STUDIES IN THE HISTORY OF TAX LAW

VOLUME 8

EDITED BY
PETER HARRIS &
DOMINIC DE COGAN

BLOOMSBURY

STUDIES IN THE HISTORY OF TAX LAW

These are the papers from the 8th Cambridge Tax Law History Conference held in July 2016. In the usual manner, these papers have been selected from an oversupply of proposals for their interest and relevance, and scrutinised and edited to the highest standard for inclusion in this prestigious series.

The papers fall within five basic themes: Two papers focus on tax theory; one on John Locke and another on the impact of English tax literature in the Netherlands in the nineteenth century. Five deal with the history of UK specific interpretational issues in varying contexts—an ancient exemption, insurance companies, special contribution, the profits tax GAAR and capital gains tax. Two more papers consider aspects of HMRC operations. Another three focus on facets of international taxation, including treaties between the UK and European countries, treaties between the UK and developing countries and the UN model tax treaties of 1928. The book also incorporates a range of interesting topics from other countries, including the introduction of income tax in Ireland and in Chile, post-war income taxation in Australia, early interpretation of 'income' in New Zealand and a discussion of some early indirect taxes in India and China.

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Preface

These papers were given on 11 and 12 July 2016 at the eighth Tax Law History Conference organised by the Centre for Tax Law, which is part of the Law Faculty of the University of Cambridge. We are happy that the tradition of making the papers available in this form continues, maintaining the high standards our publishers set themselves.

We thank those who gave papers and also those who participated in other ways. This was another successful conference, fully subscribed and by all accounts enjoyable. The conference continues as an important part of academic tax law life in both the United Kingdom and the many other jurisdictions again represented. The ongoing success has been such that there are plans for a Tax Law History IX, scheduled for July 2018.

Of course, there would be no success if it were not for the efforts of the founder of this conference, the late Professor John Tiley. This conference was a continuation of the late Professor John Tiley's legacy and a tribute to him. Without his efforts there would be no conference. The contributions are again to a high academic standard and it was particularly pleasing to welcome some new contributors who can hold their heads up with those of the faithful.

Again we owe sincere thanks to Sally Lanham at the Faculty of Law, who, through her efficiency and detailed knowledge of how to run these conferences is primarily responsible for the smooth running of the eighth rendition. Thanks also to Lucy Cavendish College who worked with Sally to make sure that things ran 'as usual' and to Jillinda Tiley, our continuing inside connection at Lucy for these conferences.

Cambridge
February 2017

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John Locke: Property, Tax and the Private Sphere

JOHN SNAPE AND JANE FRECKNALL-HUGHES

ABSTRACT

The events in England, Scotland and Ireland in 1688/1689 have had a foundational and global significance in the theory and practice of government. Without taxes there is, of course, no government and no state to be governed. Few thinkers have ever been so closely associated with particular political upheavals as was one John Locke (1632–1704) with the events of 1688/1689 and with the so-called 'Glorious Revolution'. Locke, sometime Oxford philosopher and the trusted confidant of the Earl of Shaftesbury, articulated—in a single passage of text in his *Second Treatise of Government* (1690)—four of the philosophical tropes most closely associated with these events and with the practice of liberal government ever since and in all places: the legitimacy of property rights, the contractarian nature of government, just and unjust taxation and the need for majoritarian consent both to taxation and to other levies. In this chapter, the authors subject each of the four philosophical tropes to fresh insights in order to show Locke's importance in marking out the legal frontiers of a private sphere in the lives of taxpayers and the nature and scope of taxation in relation to it. Property rights are legitimate because they are pre-politically just. They originate, in other words, from before the institution of the state. The common law preserves and enhances that justice. Property rights can therefore only be alienated, as in the case of taxation, by the consent of those who hold them. Consistently with this, the giving of such consent is informed by the formulae and methods of the common law. Government's contractarian nature limits the range of people from whom majoritarian consent to taxation is required. It does so because of the incidence of taxation upon land. The justice of taxes does not therefore require the redistribution of resources from rich to poor. It does, however, involve the maintenance of the common law, property-based, private sphere of the individual taxpayer.

INTRODUCTION

WHAT HAPPENED IN the British Isles between the autumn of 1688 and the spring of 1689 has divided communities, historians and political theorists ever since. Mid-twentieth century English schoolchildren learnt those events something like this. James II takes ship for France in December 1688. Most people at the time concede that 'having "violated the fundamental laws and withdrawn himself out the kingdom, [James] hath abdicated the government and the throne is thereby become vacant"'.[1] Luckily, William of Orange, the husband of James's daughter Mary, is on hand to accept the crown jointly with her as constitutional monarchs. In fact, as Lisa Jardine has vividly re-told the story,[2] and, as this same school history book pointed out, William had landed at Brixham, in Devon, in November 1688 at the head of 'the largest professional army that had invaded England since Roman times'.[3] Though there was not much trouble in England, in Scotland James's adherents were ruthlessly 'crushed by force of arms' and, '[i]n Ireland', as Paul Langford writes, 'there was positively a blood-bath, one which still holds a prominent place in Irish myths and memories'.[4]

More recently, the events and their background have been reassessed by Steve Pincus,[5] in an account to which we shall return. Before the mid-twentieth century gave way to the welfare state, what the upheaval denoted to the English mind was a new security of property rights under Whig government. The association between Whiggism and property and, more specifically, between Whiggism and commerce, was mistrusted by eighteenth-century Tories[6] (Whigs, said Samuel Johnson, were political scoundrels).[7] A certain idea of property—private property—was nonetheless the central constitutional achievement of the events of 1688/1689. It is arresting, therefore, that after much talk in our time of Adam Smith and his contemporaries, attention has shifted perceptibly to this earlier period. Notably, in a far-from-throwaway line, the Rt Hon George Osborne has revealed his interest specifically in late seventeenth-century thinkers and ideas.[8] The moment seems ripe for, not just talk

[1] Quoted in EH Carter and RAF Mears [1937], *A History of Britain: Book IV* (rev D Evans, London, Stacey, 2010) 143.

