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<sup>4</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

<sup>5</sup> A. John Simmons, *The Lockean Theory of Rights* (Princeton, New Jersey: Princeton University Press, 1992); *Moral Principles and Political Obligations* (Princeton, New Jersey: Princeton University Press, 1981), *On the Edge of Anarchy* (Princeton, New Jersey: Princeton University Press, 1993), *Justification and Legitimacy: Essays on Rights and Obligations* (New York: Cambridge University Press, 2001).

<sup>6</sup> Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (New York: Oxford University Press, 1995).

<sup>7</sup> Michael Otsuka, *Libertarianism without Inequality* (New York: Oxford University Press, 2003).

I conclude that the puzzle that originally motivated Locke, namely to specify an individually enforceable proviso as partial defence to a strong voluntarist conception of political obligations, is not solved by any of these contemporary Lockean positions.

### 2.1. *Locke's Proviso*

To be free, Locke argues, is not to be able to do whatever one wants ('licence'), but to act within the constraints of the laws of nature: "*Freedom of Nature* is to be under no other restraint but the Law of Nature" (II: 22, cf. I: 101).<sup>8</sup> As John W. Yolton formulates it, "a lawless man is not free", since to be free is "to guide one's self by the law of nature and reason" (Yolton 1985: 36f). When interacting with others, to be free is to be subject to the laws of nature only, meaning laws that both reciprocally restrict interacting individuals and provide each interacting person with a sphere in which he can set and pursue ends of his own with his means (II: 6, cf. II: 25, 56–59, 63). And as we saw above, the contrast to being restricted by the laws of nature when interacting is to be subject to another's "absolute power" (II: 17), understood as "the inconstant, uncertain, unknown, Arbitrary Will of another Man" (II: 22). Moreover, in the state of nature, "the *Execution* of the Law of Nature is... put into every mans hands" (II: 7, cf. II: 8, 13, 74, 87). Therefore, each individual has a natural right to execute the laws of nature in her interactions with others, which is to say that private individuals have natural political power or a natural executive right.

An account of private property appropriation that is consistent with Locke's conceptions of equality and freedom under the laws of nature as well as individuals' natural political power must identify the ideal restriction on private property appropriation that each person can use his natural executive right to enforce in the state of nature. After all, individuals must be able unilaterally to acquire private property rightfully. Otherwise it makes no sense to say that they have natural political power or a natural right to enforce the laws of nature on their own (the natural executive right).<sup>9</sup> If others' consent is in principle necessary to acquire private property rightfully, then it is not the case that individuals have a right to enforce the laws of nature unilaterally. Moreover, only if it can be shown

<sup>8</sup> John W. Yolton, *Locke: An Introduction* (Basil Blackwell Ltd., 1985).

<sup>9</sup> Just to be clear, individuals' natural political power, individuals' natural right to execute the laws of nature and individuals' natural executive right mean the same thing.

that individuals have natural political power (a natural executive right), will it follow that the rightful establishment of a civil political power – an artificial political power – requires individuals' actual (explicit or tacit) consent.<sup>10</sup> Thus, specifying a workable proviso (restriction on unilateral property appropriation) is essential to the whole Lockean project.

The required investigation into private property acquisition involves, Locke argues, a reconciliation of two reasonable, yet apparently incompatible claims: 1. all land is originally owned in common, and 2. an individual can rightfully appropriate private property from the common land without consent from the other commoners (II: 25). On the one hand, Locke argues that God gave the earth in common to humankind, so that it can preserve itself by means of labour (II: 25-30, 34, 44f).<sup>11</sup> The better secular interpretation of this point, I believe, is that if each person has an *equal* right to preserve himself under the laws of nature, then all land must belong to everyone equally prior to appropriation of any particular piece. No one piece of land can be beyond appropriation and no one piece of land can be seen as necessarily belonging to any particular person before it has been

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<sup>10</sup> This description of the intimate relationship between the account of individuals' rights and strong voluntarism on the Lockean position is, I believe, relatively uncontroversial. See, for example, the relevant writings of the prominent Locke scholar A. John Simmons. In *The Lockean Theory of Rights*, Simmons argues that central to the Lockean voluntarist project is an account of individuals' rights: "[t]he defense of... 'protective' rights gives the Lockean position in moral and political philosophy much of its distinctive flavor, for these rights are subsequently used to justify an essentially voluntaristic conception of the proper moral relation between citizens and their governments" (p.5). Simmons argues similarly in *Moral Principles and Political Obligations*; *On the Edge of Anarchy*; *Justification and Legitimacy: Essays on Rights and Obligations*. Simmons also discusses extensively the importance of the natural executive right in Lockean positions. See for example (Simmons, *The Lockean Theory of Right*, pp. 123f, cf. pp. 164, 218f; Simmons, *On the Edge of Anarchy*, pp. 59f, 261f; Simmons, *Justification and Legitimacy*, pp. 136ff, 154 f. Also, note that some of the controversy regarding Nozick's position concerns whether or not his political philosophy was committed to or attempted to overcome strong voluntarism as the ideal of political obligations. I discuss some of the related issues in "Nozick's Reply to the Anarchist: What He Said and what He Should Have Said about Procedural Rights", *Law and Philosophy* Vol. 28, issue 6 (2009), pp. 585-616.

<sup>11</sup> Locke argues that the fundamental laws of nature require self-preservation and/or preservation of mankind: "Every one, as he is *bound to preserve himself*, and... when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not, unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb, or Goods of another" (II: 6, Cf. I:52f, 86, 88, 149 and II: 4, 7f, 11, 16f, 25, 57, 64, 87, 123, 124, 127-131, 134, 135, 138, 140, 142, 149, 159, 170, 171, 207, 220, 222, 227, 233, 239, 243).

appropriated according to the requirements set by the laws of nature.<sup>12</sup> On the other hand, Locke wants to give everyone the right to appropriate from the commons without the consent of others. If actual consent by all is required to make rightful property possible, then “Man had starved, notwithstanding the Plenty God had given him” (II: 28, cf. II: 26). Since the law of nature states that we have the right and duty to preserve ourselves, Locke argues, it must be possible to consume things and to use them to secure our future preservation without first obtaining the consent of others (II: 25–6, 35). The challenge regarding private property, then, arises because everyone is seen as having the land in common, and yet everyone is also seen as enjoying a non-consensual right to preserve themselves by means of these common resources. How, then, is the private appropriation of any particular piece of property possible without thereby depriving others of their common land?

Locke's proposal is that by labouring on the commons, a person obtains a fixed property right in the appropriated resources *given that* he appropriates them subject to certain restrictions. The restriction we are concerned with here,<sup>13</sup> the proviso, deems an appropriation of natural resources rightful only if a person leaves ‘enough and as good’ of the natural resources behind for others.<sup>14</sup> According to Locke, to respect the proviso is to make sure that one interacts with others in a way that respects *each* able-bodied person's right to private property through labour, and hence by so doing does no “prejudice to any other Man” (II: 33, cf. II: 34, 36). If a person appropriates through labour subject to the proviso of leaving ‘enough and as

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<sup>12</sup> If we let go of Locke's theological assumptions, it is less clear why his position must entail a notion of common land rather than a notion of all land as originally unowned. Nozick assumes the latter reading, whereas Simmons assumes that we can use ‘unowned’ and ‘common’ interchangeably to refer to land prior to any appropriation.

<sup>13</sup> The other restrictions upon private property, namely the waste restriction, the charity restriction and the restriction governing the parental relation are not relevant to the discussion here.

<sup>14</sup> Locke famously argues: “The *Labour* of his Body, and the *Work* of his Hands, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature 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 joyned to, at least where there is enough, and as good left in common for others... The *labour* that was mine, removing them [the natural resources] out of that common state they were in, hath *fixed* my *Property* in them” (II: 27–28, cf. II: 25–36, 40–46, 50).

good' behind for others, he ensures that his appropriations are reconcilable with each employable person's right to self-preservation through labour. By appropriating private property in this way, a person obtains 'fixed' property in these natural resources and others have an obligation to respect the rightfulness of his appropriation. No able-bodied person can therefore deprive anyone else of the resources appropriated by means of labour without thereby wronging him, because to do so is to deprive him of his labour. According to Locke, the reason why the proviso must be respected is therefore not primarily because it is in our strategic, long-term self-interest to do so, but because the very possibility of rightful interaction depends on it.