[2] L Jardine, *Going Dutch: How England Plundered Holland's Glory* (London, HarperCollins, 2008).

[3] Carter and Mears, above n 1, 101.

[4] P Langford, *Eighteenth-Century Britain: A Very Short Introduction* (Oxford, OUP, 2000) 1.

[5] S Pincus, *1688: The First Modern Revolution* (Yale, YUP, 2011).

[6] P Langford, *Public Life and the Propertied Englishman* (Oxford, Clarendon, 1991) 48.

[7] J Boswell, *Life of Johnson* [1791] (RW Chapman and JD Fleeman (eds)) (Oxford, OUP, 1980) 592, 693.

[8] London, at the end of the seventeenth century was, said Mr Osborne, 'the age of Locke, Newton, Halley, Boyle and Purcell, when … the Glorious Revolution laid the foundations of

of property, nor just of an ideal tax system, but discussion of these late seventeenth-century tax ideas in their historical context. The events of 1688/1689 are often presented as about kingly power, about religious intolerance, and so on, but taxation was a foundational element of both. This, and John Locke's contribution to tax thinking, are becoming ever more clearly understood. When these events began, Locke was reading about them in the Netherlands. What he was reliably informed by his friend Charles Goodall was that, in December 1688, the House of Lords had asked William to 'take upon' himself 'the administration of public affairs … and the disposal of the public revenue for the preservation of our religion, our rights, liberties, and properties and of the peace of the nation'.[9] As 'was long ago established', Locke was one of those ready to play 'an active and highly visible role in lobbying, policy-development' and legislative drafting under the new regime.[10] Nothing could be more central to that regime than taxation. Without taxes there is, of course, no government and no state to be governed.

In this chapter, we seek to map out an account of Locke's theory of taxation in its historical context. That context, partly intellectual, partly a matter of historical events, is explored in the second section. Unlike those of other great Enlightenment theorists of taxation, notably Adam Smith's, Locke's theory is articulated principally by reference to a distinctive theory of property rights. The relevant aspects of this theory are explained in the third section. At the centre of it, so we contend, is a delimitation of the boundaries of legitimate governmental initiatives relative to property rights and, concomitant with this, a conception of the private sphere relative to taxation. An examination of these ideas forms the fourth section. Whether, in particular cases, governmental initiatives have transgressed those boundaries, and how we should know when they have done so, are discussed in the fifth section. This is where the issues involved in maintaining that private sphere against certain forms of taxation initiative become one of Locke's central concerns. Our aim, by the concluding section, is to have shown, not only that Locke merits much more consideration in the history of taxation thought than it is customary to accord him, but that—seen in historical context—his taxation ideas are much more nuanced than his place in the history of liberal thought might suggest. In each of these areas, we engage with aspects of Edward

our parliamentary democracy. Quite a time to be alive', quoted in J Ganesh, *George Osborne: The Austerity Chancellor* (London, Biteback, 2012) 35. See also J Snape, 'Stability and its Significance in UK Tax Policy and Legislation' (2015) 4 *British Tax Review* 561.

[9] Quoted in R Woolhouse, *Locke: A Biography* (Cambridge, CUP, 2007) 262.

[10] M Knights, 'John Locke and Post-Revolutionary Politics: Electoral Reform and the Franchise' (2011) 213(1) *Past & Present* 41, 42.

Andrew's two recent articles,[11] to develop a distinctively tax-jurisprudential and legal historian's approach to Locke and taxation. Our primary concern is Locke's creation of a private sphere as regards taxation and what the historical implications of this might be.

LOCKE IN HIS TIME

Few thinkers have ever been so closely associated with particular political upheavals as was Locke himself with the events of 1688/1689 and with the so-called 'Glorious Revolution'. Here, we explain briefly who Locke was and how he came to be swept up in those historical events. We follow this by saying something about the distinctiveness of his thought and what it owed to ideas that had gone before. This section culminates by setting out, and drawing out some principal implications from, the passage of his work that contains the essence of his taxation teaching.

Locke and the 'Glorious Revolution'

There is certainly something deeply arresting about Mark Goldie's verdict that, 'where Locke was once assumed to be the ineluctable fountain of political wisdom, he has now come to have an elusive and fugitive presence'.[12] Locke's life was spent in the shadows of, though scarred by, the activities of illustrious personages and the consequences of tumultuous events.

The 'Glorious Revolution', for Locke, was but one in a series of many life-changing events. Born in Somerset in 1632 to a land-owning family with Puritan leanings, he went up to Westminster School in London in 1647, just following the First Civil War (1642–46), after his father obtained patronage for him to be educated there. His family had Parliamentary sympathies, the impact of which was evident throughout his life. After school, in 1652 Locke went on to Christ Church, Oxford on winning a studentship, and he stayed on there after his graduation, until 1684, when he was removed from his place at the insistence of Charles II. While at Oxford, Locke's school friend, Richard Lower, introduced him to a group of individuals clustered around John Wilkins—the Warden of Wadham College and brother-in-law to Oliver Cromwell. This group was the nucleus of what later became the Royal Society, and when Wilkins left Oxford on the Restoration of

[11] E Andrew, 'Possessive Individualism and Locke's Doctrine on Taxation' (2012) 21(1) *The Good Society* 151; E Andrew, 'Locke on Consent, Taxation and Representation' (2015) 62(2) *Theoria* 15 (the latter repeats significant elements of the former).

[12] M Goldie, *The Reception of Locke's Politics*, 6 vols (London, 1999) i, quoted in Knights, above n 10, 41.

Charles II to the throne, its leadership fell to the chemist, Robert Boyle. Locke became a close friend of Boyle, whom he regarded as his scientific mentor, and also became well acquainted with Robert Hooke and Isaac Newton, the leading scientific thinkers of the age. Locke developed an interest in medicine during this time, and did eventually become a doctor, although he did not receive a licence to practise until 1675. He qualified for his MA at Oxford in 1658, was elected to a Senior Studentship in 1659 and was Lecturer in Greek in 1661 and 1662, Lecturer in Rhetoric in 1663 and Censor of Moral Philosophy in 1664.[13] In 1665, however, Locke left Oxford as a member of a diplomatic mission to Cleves, although it is not really known how this appointment came about.[14] On his return to Oxford, in the summer of 1666, Locke pursued his interests in medicine, helping his friend, David Thomas, who was a medical practitioner. In 1666, Thomas introduced Locke to Lord Anthony Ashley who was recuperating from illness in Oxford. This was a significant meeting, which, arguably, changed the course of Locke's life.

Ashley as Chancellor of the Exchequer at that time was an active political figure. He later became, in 1672, the Earl of Shaftesbury and Lord Chancellor of England. Locke moved to London and worked closely with Shaftesbury, as his physician, political amanuensis and friend. Locke's chief work was as secretary to the Board of Trade and Plantations and secretary to the Lords Proprietors of the Carolinas. He was instrumental in drafting the *Fundamental Constitutions of the Carolinas* (1670, subsequently revised), but also drafted economic papers for Shaftesbury. Notably, for the purposes of this chapter, Locke was a registrar to the Commissioners of the Excise ('at an annual salary of £175'), from 1671–74.[15]

Locke spent the years 1675–79 in France, possibly for health reasons or because one of his pamphlets had annoyed the government.[16] He spent his time chiefly in Paris and Montpellier, meeting the leading intellectuals of the day. He returned to find England again in the grip of political strife.

[13] Many books about Locke's work also provide various biographical details and those given here are taken from DA Lloyd Thomas, *Locke on Government* (London and New York, Routledge, 1995) 4–7; G Thomson, *On Locke* (Belmont, Wadsworth/Thomson Learning, 2001) 3–10; W Uzgalis, 'John Locke', in *The Stanford Encyclopedia of Philosophy* (Winter 2003) <plato.stanford.edu/archives/win2003/entries/locke> accessed 13 June 2016; and Woolhouse, above n 9, *passim*.

[14] See Woolhouse, above n 9, 60. Thomson, above n 13, 5 suggests that Locke possibly wished to escape the pressure that was placed on the majority of teachers to become clergymen.

[15] JR Milton, 'Locke, John (1632–1704)', in *Oxford Dictionary of National Biography* (online edition, May 2008) <0-www.oxforddnb.com.pugwash.lib.warwick.ac.uk/view/article/16885> accessed 16 June 2016. Over many years, Locke had considerable involvement with the excise, sitting—for instance—as a Commissioner of Excise Appeals in 1696 (see Woolhouse, above n 9, 362).

[16] *A Letter from a Person of Quality to his Friend in the Country*—see Lloyd Thomas, above n 13, 5.

Shaftesbury had recently been freed from a year's imprisonment in the Tower of London, seemingly from pressure from the recently called Parliament. The imprisonment was a result of his leadership of the opposition to the restored Stuarts, who had, because of their Catholicism, alienated much of the country. (Shaftesbury had switched from being Royalist to Parliamentarian during the Civil Wars, then back to Royalist after Cromwell's death.) Shaftesbury was appointed as Lord President of the Privy Council, but amid Parliament's opposition to the bill aimed to prevent James (Charles's brother) succeeding Charles to the throne (Charles had no legitimate heirs), Charles dissolved Parliament and Shaftesbury lost his post. These events are known compendiously as the 'Exclusion Crisis'. Shaftesbury then seems to have become involved with the rebellious elements that ultimately found a leader in the Duke of Monmouth, a Protestant, illegitimate son of Charles II. Shaftesbury was arrested in July 1681 on a charge of high treason. He was acquitted after a few more months' imprisonment in the Tower and when Monmouth was arrested, he went into hiding and later fled to Holland, dying in 1683. It is not really known how heavily Locke was involved in all this political intrigue, but although based in Oxford, 'he was said by a college member to live "a very cunning and unintelligible life … no one knows where he goes or when he goes or when he returns"'.[17] He too fled to Holland in 1683.

Locke did not return to England until 1689. Owing to his connection to Shaftesbury, Charles ordered Locke's ejection from his studentship at Christ Church, and his extradition was requested from the Dutch government when his name came up in association with Monmouth's rebellion of 1685. When the king offered a pardon in due time, Locke refused on the grounds that he had done nothing wrong. Locke moved to Rotterdam in 1687, undoubtedly to advise William of Orange, prior to his campaign to take the English throne—and he served William as Commissioner of Appeals when the latter became king. In his later years, Locke was less politically involved and devoted most of his time to his philosophical writings, although he was appointed Commissioner of Trade and Plantations in 1686, a role in which he was very active, and was one of the founding shareholders of the Bank of England, also being, in effect the 'intellectual leader of the Whig party'.[18] Andrew, following CB Macpherson in this regard,[19] goes further, in fact, describing Locke himself as a 'Whig oligarch', formulating a theory of 'taxation and representation', designed to serve the interest of the section of society of which he himself was a member. While, of course, accepting

[17] Quoted in Thomson, above n 13, 9, although the source is not stated.
[18] Thomson, above n 13, 9.
[19] Andrew (2015), above n 11, 18; CB Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, Clarendon, 1962).