## 2.2. *Problems of Specification in Locke's Account*

In order for Locke's account to succeed in justifying a natural executive right it must be possible to establish how individuals specify and apply the proviso. Since the proviso must be reconcilable with each individual's equal right to appropriate private property, it must be shown to be non-arbitrary, in that both the specification of the relevant details of a particular case neither involves an appeal to any individual's arbitrary will nor fails to restrict everyone in the same way. Only then are individuals' actions restricted solely and reciprocally by laws of nature enabling individual freedom. I argue that Locke's account incurs two problems of indeterminacy regarding specification: first, indeterminacy with respect to specifying the content of individuals' rights and obligations with the introductions of scarcity (2.2.1) and of trade (2.2.2), and second, indeterminacy with respect to applying these principles to particular cases (2.2.3). The result is that Locke fails to show how the normative idea of labour subject to the proviso can give rise to fixed property in natural resources (rightful unilateral acquisition of property).

### 2.2.1. *Specifying the Proviso under Conditions of Scarcity*

To see why Locke's proviso cannot give rise to 'fixed property' in the natural resources appropriated under conditions of scarcity, it is helpful to consider Nozick's famous 'zipping-back' argument.<sup>15</sup> Nozick successfully argues that when scarcity arises a strong interpretation of the proviso, according to which labour fixes one's property in the appropriated natural resources for all time, cannot explain how anyone can appropriate

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<sup>15</sup> See Nozick, *Anarchy, State and Utopia*, p. 175 f.



rightfully. Here's Nozick's argument: assume that at some point in time, a newcomer finds himself under conditions of scarcity; the others living in this society have appropriated all the resources before his arrival. In this situation he cannot appropriate his 'fair' share in accordance with the proviso. The paradox is that in exercising his right to preserve himself, the newcomer deprives another person of her 'fixed property', and yet at the same time the newcomer's situation demonstrates that the person who appropriated before he arrived did not leave enough and as good resources behind. Thus, the second to last person should not have appropriated as she did because her appropriation is inconsistent with the proviso functioning as a reciprocal restriction enabling freedom for all. But the problems do not stop here, since if the second to last person did not leave enough and as good behind, then neither did the person before the second to last person, and so on, back to the first person who appropriated. In sum, once the chain of appropriations lead to scarcity, the proviso as specified cannot give rise to permanent, fixed property in the natural resources appropriated. Therefore, a reformulated version of the proviso is necessary to explain how it should operate after scarcity arises.

The most promising way to reinterpret the proviso, consistent with Locke's text, involves arguing that when scarcity arises, Locke's notion of 'fixed' property is softened. As we saw above, Locke argues that labour on the commons gives rise to private property '*at least* where there is enough, and as good left in common for others' (my emphasis). Scarcity entails that the '*at least*' condition here cannot be fulfilled, and thus under these conditions the proviso cannot be seen as giving rise to fixed property in natural resources. This softened, reformulated proviso can take one of two forms: it can call for a rather radical reshuffling of land ownership (Sreenivasan/Otsuka) or it can cease to require the original landowners to provide newcomers with land, and instead only either with subsistence means plus some conveniences (Simmons) or with some more limited use-right to the land (Nozick). I will return to why none of these revisions succeeds after I have addressed two other, independent sets of problems facing Locke's proviso – problems generated with the introduction of trade (2.2.2) and problems of indeterminacy regarding the correct specification and application of the proviso to particular cases (2.2.3).

### 2.2.2. *Specifying the Proviso under Conditions of Trade*

Consider what happens to the proviso once we introduce trade. Assume there are 30 units of land, two persons (A and B) originally, one newcomer (C), 5 units needed for subsistence, limited scarcity, and that the newcomer

is entitled to 10 units of land. Also, assume that because there is only limited scarcity (it is possible for everyone to live well above subsistence needs given the natural resources available), no one has the right to values created by others' labour on their fair share of natural resources. For the sake of simplicity, also assume that no one is under an obligation to give up his subsistence means to newcomers. Finally, *before* C arrives, assume that A trades with B by selling eight of his 15 units of land to B in exchange for values created by B's labour. How, then, should the proviso be applied when C arrives?

One suggestion may be that A is now obliged to give C a maximum of two units of land since this will put A at the five unit subsistence level. B, now having a total of 23 units of land (15 + 8), must supply the remaining eight units.<sup>16</sup> The problem is that this solution is inconsistent with the notion of fixed property in the values created by means of labour upon a fair share of resources. After all, B has bought the land from A by means of the values she created by her labour upon her fair share of land, and it is hard to see how those created values are not then transferred to C. Of course, we could object that in this case B must sell the land back to A, so that A can pass on what he owes to C. But this won't work because of scenarios of the following kind. The reason B can afford A's land is that she has worked immensely hard to produce a fantastic wine that A has bought over the years in exchange for parts of his land. A drank the wine long before C arrives and has nothing with which to purchase his land back from B. So, if C is to get his fair share, he must get it from B, and yet this solution seems highly unfair to B.<sup>17</sup>

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<sup>16</sup> Compatible with this interpretation is the view that in cases where one person is deprived of his natural resources by some natural disaster, he must be given a new original share.

<sup>17</sup> We could try to overcome the problem by providing a different interpretation of the proviso. For example, we could argue that the proviso still refers to the largest universalizable share, but those who cannot meet these obligations, must work for those who take on the additional burden. In our example, person A would be under an obligation to work for person B to compensate her for having taken on almost the entire burden of giving C his fair share of the natural resources. The (illiberal) problem with this solution is that despite no wrongdoing, A becomes indebted to B due to what C does (arrives). Alternatively, we could argue that amongst the three persons, A, B and C in our example, C is actually unfairly advantaged with respect to A. After all, it is not clear that B should be the only one who carries the burden of A's inability to provide C with resources. Thus, C must take on some portion of these costs. For example, it may be argued that C cannot, under these circumstances, have a right to 10 units in total, but rather must do with two fewer units plus some labour from A. This solution does not, however, make much progress with regard to envisioning

The common problem occurring with the introduction of scarcity and trade above is the undermining of Locke's confidence in the proviso. The worry is that the proviso cannot function as a reciprocal and non-arbitrary restriction upon private property appropriation under these conditions.<sup>18</sup> Because contemporary theories have not recognized the problems for the proviso arising with the introduction of trade, they have addressed only the problems related to the introduction of scarcity. This is unfortunate, of course, since solutions to problems concerning scarcity cannot also solve the independent problems associated with trade. Still, since contemporary theories recognize only scarcity as causing problems for Locke's proviso, they have attempted solutions only here. In section 2.3, I will show why those solutions are inadequate. But first, I want to talk about a different set of problems facing the proviso.

### 2.2.3. *Problems of Specification and Application of the Proviso to Particular Cases*

There is also a problem of applying the proviso (as specified) to particular cases. As we have seen, the guiding principle with respect to application is the normative idea that labour subject to the proviso gives rise to fixed property in the natural resources thereby appropriated. On Locke's theory, a person who mixes her labour with natural goods adds value to them. This is why no one else can appropriate what she has created by means of her labour on her fair share of the natural resources without wronging her. To do so is to confiscate her labour. Determining whether anyone has been wronged in this way, however, requires that we know the boundaries of any individual's property. But knowing boundaries requires that we be able to determine exactly what a person must do (physically) in order to be seen as having appropriated a particular piece of land by means of her labour. What physical actions are required adequately to set out the boundaries of one's property? I will argue that such determinations appear impossible. Consequently, problems of indeterminacy with respect to application characterize Locke's conception of the proviso and undermine its ability

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how the three persons are *equally* restricted by laws of nature that enable freedom for all. Moreover, regardless of the alternative chosen, an additional problem concerns determining how much labour A should provide the other two. In light of my discussion of indeterminacy problems in the next section (2.2.3), I believe it is fair to say that this problem alone is considerable.