Locke's adherence to Whig principles, we subscribe to a more recent refinement of this view. Locke, we take it, rather than simply wanting to protect the interests of the landed gentry, thought nonetheless that the views of that group could be enhanced and extended for the public good.[20]

Locke in his lifetime saw much of what had been established for centuries swept away to be replaced by something new, revised or completely different—the monarchy in its various forms, the House of Lords, the Anglican Church and the Cromwellian Protectorate. The idea of 'starting from first principles' permeated much of his writing. For example, in *An Essay Concerning Human Understanding*, he saw himself as 'clearing the ground a little, and removing some of the rubbish that lies in the way to knowledge'.[21] Likewise in the *Essay*, throughout Book 1, he uses the image of a 'tabula rasa', or blank slate, to describe the state of a man's mind, before experience writes upon it. In his *Second Treatise of Government*, in defining political power, which is 'for the regulating and preserving of property',[22] he aims to 'derive it from its original'.[23] This underlying concept of 'going back to the beginning', allied to his own political experience, often goes unremarked in terms of its influence on Locke's writing, especially his political thought. Often forgotten, also, is the fact that, as Mark Knights and others have shown, Locke was, with his friends (his so-called 'college', which included John Freke and Edward Clarke), very politically engaged, even after the Revolution, and well into the 1690s.[24]

Distinctiveness of Locke's Thought

The twentieth-century conservative political philosopher, Eric Voegelin, isolates four distinctive and innovative features of Locke's political thought. Essentially, these are contained in Locke's *Two Treatises of Government*,[25] originally published anonymously in 1690. Voegelin's reading of Locke is idiosyncratic, yet, read in the light of recent Locke scholarship, these four features, or stages, are highly suggestive. They all involve a particular conception of what it is to be a human being living in civil society. It is on this

[20] See, eg, Knights, above n 10.

[21] J Locke, *An Essay Concerning Human Understanding, Epistle to the Reader* [1689, dated 1690] (P Nidditch (ed)) (Oxford, OUP, 1975) 9–10.

[22] J Locke, 'Second Treatise of Government' in P Laslett (ed), *Two Treatises of Government* [1690] (Cambridge, CUP, 1988) 1 (hence referred to as TTG1 for the *First Treatise* and TTG2 for the *Second*).

[23] Locke, above n 21, 2.

[24] Knights, above n 10, at 42, 47.

[25] Locke, above n 22. Though not published until 1690, it is now widely accepted that the manuscripts of both *Treatises* date from the time of the Exclusion Crisis, rather than the Revolution of 1688/1689 (see Woolhouse, above n 9, 181).

new conception, says Voegelin, that the whole of Locke's political philosophy rests.[26] It implies a certain human attitude to two key features of civil society: property and taxation. Locke, in effect, invented 'the commercial man'.[27]

First, Locke's man is tolerant, in the sense of believing in 'religious liberty', defined as a requirement for people to worship some deity, so long as that worship does not threaten the safety of the state.[28] So atheism is not a viable personal option in Locke's state, and neither is Catholicism nor Islam, though for different reasons.[29] Toleration, in this sense, means that 'spiritual manifestation' is 'excluded' from the public sphere. Locke's circle of 'Court Whigs' and 'commonwealthsmen' which included religious freethinkers, would certainly have shared this point of view.[30]

Next, says Voegelin, Locke characterises man 'as the product of divine workmanship'.[31] A contemporary reader might consider this a fairly devout sentiment, but this is not so: it is a device. It enables Locke to postulate, first, that humans should live as long as possible,[32] and, secondly, that their obligations towards each other can be spelt out in terms familiar from the English common law.[33] What one owes to God should thus be, first, to preserve the lives of others and, secondly, to avoid damaging the assets of others.[34] 'Man is a proprietor who watches over his own property and recognises his duty not to damage anybody else's, and God is formed in his image'.[35] This, as Edward Feser explains, is a significant break from the scholastic idea that human nature is defined by the soul of man.[36] The main end of man, says St Thomas Aquinas, is 'the good for man', namely 'communion with God in the beatific vision'.[37] 'Subsidiary ends', arising from man's subsistence, include 'self-preservation, procreation, knowledge and many other things'.[38] These are the ends that governed scholastic

[26] E Voegelin, *The New Order and Last Orientation* (J Gebhardt and TA Hollweck (eds)) (Columbia, University of Missouri Press, 1999), 146.
[27] ibid.
[28] ibid 142.
[29] ibid 145.
[30] Knights, above n 10, 59.
[31] Voegelin, above n 26, 146.
[32] ibid, referring to TTG2, para 6.
[33] Voegelin, above n 26, 146. For the significance of the common law to Locke's thought, see, eg, M Seliger, *The Liberal Politics of John Locke* (London, Allen and Unwin, 1968) 233–37. Locke joined Gray's Inn in December 1657 (see Woolhouse, above n 9, 21). The future Lord Chancellor, Peter King (1669–1734), became almost a surrogate son to Locke from about the mid-1690s (ibid 414). Lord King LC's judgment in *Keech v Sandford* (1726) 25 ER 223 is still an urtext in relation to constructive trusts (an institution, of course, of equity).
[34] Voegelin, above n 26, 146–47.
[35] ibid 147.
[36] E Feser, *Locke* (Oxford, Oneworld, 2007) 16.
[37] ibid 18.
[38] ibid.