<sup>18</sup> They are also inconsistent with the intuition encouraging industriousness that Locke wants his position to capture, but this issue is beside my current concerns.

to function as a non-arbitrary, reciprocal limit on private property appropriation.

Perhaps we should see boundaries as determined by an appropriate marking or staking out a particular parcel of land. What, though, constitutes an appropriate marking? We could, for example, mark a piece of land by placing sticks in the ground, putting marks on stones, building a fence or digging a ditch around the outskirts of the property. Two problems emerge: first, there appears to be no readily available reason to prefer any one of these methods over another, and second, there appears to be no readily available reason why the marks should be interpreted by someone else in one way rather than another. Therefore, we cannot reasonably assume that individuals in the state of nature will come to the same conclusions with respect to the method of marking or with respect to how to interpret the marks.<sup>19</sup> Though some ways of interpreting the marks will be better than others, there will always be more ways left, and there is no obvious reason that singles out any one of these ways as ‘more rational’. Consequently, in the state of nature, we have no single rational way of determining land boundaries in cases of reasonable disputes.

To make things worse, two persons may even see themselves as having consented to a particular boundary, only to discover that they had not considered some other important empirical factor affecting that to which they had consented. Perhaps they agree that the boundary should be in the middle of the river, but where, exactly, is the middle of the river?<sup>20</sup> Assume they discover gold in the river. Knowing exactly where the boundaries are becomes vital – and yet when they earlier consented to the boundaries, they failed to consider every relevant, empirical issue pertinent to an adequate determination of the boundaries. And of course, if they now consider these empirical questions, but reasonably disagree, then there is no reason to prefer one interpretation of the boundary over another. Consequently, if the disputing parties cannot come to an agreement, no one particular interpretation can be enforced without also subjecting one of the parties to the ‘arbitrary will’ of the other. Therefore, to be subjected only to the laws

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<sup>19</sup> I’m here staying with various traditional ways in which people have marked their properties. If we introduce more advanced ways, especially those which involve technology, it becomes increasingly hard to see how everyone reasonably can be expected to interpret these boundaries in the same way.

<sup>20</sup> I am grateful to Amy Mullin for making me develop this point.

of nature in cases of reasonable dispute some parcels of land must be seen as owned in common<sup>21</sup> or else as forever in dispute.

So far, the problem of clear, determinate boundaries has been seen as concerning only the impossibility of non-consensual property boundaries of reasonably contested property, and hence this problem appears somewhat limited in scope.<sup>22</sup> One might here object that this is not a problem for the Lockean account, since on this account the boundaries are not determined by marking as such, but by the ‘marks’ left by labour. Where one’s labour ends, there ends my property. This is surely a somewhat unreasonable suggestion, since it would entail, for example, that I must touch a coconut on its entire surface to have appropriated it. Still, even if we ignore this particular problem, it seems that the indeterminacy infects property appropriation according to the proviso in general. The main problem is that when applying the normative idea of labour-subject-to-the-proviso to particular cases, there is always the possibility of reasonable disagreement. Virtually any property, except possessions that are nearly continuously empirically – or literally physically – possessed, can be reasonably contested in the state of nature. To see why, remember that *labour* subject to the proviso gives rise to the non-consensual private property right. So we must determine what Locke means by ‘labour’. First, it is uncontroversial to say that labour must include some physical activity on the land and that the physical activity must be intentional in the sense that the appropriating person considers himself to be labouring on the land. Otherwise we would appropriate simply by walking across land or touching something unowned. Second, labouring activity must be purposive in the sense of creating something from the land or doing something with it. Yet, what is done cannot merely amount to wasting or destroying the natural resources. After all, Locke sees labour as distinguished from waste in that by labour we aim to productively utilize the natural resources. Therefore, labour involves a

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<sup>21</sup> This is a very unsatisfactory solution of course, because new indeterminacy problems arise with regard to how each person can use the common land. I cannot investigate these further indeterminacy problems here.

<sup>22</sup> At one place, Locke seems ready to accept that it may be difficult to settle property boundaries in the state of nature: “Men, at first, for the most part, contented themselves with what un-assisted Nature offered to their Necessities: and though afterwards, in some parts of the world, (where the Increase of People and Stock, with the *Use of Money*) had made Land scarce, and so of some Value, the several *Communities* settles the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so by *Compact* and Agreement, settled the *Property* which Labour and Industry began...” (II: 45).

person who is and intends to be engaged in constructive, purposive physical use of the land.

Several problems arise in applying this conception of labour under the proviso to various empirical circumstances. First, there is a problem of establishing *how much labour* is necessary to appropriate something through labour, and how much is required to meet the waste condition. For example, it seems fairly clear that if I continuously or regularly tend to my potato field it cannot be considered unused, a part of the commons, or wasted. But what if I have not touched it for a month, two months or six months? Must we grow things continuously on a piece of land in order not to be wasting it? Or what if there is a short distance between my two potato fields? Can a person consider the unused land between the fields as belonging to the commons? The general point is that if one is not, more or less, continuously physically tending to the land, it is unclear why others should recognize the obligation to stay away from it if, in fact, it is *labour* that gives a fixed right to it.<sup>23</sup> Indeterminacy problems are not, in other words, easily containable.

Let me suggest a possible solution. Assume that these problems arise from the commitment to Locke's labour intuition and that we can jettison this commitment while remaining faithful to our other Lockean commitments. We simply assume that the way in which persons use their fair shares is irrelevant to evaluating what belongs to whom. Instead, we argue that each person has a right to a fair share of land and that she has the right to use this land as she likes. Thus, it is unnecessary to investigate how much labour one must invest and whether other persons consider the use of this land wasteful or not. Under this assumption, all we need to show is that it is possible to establish the correct application of the proviso in particular circumstances, so that we can identify which particular piece of land a particular person has a right to in the first place.<sup>24</sup>

What is now necessary is simply to establish what it means to leave enough and as good behind when we appropriate property. Various particular pieces of land are empirically very different, so how do we tell whether we have appropriated correctly under the proviso? For example, because different geographical areas have different natural resources, it is difficult to see why any one person's appropriation of a particular piece of

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<sup>23</sup> I discuss problems related to distinguishing labour from waste in "Lockean Freedom and the Proviso's Appeal to Scientific Knowledge", in *Social Theory and Practice* vol. 36, no. 1 (2010), pp. 1–20.

<sup>24</sup> Naturally, in this case the problem concerning determining boundaries also resurfaces.

land cannot be challenged by another person. In any appropriation, there is no 'objective' or shared point of view from which it is obvious to all that 'enough and as good' is left behind for others. After all, no two lakes, fields, forests, etc. are equal in the sense of having the same empirical characteristics. Consequently, it is unclear why leaving behind a different lake or field is both enough to leave behind and as good as the one that has been taken. Obviously, different pieces of land can provide enough resources to secure survival and conveniences, but in virtue of what can we demonstrate that they are 'as good'? To which standard can we possibly appeal to justify the claim that this lake here is 'as good' as that lake over there, especially when they do not share the same physical characteristics? How can one person justify his judgment over that of another? 'You say you have left enough and as good behind for me, and I say you haven't' – and I then point to the empirical differences between the land which you have appropriated and the land which you have left for me. How can you possibly demonstrate that I am mistaken in my evaluation of the land? If you try to justify taking a particular piece of land I want merely by claiming that another piece of land is equally good, then surely I can reasonably counter your argument by saying, 'if they are really that equal, why don't you take the other piece?' Only in the case where you and I have exactly the same subjective preferences could we come to the same conclusion regarding the values of various pieces of land. But even this does not establish who gets which piece. And in cases where we do not have the same preferences, there is no reason why I should let you get away with having obtained what I consider the better piece.