morality. There, moral obligations arise from what promotes these ends and what is 'forbidden' is what frustrates them.[39] The Lockeian standpoint, focused on the here and now, and on the public sphere, marked an important departure from the transcendent orientation of scholasticism. What was central, for Locke, was public virtue. 'Locke', writes Knights, 'was always nudging his friends into acting for the public good and he and Clarke spoke the language of virtue'.[40] Locke and his circle were committed to the promotion of their view of the public good and to 'public-spirited reform'.[41]

Thirdly, says Voegelin, with Locke, 'man is the proprietor of himself'.[42] What Locke actually says is that 'every man has a "property" in his own "person"'.[43] Contrary to what some have said, this is not inconsistent with the idea that man is the property of God. God's and man's are different proprietary rights subsisting in the same individual at one and the same time consistent with the common-law orientation of Locke's thought.[44] It is quite as radical as the first distinctive feature of Locke's political thought rehearsed above. It is absolutely contrary to Thomas Hobbes (1588–1679), who, 'if he had lived to witness it … might have classified it [that is, the idea of man having a property in his own person] as a variety of madness similar to that of the man who believes himself God'.[45] These rights are the inverse of 'right' in scholastic natural law. While later scholastic philosophers differed, Aquinas conceived of right (*ius*) in terms of 'every one carrying out his or her obligations relative to everyone else'.[46] Locke, so Feser argues, thinks of liberty as freedom to pursue, autonomously, one's 'own private ends', not freedom to 'participate in public decision-making'.[47] James Tully,[48] Richard Ashcraft,[49]

[39] ibid.
[40] Knights, above n 10, 59.
[41] ibid 61.
[42] Voegelin, above n 26, 147.
[43] TTG2, para 27, quoted at Voegelin, above n 26, 147.
[44] Whilst making an important but different point, Kevin Gray's observation that '[a] pervasive influence in all philosophical thinking on "property" is still the brooding omnipresence of John Locke' is revealing both of Locke's influence on the common law and the attitude of common lawyers to Locke (see K Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252, 293).
[45] Voegelin, above n 26, 147.
[46] Feser, above n 36, 19.
[47] ibid 28.
[48] J Tully, 'The Framework of Natural Rights in Locke's Analysis of Property: A Contextual Reconstruction', in A Parel and T Flanagan (eds), *Theories of Property: Aristotle to the Present* (Waterloo, Ontario, Wilfrid Laurier University Press, 1979); J Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge, CUP, 1980).
[49] R Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton, PUP, 1986).

and Martin Hughes[50] have denied this, arguing that Locke was a liberal, certainly, but also a democrat.[51]

Fourthly, for Locke, man consents 'to incorporate as a community'.[52] This incorporation authorises a 'disproportionate and unequal possession of the earth',[53] at least so long as there is no bottom-up revolt. In the 'state of nature', there is equality. In civil society, there is 'property differentiation'.[54] From this, the deeply conservative Voegelin concludes that the 'avowed purpose' of Lockeian government is 'the preservation of the inequality of property'.[55] This conclusion about Lockeian political order is comparable to those drawn by Macpherson, who depicts Locke as one of the principal architects of a new seventeenth-century 'possessive individualism',[56] and of Ellen Meiksins Wood, who portrays Locke as no more than 'an advocate of 'constitutional' or 'limited' government, a believer in the traditional 'mixed constitution', albeit in its most parliamentary form.[57] Either way, despising egalitarian democracy, it is Locke's scheme to provide an intellectual foundation for securing property rights, via a sovereign legislature, against 'the Fancy or Covetousness of the Quarrelsom and Contentious'.[58] This, as will be seen, is the broad view to which we adhere in what follows, and it is supported by Andrew in the two articles referred to above. We agree, however, with Knights, that it is not as simple as this. Other, more recent, though historically less plausible readings, noted briefly above and developed below, understate Locke's belief that Whig virtues could be adopted widely as the basis of a new type of commercial society. The fact that readings of Locke vary so markedly sits well with his often 'very cunning and unintelligible life', as it appeared to his contemporaries, and his 'fugitive presence' for historians.

Voegelin is useful in pinpointing the innovative aspects of Locke but his work remains controversial. With Locke, he writes, 'the spiritual personality of man is banished from the public sphere and condemned to impotence; the public person of man is abased to an object of property rights along with land, furniture, and other chattels; government is reduced to an instrument for the preservation of a social state of doubtful justice'.[59] It is not necessary

[50] M Hughes, 'Locke on Taxation and Suffrage' (1990) 11(3) *History of Political Thought* 423; M Hughes, 'Locke, Taxation and Reform: A Reply to Wood' (1992) 13(4) *History of Political Thought* 691.

[51] See Andrew (2015), above n 11, 15–16, for a detailed review of the literature.

[52] Feser, above n 36, 149.

[53] TTG 2, para 50.

[54] Voegelin, above n 26, 150.

[55] ibid 151.

[56] Macpherson, above n 19.

[57] EM Wood, 'Locke Against Democracy: Consent, Representation and Suffrage in the *Two Treatises*' (1992) 13(4) *History of Political Thought* 657, 689.

[58] TTG2, para 34, quoted in Andrew (2015), above n 11, 15.