The general problem seems to be that the unilateral appropriation of a piece of land cannot engender any obligations on the part of others to respect a right to the piece. And if the only reason anyone settles for what she considers to be a less valuable piece of land is that she is weak and wishes to avoid a violent conflict, then we have failed to explain the possibility of fair shares in the state of nature. Moreover, it is important to note that since different geographical pieces of land and various natural resources are empirically different, allowing unlimited empirical facts, including knowledge of 'who appropriated what when' and all persons' subjective preferences, will not solve the problem of determining which things are equally good. We need the criteria by means of which we can evaluate the value of things – and more empirical knowledge will not solve this problem. For example, even if I know everyone's subjective preferences and I have complete knowledge of all empirical facts, it is still unclear how I should adjust my rightful appropriation in response to everyone's subjective preferences, and vice versa. Unless there is a perfect harmony, so

that no two persons ever want the same piece of land and no coercion is ever needed (except in response to vice), just interaction appears impossible. Yet the Lockean ideal solution must provide us with the tools needed to determine objective, particular boundaries in the empirical world, independent of possible, coincidental harmony between subjective preferences. The underlying problem is, I believe, that the proviso is a normative principle to which there is no, one indisputable empirical answer, which is why more empirical information will not solve the problem of indeterminacy regarding application.

At this point one may object that the above problems can be solved if we agree to use one particular interpretation of ‘labouring activity’ as well as one particular interpretation of how to apply the proviso in particular circumstances. This solution is no solution, however, since it still subjects our right to appropriate to one another’s arbitrary choices, namely to the odd chance that others might consent to our particular appropriation. Additionally, in this case we have still failed to explain the very thing Locke set out to explain, which is the possibility of *non-consensual* or *enforceable* property rights in the state of nature. Indeed, what distinguishes Locke from the rest of the libertarians of his time is exactly his claim that he can explain how individuals can rightfully appropriate *without first* obtaining consent from others (without agreement).<sup>25</sup> Therefore, if we need to point to the possibility of actual, empirical consent in order to explain the possibility of rightful private property, then Locke has failed to give a non-consensual account of private property appropriation in the state of nature.<sup>26</sup> And this is what is needed to justify the natural executive right

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<sup>25</sup> In “Introduction: Left-Libertarianism – Historical Origins”, H. Steiner and P. Vallentyne, (eds.), *The Origins of Left-Libertarianism. An anthology of Historical Writings*, (New York: Palgrave, 2000), pp. 1–19, Cunliffe explains that libertarian natural rights-thinkers in the 17<sup>th</sup> century consider “three main property regimes in external natural resources... to be consistent with [the idea of self-ownership]: no property (Pufendorf), joint ownership (Grotius), and equal shares (Locke)” (p. 3). The differences concerning which property-regime is consistent with the idea of self-ownership in the libertarian tradition arise from disagreements concerning how particular persons can obtain private property from the earth God gave them in common. Both Grotius and Pufendorf (2000: 21–31) argue for the necessity of tacit consent (through tradition or custom) or explicit consent (through positive laws) from the community rightfully to use or appropriate private property from the common property. In contrast to Grotius and Pufendorf, Locke argues that labour subject to certain restrictions gives rise to rightful private property *without* consent from others.

<sup>26</sup> In “Nozick’s Reply to the Anarchist: What He Said and what He should Have Said about Procedural Rights” I argue (against Nozick) that a private arbiter cannot resolve indeterminacy disputes.



(each individual's natural right to enforce the laws of nature), without which strong voluntarism as the liberal ideal of political obligations is also impossible.

### 2.3. *Contemporary Lockean Proviso*

I return now to the problem of the more general specification of the proviso. I will consider four major, contemporary conceptions of the Lockean proviso that seek to overcome the problems noted above with regard to scarcity and newcomers. I start with Nozick (2.3.1) and Simmons (2.3.2), since they agree that the newcomers do not have a right to acquire land, but only to use land. After arguing that these positions seem to increase rather than solve the problems, I look to Otsuka and Sreenivasan for help (2.3.3). I argue that although their positions have the advantage that everyone gets a right to acquire land, their provisos incur the other problems: also they appear to subject some to the arbitrary choices of others and they are not individually enforceable.

#### 2.3.1. *Robert Nozick's Proviso*

In *Anarchy, State and Utopia*, Nozick argues within a Lockean framework. A major aim in this work is to solve the problem of rightful private property appropriation under conditions of scarcity. As should be clear, the proviso delineates a precondition on rightful original acquisition of private property, and on Nozick's understanding, "[t]he crucial point [of Locke's proviso] is whether appropriation of an unowned object worsens the situation of others" (175).<sup>27</sup> We saw that Nozick's aforementioned 'zip-back argument' shows that Locke's proviso is inconsistent with rightful, original acquisition in times of scarcity. Nozick's solution to the zipping back problem involves a softening of the proviso. He suggests that a person may appropriate under conditions of scarcity given that he 'compensates' newcomers who, as a result of the appropriation, face conditions under which original appropriation is no longer possible (178). Compensation, Nozick maintains, can consist in either access to use the landowners' land or access to use or acquire some of the social product that landowners have produced upon their land. And since the capitalist system produces a large social product and newcomers have access to this social product through markets, it reconciles the landowners' original appropriation of all the land

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<sup>27</sup> All unidentified references in this section (2.3.1) refer to Nozick's *Anarchy, State, and Utopia*.

with the newcomers' right to acquire a fair share of material resources. This softening of the proviso is seen as maintaining its core idea that private property appropriation must not leave others in a worsened condition.

A first, major problem with this argument is its inconsistency with the Lockean, bilateral logic of rights and duties. The rightful relation the proviso is supposed to establish between a particular newcomer and a particular landowner is a bilateral relation: each particular landowner's duties to each particular newcomer should correspond to each particular newcomer's rights towards each particular landowner – and vice versa. Thus, a particular landowner cannot appeal to advantageous operations of markets as such to relieve him of his duty under the proviso to establish a rightful relation between himself and a particular newcomer. In order for the proviso to function in its role of securing rightful bilateral relations (reciprocal rights and duties) between particular persons, the appropriator must ensure that *he* (and not some other possible person or system) leaves each newcomer no worse off than if he had not appropriated his land. If the particular landowner in question currently possesses more land or more material resources than he has a right to under the proviso, the fact that others provide newcomers with more land or more material resources than they have a duty to do under the proviso cannot be used by him to legitimate his unjust shares. If the landowner possesses too much, then he possesses too much regardless of what others do with their land and material possessions.

Another way to illustrate this point involves imagining a society in which there is scarcity, but also some person who is both tremendously industrious and generous to newcomers. So this generous, rich person keeps producing a large surplus and gives it away to newcomers or provides all newcomers with employment opportunities. The fact that the generous person gives her surplus away or provides employment for all does not entail that the other landowners in this society have rightfully appropriated and are relieved of their obligations under the proviso. The point is that Nozick cannot permit a particular landowner to appeal to a relation between some or all of the *other* landowners – or markets as such – to justify the relation between himself and particular newcomers since this involves contradicting the bilateral logic informing the Lockean position. So, even if there are benefits that persons can obtain by participating in a capitalist economic system, this cannot be used by a particular landowner in relation to a particular newcomer to justify his claim that he does not

have to give the newcomer access to his land. Therefore, if a person's right to his particular piece of land is undermined when scarcity arises, then insofar as Nozick wants to stay within the Lockean bilateral framework, he cannot argue that an economic market system *as such* can rectify this.