[59] ibid.

to subscribe fully to Voegelin's views, nor to acquiesce in his idea of justice, to accept that the ideas that Voegelin deplores were seriously argued as being for the public good in Locke's own time. That is why, though historians might be wary of Voegelin's views, his conservatism nonetheless seems to cast into stark relief the kinds of ideas to which Locke and his circle subscribed. Locke's association with natural law binds him to conservatives, while his individualism makes him appeal to liberals.[60]

Essence of Taxation in Locke

Locke's views on taxation follow on from the world-view just described. The essence of his taxation thought appears in the *Second Treatise of Government* (TTG2), paragraphs 138–142 and 157–158.[61] Locke says, in the key passage:

> 'Tis true that Governments cannot be supported without great charge, and 'tis fit every one who enjoys his share of the Protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own Consent—*i.e.* the Consent of the Majority, giving it either by themselves or their Representatives chosen by them. For if any one shall claim a *Power to lay* and levy *Taxes* on the People by his own authority, and without such consent of the People, he thereby invades the *Fundamental Law of Property*, and subverts the end of government. For what property have I in that which another may by right take when he pleases himself?[62]

Locke's comments in the *Second Treatise of Government* contain the essence of his teaching on taxation. Needless to say, they have been the subject of much debate as to their exact meaning. What, for example, does he mean by 'estate'? The word is capable of different interpretations, from conveying the idea of particular assets (land or chattels) to the legal rights and obligations subsisting in relation to those assets. Given that the holding of a 40-shilling freehold at this time conferred the right to vote in the shires,[63] some have suggested that Locke envisaged landholders only as having to pay tax, rather than everyone, although both views have attracted support.[64] In Locke's development of one element of this passage, in *Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money* (1692),[65] Locke does suggest that the 'publick charge' of government must

[60] Feser, above n 36, 28.
[61] Andrew (2015), above n 11, 16.
[62] TTG2, para 140.
[63] See J Cohen, 'Structure, Choice and Legitimacy: John Locke's Theory of the State' (1986) 15(4) *Philosophy and Public Affairs* 301.
[64] See, eg, Hughes, above n 50, 442; and Cohen, above n 63, 301.
[65] J Locke, *Some Consideration of the Consequences of the Lowering of Interest, and Raising the Value of Money* [1691] in *The Works of John Locke in Nine Volumes*, 12th edn,

be borne by landholders, since merchants and labourers do not have the resources to bear it. This is very important to Locke's theory. Similarly, the words 'proportion for the maintenance of it' ('it' being 'protection', by reference to the earlier part of the sentence) have caused debate. 'Proportion' might innately suggest 'equity' or 'fairness', which may or may not mean progressive or proportionate taxes in the current sense of these terms,[66] but the linking of the concept to the 'maintenance' of protection opens up a debate on whether tax should be paid in relation to income/assets or on some consumption basis. Does the idea of a 'share of the Protection' suggest that a wealthy individual should be entitled to more 'protection' because he possesses more land and chattels? There is no real indication as to how tax revenues might be spent, as the basic idea is of individuals contributing to state coffers for protection. The concept of the state helping out a specific sector of the community or providing welfare for the needy cannot be easily accommodated within Locke's thinking. At this distance in time, it is hard to be precise about Locke's intentions, but it may be the case that he used words that would allow for the development of a tax system along one of several possible lines, and was doing no more than establishing a broad philosophical underpinning.

Andrew makes the important point that, when late seventeenth-/early eighteenth-century people talk about 'taxation', especially in relation to representatives, they should not necessarily be understood to mean *all* taxes.[67] 'Taxation' referred to hearth taxes and (especially) land taxes, not to duties of excise or to customs duties.[68] It is useful to remember, too, that the real 'age of excises', so to speak, was the late 1690s, after Locke's *Two Treatises* had been published, a fact that no doubt reflected their frequent use in The Netherlands. William III, presumably, had some hand in their introduction, although the English were already familiar with them. These excises provide the context for Locke's arguments about the incidence of taxation and for the arguments of Locke's college as to the need for 'pragmatic measures' to ensure 'supply to fund the war' with the new regime's Absolutist Catholic enemies.[69] Excises were of a piece with other measures designed 'to preserve liberty, property and Protestantism', namely the recoinage, freedom of the press, poor relief reform, the suppression of vice and the institution of the Bank of England.[70]

Vol 4 (Rivington, London, 1824) <oll.libertyfund.org/title/763> accessed 12 February 2014. This is cited by T Dome, *The Political Economy of Public Finance in Britain 1767–1873* (London and New York, Routledge, 2004), 12, n 6.

[66] See DM Byrne, 'Locke, Property and Progressive Taxes' (1999) 78(3) *Nebraska Law Review* 700.

[67] Andrew (2015), above n 11, 19.

[68] ibid 18.

[69] Knights, above n 10, 60.

[70] ibid. (Reading this list, it is not difficult to see, mutatis mutandis, why Locke seems so present in Mr Osborne's thoughts.)

PROPERTY RIGHTS AND THEIR SIGNIFICANCE

'Property', for Locke, has a special significance. His theory is explanatory and justificatory. It precludes a role for taxation as an instrument for redistributing wealth from rich to poor. Property is instead identified with privacy and it signifies an opposition to the public realm of the state.

'Property' in Locke

Locke's is one of the most famous of all theories of property, a theory devised with the express purpose of refuting the arguments of apologists for the divine right of kings. Because of its importance to the present argument, though Locke's property theory is well known, there is no harm in emphasising certain of its aspects here.

Locke's property theory is developed in his *Two Treatises of Government*. It is designed to show that those who hold property rights in Locke's own day may do so rightfully. The reason for this is that the key political controversy of Locke's career was with the followers of a leading but now dead apologist for divine right (or 'absolutism'), Sir Robert Filmer (1588–1653). Filmer commended but sought to further the work of Hobbes, the great theorist of sovereignty, whose *Leviathan* had appeared in English for the first time in 1651. Filmer had wanted to show that property in resources within a kingdom was the monarch's alone, having descended from Adam (the first man) to each successive king via his heir—that is, via his eldest son.[71] Given the premises, Filmer's was itself quite a sophisticated theory, addressed to followers of Hugo Grotius (1583–1645), who was then read as having argued that the earth had originally been divided by common *consent* of mankind.[72] Locke even agreed with Filmer that Grotius's was not a coherent position.

Locke's *First Treatise of Government* (TTG1) comprised a detailed engagement with Filmer, while TTG2 included a theory of property designed to show that all people have a natural right to property, God, at the creation of the world, having given the earth 'to Mankind in common'.[73] In addition, TTG2 stressed the inalienability of the right to property, along with those to life and to liberty.[74] Basing itself on these natural rights, TTG2 'argued that government is based on a social contract, which binds current citizens

[71] R Filmer, 'Observations Concerning the Originall of Government' [1680] in JP Sommerville (ed), *Patriarcha and Other Writings* (Cambridge, CUP, 1981) 184.

[72] ibid 234.

[73] TTG2, para 25.

[74] These ideas came to be embodied in the 1776 American Declaration of Independence (see JW Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York, OUP, 2008) 17, 28–9).

through their express or tacit consent'.[75] Finally TTG2 supported a people's right of revolution in the event that their legitimate sovereign had greatly misused the competences placed in his hands.

From these three ideas grew a Lockeian conception of the rule of law and of the competences vested in government being placed there on trust for the people.[76] So far as the right of property was concerned, Locke's fundamental premise was that God granted the world to mankind in common.[77] By labour, the first men appropriated parts of the land:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.[78]

For Voegelin, this is an outrageous attack 'on the dignity of man', because 'the human person' is reduced to 'a capital good', capable, by natural right, of infinite economic exploitation.[79] For Waldron, however, labour is theologically significant, the 'creation of natural resources' itself having a 'teleology'.[80] Man has a duty to labour, to appropriate resources, so as to do God's work, which is what he is *for*.[81] That sits well with the practical, and pragmatic, thought of the members of Locke's college. The successors of the first men have bought, sold and inherited property in land,[82] right up to the present day.[83]

The justice of the original acquisition (namely, by the first men to cultivate land) was to be determined, said Locke, by two factors or 'provisos'.[84] First, there is *the sufficiency proviso*, which prevents a person from encroaching on property rights already established,[85] subject to one important condition, to be discussed later.

> 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.[86]

[75] BH Bix, *A Dictionary of Legal Theory* (Oxford, OUP, 2004) 130; Ely, above n 74, 28–29.
[76] J Dunn, *Locke* (Oxford, OUP, 1984) 52–57.
[77] TTG2, para 25.
[78] TTG2, para 27.
[79] Voegelin, above n 26, 148.
[80] ibid 159.
[81] ibid 160.
[82] TTG2, para 47.
[83] Locke's property theory is summarised, eg, in Dunn, above n 76, 32–44.
[84] There are useful discussions of the two provisos in A Clarke and P Kohler, *Property Law: Commentary and Materials* (Cambridge, CUP, 2005), 81–106; J Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge, CUP, 2002) 151–87.
[85] Voegelin, above n 26, 148.
[86] TTG2, para 27.

This sufficiency proviso Robert Nozick regards as being faulty, since all appropriators of resources, from the very first one onwards, are in this position.[87] Secondly, there is *the spoilation proviso*. Locke summarises this as follows:

> As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.[88]

Locke finally gives property primacy in his commonwealth. 'The great and chief end', he says, 'of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting'.[89] The traditional view is that the 'property' to which Locke refers is property in land and property in the proceeds of the sale of land, whether or not the latter has been reinvested in more landed property. That is the traditional view to which we adhere. However, it is fair to say that those who see Locke as a democrat, notably Tully, Ashcraft and Hughes, also take Locke's property as referring to a much wider category of rights than this: rights relating to civil liberty; the right to live; and the right not to be enslaved.[90]

Explanation and Justification

Today, we are apt to assume that a theory of property will make an argument about what should, or ought to, be the case. Such arguments are known as 'normative' arguments. Locke's theory is somewhat different. Although a norm is important, the theory also has an interpretative element. While it shows that property rights can be legitimate, it does so by offering an explanation of how those rights came into existence. Notwithstanding this, Locke's property theory is not simply one of historical significance.

Locke is assuring his readers that, despite all this talk of equality, some kinds of inequality are acceptable. Waldron argues for the explanatory, but not the justificatory, force of Locke's argument. What Locke is arguing for, he writes, is 'basic equality', not equality of outcome, and he does so both out of his Protestant convictions and a wish to demolish the inequality involved in Filmer's argument that the earth was originally granted to Adam.[91] Locke also does it to emphasise the legitimacy of the range of property rights that would be desirable to the members of commercial society.

[87] R Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974) 174–82.
[88] TTG2, para 31.
[89] TTG2, para 124.
[90] Andrew (2015), above n 11, 15.
[91] Waldron, above n 84, 153.