Now, one may object that I have presented Nozick's argument in the wrong light. On a more sympathetic reading, Nozick is not saying that capitalist markets as such can fulfil the requirements of the proviso, but that a person who engages in the capitalist markets in the right way, *thereby* fulfils his requirements under the proviso. By participating, the landowner enables the newcomers to acquire their fair share, and hence fulfils his obligations under the proviso. But this does not solve the problem because an individual cannot in principle ensure that the system actually provides the newcomers with their fair share. That is to say, if a landowner wants to appeal to his participation in the system to redeem his appropriations, he presumably must have a right to ensure that the system as a whole really will provide the newcomers with such general conditions. After all, we are after a notion of enforceable property rights and duties here. Yet it seems impossible that individuals have an enforceable right to ensure that the 'system' or everyone will act in such a way that newcomers have access to appropriate a fair share of the resources. It is impossible that everyone can assume such systemic control at the same time, and consequently they cannot enjoy such a right *as* individuals. And having such a right *as* individuals is required to justify Locke's natural executive right.

Another difficulty in Nozick's solution to the 'zipping-back' problem is procedural. It builds in a certain asymmetry between the bargaining parties that necessarily undermines the possibility of a just result of the procedure of determining compensation. The way in which Nozick lets markets determine the amount of compensation favours original landowners over newcomers. First, landowners are not required to put land on the market, and the landowners seem to have the right to set terms for use so that the newcomer's activities on the land do not undermine the landowners' own (long-term) plans for their land. For example, the landowner presumably may prohibit the newcomer from burying nuclear waste on the land, even if the landowner himself has a right to use his land in this way. Second, the original landowners can choose rather freely which of the various means or 'social products' to offer in return for a newcomer's labour and as compensation for lack of access to raw materials. There is no explanation of how the newcomers are assured rights to *particular* means or social

products.<sup>28</sup> Third, newcomers have no means but their labour power, which radically undermines their bargaining position.

For these reasons, Nozick's proviso not only makes an illegitimate appeal to markets and deprives newcomers of a right to appropriate land and raw materials, but it also favours landowners with regard to the procedural question of which and how much compensation the newcomers must have a right to. Consequently, Nozick's solution is unacceptable. It allows one party arbitrarily and unilaterally to decide how the rights of another are satisfied. Rather than being subject to reciprocal laws ('side-constraints') enabling individuals' freedom, some particular persons are (wrongly) given the right to apply these laws on behalf of all the interacting persons – and they are given the right to apply them in a way that favours their own situation.

### 2.3.2. A. John Simmons' Proviso

Nozick and Simmons agree on the fundamental assumption that the proviso does not give everyone a right to land. The main difference between their conceptions of the proviso is that Simmons' proviso secures everyone more material resources than does Nozick's, which is why we commonly refer to Simmons' libertarianism as 'left-wing' and Nozick's libertarianism as 'right-wing'. After a brief outline of Simmons' position, I argue that despite its strengths and impressiveness as a Locke interpretation, his conception of the proviso actually exacerbates the philosophical problems inherent in it.

According to Simmons, individuals originally have an enforceable right to appropriate a fair, but not a particular share of the world's resources through labour (1992: 238, 281, 291f).<sup>29</sup> Labour, in turn, is seen as a purposive, intentional activity aimed at satisfying one's basic needs ('self-preservation') and obtaining some conveniences ('self-governance') (1992: 272–275). The reason labour is seen as giving rise to an original, natural, non-conventional and non-consensual right to the particular goods

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<sup>28</sup> Of course, it is tempting to argue that Nozick's appeal to the markets only holds given that the markets *actually* do provide newcomers with access to a fair amount of the relevant social products, whatever they are. This counter-objection fails, however, because we still need an account of which particular goods everyone has a right to – and in giving this account we cannot appeal to the original property owners' choices regarding which products to put on the market. And, of course, unless the property owners are permitted to produce what they want to produce, they are not free in a liberal sense.

<sup>29</sup> In this section I refer to Simmons' various works by publication year only.

appropriated is that it is necessary to “secure” our rights to self-preservation and self-governance (1992: 224f, 236f, 242). Simmons also emphasizes that he wants to capture the “widespread or enduring intuition about property rights... that labor in creating or improving a thing gives one special claim to it... [so that] it would be wrong for others to take it away” (1992: 223, cf. 318ff). Labour therefore not only gives one a right to the “particular products” of one’s labour (1992: 248), but it also gives one a right to *exclusive* property rights in these goods (1992: 230f, 275). Consequently, like Nozick, Simmons holds that labour subject to the proviso protects a use right to resources, but in addition, he argues that labour subject to the proviso must give rise to *exclusive* use rights or exclusive private property rights. The more limited use right of the kind Nozick gives to newcomers is sufficient for self-preservation, Simmons maintains, but not for self-governance (1992: 275f). On Simmons’ view, self-governance requires liberal independence from each other’s choices with regard to the fruits of our labour on our fair share of the material resources. Self-governance therefore requires that we are free to set and pursue our own ends with our rightful means, and only exclusive property rights can ensure this (1992: 261ff).

For Simmons, the main point of the proviso is that it prohibits “appropriation that denies others an opportunity equal to one’s own” (1992: 292). He also argues that the proviso requires that we calculate the fair share of material resources as relative to the number of persons existing in a society at any given time or as relative to the number of persons who actually want to appropriate (1992: 295). Thus, Simmons argues, “the ‘fairness’ of acquisitions... is *relative* to the time at which they [the appropriations] occurred” (1992: 297). Moreover, under conditions of scarcity, the proviso is softened in that it is met if and only if newcomers can obtain ‘the opportunity of a living’ or ‘a condition of non-dependence’.<sup>30</sup> When scarcity arises, those who have already appropriated land do not have to give their land to the newcomers, but must provide them with alternative ways to acquire the

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<sup>30</sup> Simmons argues that the proviso secures newcomers the rights to “the opportunity of a *living* – a condition of nondependence, in which one is free to better oneself, govern one’s own existence... This requirement is... consistent with one’s being unable to appropriate. But it... requires not only an unreduced level of material well-being, but independence and opportunity... Each appropriation must simply leave enough and as good of the relevant goods in common for others, if there is no alternative way to secure the rights of others to self-preservation and self-government. The only relevant baseline is the condition of others prior to the appropriation. Appropriation must initially leave others with no less opportunity to exercise their rights (to a fair share) than they had before the appropriation took place” (1992: 293f, cf. 291f).

same level of material well-being and conditions of self-government that they themselves (the original appropriators) enjoyed. After the introduction of money, Simmons argues, the proviso will not permit large monetary inequalities insofar as these are incompatible with everyone obtaining reasonable opportunities for self-preservation and self-government (1992: 293f, 302-6, 314-319, 321).<sup>31</sup>

Simmons emphasizes that the practical problems of calculating exactly what fulfilling the proviso requires may be “enormous, if not insuperable” (1992: 295). Nevertheless, he maintains that his interpretation of the proviso results in “a theoretically clear (or clarifiable) limit on natural property rights, an objective measure of lawful accumulation” (1992: 294f), namely an amount that “preserves for each an opportunity for independence and self-government, not just self-preservation” (1992: 291, cf. 225, 284, 291-293). Moreover, he argues that “Governments must settle... conflicts” regarding what the fair share for newcomers is (1992: 298). Here one might naturally ask why Simmons claims that “governments must settle conflicts” regarding fairness, including the rights of newcomers, when his argument is aimed at explaining the possibility of justice within the state of nature. After all, Simmons aims to justify individuals’ natural executive right and strong voluntarism as the liberal ideal of political obligations, in which case

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<sup>31</sup> By consenting to the introduction of money, Simmons argues, people must be seen as consenting to more inequality. Yet contrary to Locke, he argues that the best Lockean position cannot conclude that there are no restrictions upon permissible inequality after the introduction of money. Simmons gives two reasons in support of his view. First, the consent involved must be seen as a *tacit* consent to the use of money (1992: 304). He then argues that though this tacit consent can be seen as permitting some inequality, it cannot be seen as permitting dependence or enslavement. After all, by tacitly consenting to the monetary system, one cannot possibly be seen as consenting to all kinds of unforeseeable consequences of this system (1992: 303). Second, Simmons questions whether the tacit consent involved with respect to the introduction of money can be correctly described as voluntary consent, since these kinds of choices are typically not considered sufficiently free (1992: 304). Indeed, the better Lockean position should justify the monetary system without any appeal to tacit consent – just as Locke himself does with regard to private property in general (1992: 304). For similar reasons, Simmons argues that unrestricted capitalist property appropriation is unjustifiable because it is inconsistent with the proviso’s requirement of leaving enough and as good materials behind. Indeed, he sees property distribution as it presently exists as unjustifiable since most contemporary private property systems permit accumulations of wealth that make it impossible for the less fortunate to free themselves from “dependence and subservience” (1992: 276f). It therefore seems correct to argue that Simmons judges that persons finding themselves in these systems can give rise to “popular resistance to government” (1992: 317), since the government fails to protect their basic property rights. This seems to make the point regarding the need for specifying what to do when ‘conditions of self-preservation and self-governance’ do not exist, more urgent.

the solution to fairness questions must be conceivable without appeal to how governments (civil society) can solve conflicts. Hence, I believe that Simmons is here merely claiming that because he has presented a theoretically clear conception of the proviso, these conflicts are not ‘insuperable’. Private individuals can solve these conflicts on their own; it is not in principle necessary to appeal to a government to solve them. Instead, Simmons is merely pointing out that the proper role of government naturally includes settling such conflicts in accordance with the proviso.

It is also important to emphasize that like Nozick, Simmons’ position does not entail a radical redistribution of anyone’s original fair share of natural resources, including land, each time newcomers arrive. The proviso only requires that newcomers are provided with conditions under which they can exercise their right to self-preservation and self-government, and radical redistribution is not required for this. It is only in cases where newcomers do *not* have opportunities for an independent and decent living that they have the right to appropriate the property of existing property owners. Presumably, one reason Simmons is hesitant to permit radical redistribution is that it entails what he calls ‘purely conditional property’, meaning that one’s right to one’s private property thereby becomes radically conditioned by the proviso. Each time the proviso must be applied to regulate new relations (between existing property owners and newcomers), all current property holdings are potentially up for redistribution. And such a notion of purely conditional property undermines Simmons’ conception of the labour intuition and the liberal conception of freedom it enables.<sup>32</sup> That is, as we saw, Simmons views labour subject to the proviso as giving the labouring individual a special, exclusive claim to the values he creates, and this is seen as essential for individuals to be independent of one another. Their exclusive rights to the values created by their means are necessary for them to be able to set and pursue ends of their own or to live their own lives. Arguing that the proviso only gives a right to purely conditional property and that private property can be radically redistributed each time newcomers arrive, serves to undermine this conception of how

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<sup>32</sup> As mentioned below, I take it that this is the main reason why Simmons does not give everyone a right to land as does Otsuka and Sreenivasan. To put the point differently, a major objection from Simmons’ position to the positions of Otsuka and Sreenivasan is that the latter positions entail purely conditional ownership and radical redistribution, which, in turn, is incompatible with a liberal conception of private property ownership. Instead of sacrificing freedom for strict equality, Simmons therefore tries to balance the concerns of freedom and equality by softening the proviso in the ways described above.

labour subject to the proviso secures freedom or independence. Simmons' description of his proviso as 'moderate' therefore aims to capture how it rejects unrestricted capitalist appropriation, the current property distribution, purely conditional property, and radical redistribution.<sup>33</sup>

I will limit also my criticism of Simmons' account of the proviso to how it operates under conditions of scarcity. Remember that Simmons argues that labour subject to the proviso results in exclusive property rights, and that under conditions of scarcity those who have already appropriated can provide other resources to newcomers. The first problem we encounter is similar to one we found in Nozick, namely that because existing property owners are not required to offer land to newcomers, some persons end up with a right to land while others do not. The problem is that it is unreasonable to claim that having an exclusive property right with regard to land and not having such a right can be seen as being reciprocally or equally restricted by the laws of nature. The possibility that a newcomer can obtain land is subject to whether or not existing landowners choose to relinquish some of their land, and this amounts to an objectionable asymmetry in the relation between them. Indeed, not providing a newcomer with land also seems to involve a paradox for Simmons. The problem is that since landowners have exclusive property rights, they cannot be obliged to let newcomers live on their property, and yet presumably the newcomer must have somewhere to live. Consequently, I believe that any reasonable conception of the proviso must secure each person a right to obtain land for her exclusive use.

Second, I believe that Simmons' proviso under conditions of scarcity is too indeterminate to fulfil the function he claims for it. Simmons admits that it is very difficult practically to establish exactly what amount of resources newcomers will have a right to – it is 'enormous, if not insuperable'. That is, applying the principle in actual circumstances is seen as a practical but not a theoretical problem. Because the proviso is seen as a '*theoretically* clear principle', it can serve as the basis of the (non-consensual) right to exclusive use of private property. In my view, however, this argument is unconvincing. To see why, let us grant Simmons that the principle is 'theoretically clear' and assume full empirical knowledge. Even so, Simmons' principle is too indeterminate with regard to the particular

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<sup>33</sup> The best interpretation of the Lockean position on private property, Simmons argues, is one that involves "neither a defense of unlimited capitalist appropriation and a conservative acceptance of all existing property relations nor a defense of purely conditional property and radical redistributionism" (1992: 222, cf. 317f).



resources it is supposed to regulate. We cannot reasonably believe that individuals will arrive at the same conclusions concerning how to apply it. Individuals have vastly different conceptions of which particular kinds and what particular amounts of resources are required for 'self-government', and they are even likely to differ significantly on the question of what constitutes a decent 'subsistence-level'. It is not at all clear that any such disagreements reflect unreasonableness on behalf of the interacting partners. Rather, it seems fully possible that the disagreements can be reasonable. Without further specification of the type and amount of resources we have a right to or of a way of creating a more determinate standard for what counts as self-governance and subsistence, we do not have a proviso by means of which persons can identify exactly what the fair share of material resources amounts to. Persons who use coercion to enforce an indeterminate proviso cannot determine whether or not their use of coercion is justified, since enforcing one's particular, albeit reasonable conception of the proviso involves enforcing one's arbitrary will rather than simply a law of nature. Since there are many reasonable, competing interpretations of the proviso available, enforcing any one of them is to subject others to one's arbitrary will rather than to reciprocal, non-arbitrary restrictions.

Another challenge to Simmons' proviso confronts his argument that the proviso's requirements are fulfilled if newcomers find themselves in 'conditions' of opportunities for living independent lives. There are two problems with this claim. On the one hand, it is not clear that opportunities for independence can be provided if persons have no right to appropriate land for their exclusive use. For example, if we argue that conditions for independence can be provided through opportunities for employment in the economy, then it seems that newcomers can be forced to accept that the only way they can appropriate their fair share is by virtue of trade (labour for products). But this solution undercuts Simmons' commitment to the idea of independence, since persons are now required to be dependent upon one another (through trade) to secure their 'independence'. Moreover, if the proviso entails an obligation to provide others with opportunities of trade and employment, then it is not clear that a requirement of this sort is consistent with Simmons' commitment to 'exclusive property rights'. Providing opportunities of trade and employment to others requires that individuals make their private property available to others.

On the other hand, for reasons similar to those given in relation to Nozick's account, it is unclear that Simmons can make use of arguments that appeal to *conditions* of opportunity and independence in this way. This is because an appeal to 'conditions' is reminiscent of Nozick's reliance

on a (capitalist) 'system' to solve problems that must be addressed in bilateral relations between particular individuals (in the state of nature). Simmons' proviso is supposed to explain what each person in the state of nature must do with regard to particular others in order to respect the laws of nature with regard to private property. The problems facing Nozick also face Simmons. First, it seems impossible for a single individual person to provide another (newcomer) with all that would be required to constitute *conditions* of opportunity and independence. How can all the individuals simultaneously assume the control needed in order for the totality of relations ('the system') to fulfil its duties under the proviso on their behalf? And yet, if an individual cannot unilaterally enforce what the proviso requires of her, she cannot be seen as having a natural executive right.

Second, and also similarly to the argument against Nozick, I do not believe Simmons' Lockean commitments permit him to argue that a set of general conditions can fulfil the function of the proviso. The bilateral logic of the Lockean position seems to require an interpretation of the proviso, according to which *each* particular person must ensure that *his particular* property holdings are reconcilable with the appropriation rights of *particular* newcomers. The proviso must regulate their bilateral interactions reciprocally. A person cannot rightfully claim that he has fulfilled his duties under the proviso towards a particular newcomer by arguing that he has no obligations because others are more than fulfilling theirs. Again, it seems that the proviso is inconsistent with arguments according to which a particular person appeals to the existence of conditions or systems provided by others to relieve him of the duties he has under the proviso.

At this point one might object to this last argument against Simmons and Nozick that I misunderstand what the work 'conditions' or 'systems' is supposed to do. One might argue that the point is simply that certain empirical conditions make the application of the proviso *irrelevant* to regulating particular persons' interactions. This is because these empirical conditions emulate original appropriation under conditions of abundance, where there is (on the Lockean conception) never a problem of leaving enough and as good behind. In cases of abundance the proviso comes into play, but on the Lockean account there are never any problems in fulfilling it since there is always enough and as good natural resources available to all. Similarly, when the 'capitalist system' or 'conditions of independence' exist, the proviso is always fulfilled because in these scenarios there is always enough and as good material resources available to everyone. This analogy between original appropriation under conditions of abundance ('the commons') and the 'markets' or 'conditions' is a false analogy,

however. In the state of nature, markets or ‘conditions of independence’ refer to a set of voluntary, normative relations between persons. Consequently, a person’s access to these ‘markets’ or ‘conditions’ (in principle) goes through others’ consent. In contrast, in the state of nature ‘the commons’ are non-relational in nature, and consequently a person’s access to the commons does not (in principle) go through others’ consent. And the Lockean, as emphasized above, needs a non-consensual account of private property appropriation to justify the natural executive right. This is why abundant ‘commons’ can do the work of fulfilling the proviso, whereas ‘the markets’ or ‘conditions’ cannot. The fact that those participating in markets or in enabling these ‘conditions of independence’ are likely to consent to give the newcomer access is irrelevant; his ‘rights’ are still made dependent upon others’ consent. I do not therefore believe that this counter-objection overcomes the problems noted above.

Another way of defending Simmons here involves accepting that individuals cannot have a right to (and hence can use coercion to) create conditions of opportunity and independence and they can also not be forced to become dependent upon trade. Correspondingly, Simmons could argue merely that if these ‘conditions of opportunity and independence’ happen to exist, then persons may choose not to invoke their enforceable rights under the proviso. After all, Simmons does argue that when conditions of opportunity and independence are not met newcomers have a right to appropriate some of the property of existing property owners (1992: 298). So, on this alternative reading, we go a little further and argue that newcomers can always choose to appropriate some of the original property owners, but newcomers can choose to take advantage of what the labour markets (or ‘general conditions’) offer instead. Still, regardless of whether we read Simmons as arguing that the right to appropriate the original landowner’s land is always an available choice for newcomers or that this is their default option when markets do not function, the problem remaining is to explain what, exactly, the newcomers have a right to appropriate from the original landowners if this is what they choose or must do. Obviously, the answer to this question cannot involve a reference to ‘conditions of opportunity and independence’, since we are now explaining what is required when those conditions are not met or, alternatively, when we do not want to be dependent upon others (trade) in this way. Unfortunately, an explicit answer to this question is absent from Simmons’ account. This leads us to infer that the rightful amount of resources is whatever is required for ‘self-preservation’ and ‘self-government’. But as argued earlier, this too is an indeterminate standard and so cannot be Simmons’ way out of the

problem. Consequently, Simmons' account still fails to provide a successful interpretation of the proviso under conditions of scarcity.

To sum up, I have argued that four problems of specification arising in relation to Nozick's and Simmons' provisos under conditions of scarcity require the following amendments to their positions. First, the content of the proviso must be made more determinate so that it can identify the specific ways in which already acquired property must be redistributed. Second, it seems unreasonably unfair if the proviso does not give everyone a right to land. Third, it is problematic to appeal to 'conditions' or 'systems' of interaction when delineating an individual's rights and duties on a Lockean account. And fourth, even if we set aside the issue of whether or not one can appeal to 'conditions' or 'systems' to relieve oneself of the obligation to offer some of one's private property to newcomers, we still need a conception of the proviso that explains what our obligations are when the 'conditions' or 'systems' are not in place. In my view, the most promising solution to the first two problems involves arguing first that newcomers have a right to a fair share of land, and subsequently arguing that we can establish what this amount of land is. We can then evaluate whether this solution is consistent with the third and the fourth requirement, namely whether the solution amounts to a proviso that individuals in the state of nature can, in principle, meet and enforce on their own.

### 2.3.3. *Gopal Sreenivasan's and Michael Otsuka's Provisos*

The most promising Lockean provisos of the kind we are looking for are found in the works of Michael Otsuka and Gopal Sreenivasan. *Prima facie*, Sreenivasan's and Otsuka's solutions seem preferable to those of Nozick and Simmons, for they not only give all persons a right to land, but also they tie the proviso to something empirically measurable: the total welfare potential of the land divided by the number of persons. (The difference is that Otsuka adjusts welfare potential in response to persons' innate labouring capacities.) Therefore, these solutions appear do better regarding the charges of unfairness (inequality) facing Nozick's and Simmons' solutions and to lessen the problem of application. Nevertheless, I believe that these solutions remain equally problematic with respect to the third and fourth requirements concerning the appeal to systems or conditions to justify appropriation and an explanation of our obligations such that the proviso is individually and non-consensually enforceable. It turns out that Sreenivasan's and Otsuka's solutions face a dilemma: either they cannot appeal to economic systems at all, and we are back to square one, or they must let individuals' consent to the economic systems do the justifying

work, in which case they must give up on the Lockean ambition of finding an individually enforceable proviso.

Sreenivasan argues that if all persons start out with “the largest universalizable share of land”, then the requirement of the proviso is met.<sup>34</sup> The largest universalizable share is calculated on the basis of the ‘comfort and support’ (welfare) which the various pieces of land can produce divided by the number of persons who have a right to appropriate their fair share of these resources. This calculation is seen as a function of all the variables that influence the welfare that can be produced from the land, including available technology, fertility and economic organization (117, including note 54).<sup>35</sup> <sup>36</sup> Otsuka argues in a similar fashion. The main, relevant difference is that Otsuka includes the natural abilities of the persons appropriating the land as a relevant variable when calculating the welfare potential of the land, which entails that the disabled obtain a right to more valuable land than the able-bodied. Otsuka then argues that if we assume that persons have ‘normal’ tastes, meaning that they also want luxuries, then by giving the disabled possession of the luxury goods, their rights can be secured through trade (Otsuka, *Libertarianism without Inequality*, pp. 30ff). He gives an example in which a majority of able-bodied persons and a minority of disabled persons inhabit an island. By giving the disabled persons control over the beaches and the able-bodied the right to the farmland, ‘robust rights to self-ownership’ can be secured to both parties. By ‘robust rights to self-ownership’ Otsuka means that both the able-bodied and the disabled can set and pursue their own ends without being forced to labour for others and also without any coercive redistribution (Otsuka, *Libertarianism without Inequality*, pp. 32–34), since both parties’ rights can

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<sup>34</sup> Sreenivasan emphasizes that this reading of the proviso is meant as a sufficient, and not a necessary requirement (Sreenivasan 1995: 115). This means that if it is empirically the case that all persons start out with the largest universalizable share, then the proviso is satisfied. Since I am exploring a proviso that can function as the critical standard individuals can rightly enforce when they exercise their private property rights in the state of nature, I investigate the possibility of persons having a coercive right to appropriate the largest universalizable share as understood by Sreenivasan and as nuanced by Otsuka.

<sup>35</sup> All unidentified references in this section refer to Sreenivasan’s *The Limits of Lockean Rights in Property*.

<sup>36</sup> Similarly to Simmons, Sreenivasan says that calculating the rightful share “could manifestly be discharged only by a civil state” (117). Since Sreenivasan also aims to stay within a Lockean framework, by ‘manifestly’ here he presumably means that such a calculation is incredibly difficult, but not in principle impossible for any one individual.

be secured through trade (farming products exchanged for access to beaches).<sup>37</sup>

Why, then, are these conceptions of the proviso problematic? Primarily, the worry is how to take into account the currently available economic system when specifying the welfare potential of a particular piece of land.<sup>38</sup> These are important considerations because the economic system in a particular area will figure into any calculation of the welfare potential of land. For example, assuming no trade, the welfare potential of oil-land is presumably very little, and possibly zero, whereas on the assumption of trade, the welfare potential can be enormous. Moreover, if we assume an economy in which some persons lack an opportunity to trade on equal terms with others, then the welfare potential of otherwise equal pieces of land will not be the same. Since there is no wrongdoing involved in not wanting to trade on equal terms with others in the state of nature, we must take into account these empirical facts about economic systems when we calculate particular persons' fair shares. In addition, presumably persons cannot be forced to rely on trade, since this is inconsistent with the right to set and pursue one's own ends. The problem is that it seems that we have to take economic factors into account in order to have the shares come out fairly, but we cannot make the economic factors static without limiting a person's freedom to change her economic practices. So there is no consistent economic foundation for calculating the welfare potential of a piece of land. This makes it tempting to argue that we should ignore economic factors altogether. But if we ignore economic factors and also do not force people to become dependent on trade, then it seems that each person must have a right to a fair share of each natural resource. Thus we undermine the point of calculating a fair share on the basis of welfare potential, and we are back to square one.

Let me consider one possible solution to this problem. Assume that everyone gets together and agrees to trade with one another on equal

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<sup>37</sup> Any additional costs required to secure the rights of the disabled persons can come through fines charged against criminals for their wrongdoing (Otsuka, *Libertarianism without Inequality*, pp. 31–53).

<sup>38</sup> In this paper I set aside one important problem that arises in relation to this conception of the proviso. On the largest universalizable share conception of the proviso no one has a right to set and pursue any particular end, but only to obtain a certain level of welfare. The problem arising is that those who find ways to enhance the welfare potential of land can (allegedly rightfully) undermine other persons' rightful claims to their particular private property. I explore this problem in "Lockean Freedom and the Proviso's Appeal to Scientific Knowledge".

terms, and they decide to institute a capitalist economic system. Ignoring the problem of newcomers, what, exactly, is it that they agree to? They may agree to calculate the fair share by stipulating the net current market value as the welfare potential of various pieces of land and divide it by the total number of claim holders. Obviously, this is probably an insurmountably difficult task which we currently do not have the knowledge to undertake. But in good Lockean spirit, let us ignore the practical difficulties. Can they employ this solution? In my view, they cannot without thereby letting some persons' choices and preferences determine the fair shares of others.

To see the problem, remember that calculations of this kind must employ indifference curves, which are the basis of any supply and demand curves used to assess the market value of things.<sup>39</sup> The problem, as pointed out by Nozick, is that there is no neutral point of view from which we can select the 'correct' indifference curves. On the one hand, we can choose a hypothetical alternative, according to which we stipulate what we believe persons typically (statistically) or reasonably (given human bodily needs and societal level of development) want and calculate the net value of each individual's fair share on the basis of the corresponding indifference curves. The problem with this alternative is that there will be reasonable disagreement regarding which hypothetical indifference curve is better than another, and therefore there is no reason to calculate the fair share on the basis of one particular indifference curve rather than another one. Also note that we cannot have the right against others unilaterally to designate some particular individual to make the choice of which hypothetical indifference curve to use, because that amounts to one person authorizing someone else to exercise a third person's rights on his behalf. Consequently, each person's actual consent is needed to justify also the authorization of someone to act on behalf of everybody in this way, which is to say that this strategy requires us to invoke everyone's actual consent a second time to end up with rightful determinations of the fair share of resources.

On the other hand, the alternative is to use as our basis the interacting persons' actual indifference curves, in the sense that we collect related empirical data on everybody's preferences and then we use this information as the basis of our calculation. This alternative, however, succumbs to the same problems encountered under the assumption that current

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<sup>39</sup> Indifference curves feature prominently in economic theory. They are used in graphs showing which combinations of various goods leave a customer equally satisfied, meaning that every point on an indifference curve yields the same utility for the customer.

fluctuating economic practices can be a part of the calculation of welfare potential. That is, as persons' actual preferences change, so will the basis of the calculation, and so also the calculation of fair shares. Again, rather than arriving at an objective measure by means of which we can identify which fair shares we have a right to independent of our individual, empirical and subjective desires, we are merely building those desires into the calculation itself. The consequence is that everyone's fair share is constantly affected by the changing desires and preferences of each individual, including, of course, changes that result from individuals' choices – whether one's own or someone else's.<sup>40</sup> Hence rather than having overcome the problem of subjecting the determination of fair shares to someone's particular preferences and choices, yet again, what determines the fair share is everyone's particular preferences and choices. In addition, with Simmons, we may reasonably argue that it is hard to see how such a 'purely conditional' conception of private property actually secures people's freedom to set and pursue ends of their own over time, since what counts as their means in principle changes each time someone's preferences change for some reason. Consequently, rather than envisioning everyone's arbitrary choices being restricted reciprocally by laws, everyone becomes restricted by everyone's arbitrary choices. Finally, of course, if consent to trade as equals and to use indifference curves to determine fair shares in a capitalist economy is necessary to find a workable proviso, then we have failed in our attempt to help Locke find an individually enforceable conception of private property appropriation.

### 3. Conclusion<sup>41</sup>

The sum of arguments given in this paper does not provide a conclusive refutation of the Lockean proviso. I do believe, however, that they justify

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<sup>40</sup> To give one example, my new, increased preference for Californian pinot noir can be the result of my decision to go to California to try some or the result of my friend's choice to bring me a bottle of this treasure. But my changed preference can also simply reflect that my palate is changing for some unknown reason.

<sup>41</sup> Many thanks to Arnt Myrstad, Arthur Ripstein, Gopal Sreenivasan, Sergio Tenenbaum, and Shelley Weinberg for numerous discussions of the ideas presented in this paper. Thanks also to Daniel M. Silvermint for his comments on a presentation of some core ideas of this paper at the APA, Pacific Division, San Francisco, March 31 - April 4, 2010. And a special thanks to Shelley Weinberg for our many discussions and her numerous, specific suggestions regarding more effective ways to present the ideas in this paper.



my claim that contemporary positions do not overcome the problems of specification identified in Locke's own proviso. None have provided us with an objective standard that is clearer and better than the one we started out with. An objective standard is crucial because a Lockean notion of a natural executive right and the related claim that strong voluntarism is the liberal ideal of political obligations require the possibility of demonstrating how individually, enforceable property rights are possible in the state of nature. This is why it is essential that the Lockean account of the proviso can explain how individuals acting on their own can justly appropriate private property in the pre-state condition. But as we have seen, none of the available Lockean provisos can function as a privately enforceable restriction upon appropriation of private property. And without a proviso that can function in this way, we cannot explain how justice with regard to private property is possible in the state of nature. Unless we can give some content to the proviso that does not fail in its application, the state of nature is not merely an inconvenient place to realize justice. It is at best a state devoid of justice. Despite the interacting persons' best intentions, the proposed provisos seem to make it impossible for them to interact rightfully in this condition, since in one way or another, the interacting persons become unequally restricted or subjected to each other's 'arbitrary will' rather than reciprocally restricted by 'laws of nature' (principles of justice) that enable their individual freedom.