The idea that property in land was plunder had been fostered by one of the radical movements spawned by the Civil Wars. One of these movements was the 'Diggers', early communists, whose leader, Gerrard Winstanley (1609–76), poured scorn on English kings as perpetuators of the Norman yoke. Lords of manors bent on enclosing common land, priests who collected tithes and the judges who administered the laws of property were all complicit in plunder.[92] Locke's theory of property would have been cognizant of this idea, just as it would have been of divine right. Winstanley's *New-Yeers Gift for the Parliament and Armie* (1650) had been uncompromising in its denunciation of property rights:

> The party that is called a king was but the head of an army, and he and his army having conquered, shuts the conquered out of the earth, and will not suffer them to enjoy it, but as a servant and slave to him; and by this power the creation is divided, and part are cast into bondage. So that the best you can say of kingly power that rules by the sword is this: he is a murderer and a thief … Property came in, you see, by the sword, therefore the curse; for the murderer brought it in, and upholds him by his power, and it makes a division in the creation, casting many under bondage; therefore it is not the blessing, or the promised seed. And what other lands do, England is not to take [as a] pattern; for England (as well as other lands) has lain under the power of that beast, kingly property.[93]

Locke's theory is designed to meet this type of polemic just as surely as the arguments of divine right apologists. The theory is not just of historical significance. It was relevant in Locke's day because enclosures of common land had been gathering pace. There was a sense in which common land was unappropriated in the way that the whole world originally was. In our own day, Locke's theory continues to be relevant in relation to explaining the creation of intellectual property rights,[94] as well as the conclusion of international agreements over the *global* commons.[95] It still has considerable weight, too, when it comes to arguing about the reach and extent of the tax system.

Property and Redistribution

Locke's property theory, in our view, is such as to preclude a role for taxation as an instrument for redistributing resources from rich to poor.

[92] JC Davis, JD Alsop, 'Winstanley, Gerrard (bap. 1609, d. 1676)', *Oxford Dictionary of National Biography* (online edition, May 2008) <0-www.oxforddnb.com.pugwash.lib.warwick.ac.uk/view/article/29755> accessed 10 May 2016.

[93] G Winstanley [1650], 'A New-Yeers Gift for the Parliament and Armie' in D Wootton (ed), *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (London, Penguin, 1986) 326–28.

[94] A Clarke and P Kohler, *Property Law: Commentary and Materials* (Cambridge, CUP, 2005) 90–91.

[95] For example, the 1982 UN Convention on the Law of the Sea; the 2013 Global Ocean Commission; see further <www.some.ox.ac.uk/research/global-ocean-commission/> accessed 10 May 2016.

This proposition follows from the pre-political nature of property rights. Relinquishment of any of those rights in favour of government, or fellow-subjects, must be voluntary or, if forcible, then compensated. Locke's writing is, at one and the same time, as chilling and possibly as invigorating as that.

By the late seventeenth century, there were good political reasons for someone in Locke's position to contrast the timeless justice of property with both the contingency that characterised possessions under Filmerian monarchy and the communal right advocated by such as Diggers and Levellers. 'Distribution', say Liam Murphy and Thomas Nagel, refers to an existing determination of the shares, as between private property and 'publicly provided benefits' actually obtaining in a society for 'different individuals'.[96] It follows that 'redistribution' denotes political action that could involve both 'in kind' and cash 'redistributive transfers' between those individuals.[97] We are accustomed to think of redistribution in favour of poor individuals and away from rich ones. Nonetheless, redistribution can equally well be effected in favour of rich individuals and away from the poor. To understand what Locke is saying about taxation, it is necessary, for sure, to keep his theory of property firmly in mind. However, it is also necessary to remember that, at least in early seventeenth-century England, not only was the tax system very weak, 'absorbing only a tiny proportion of national income', but also that taxes existed to fund royal government, an institution that 'still betrayed its origin as a system for the administration of the king's own household affairs'.[98] To suggest that such a system was even capable of effecting public/private wealth transfers seems entirely anachronistic. Seventeenth-century taxes, for the most part, were barely capable of being raised exceptionally and to pay for defence against national emergency. However, the 'vast bulk' of government 'revenue came not from taxes but from customs dues, the income on royal estates, and feudal dues such as wardship and purveyance'.[99] For Locke, interfering with property rights is wrong because, as seen above and considered below, property rights originated before political societies began. For this reason, property rights are characterised as natural, or absolute, rather than political, or conventional. Property rights are in their origin, in other words, pre-political. The Lockeian conception of property, so Waldron writes, is of private property, 'in the sense that Lockean rights are not dependent on the discharge of any function which cannot be related to the private affairs of the proprietor'.[100] Tully and others had earlier denied this, arguing (against Macpherson) that Lockeian property rights are conventional and that it might be necessary

[96] L Murphy and T Nagel, *The Myth of Ownership: Taxes and Justice* (New York, OUP, 2002) 76.
[97] ibid 89.
[98] Wootton, above n 93, 23.
[99] ibid.
[100] J Waldron, *The Right to Private Property* (Oxford, Clarendon, 1988) 162.

(in Andrew's summary of Tully's argument) to 'mandate redistribution of property to ensure that the natural rights of the majority are secure'.[101] We agree with Waldron's conclusion 'that Tully has presented no convincing evidence to challenge the traditional interpretation of Locke's view on property in civil society'.[102] To the contrary, their argument destabilises property rights, the opposite of what Locke needed to argue to interest commercial people in the Revolution settlement. It was about tying them into the new regime.

If, contrary to Tully, and with Waldron, we read Locke as insisting on the sacrosanct nature of property rights, and if we bear in mind Locke's emphasis on consent, it follows that any transfer of those rights must be voluntary or, if not voluntary, then justly compensated as an injury to the property-holder. The essence of Lockeian taxation, as already mentioned, is that it is a voluntary transfer by the subject to the sovereign of all or part (depending how 'proportion' in TTG2, paragraph 140, is interpreted) of the former's property in some resource.[103] The need for the voluntary transfer of property rights has the further consequence that it is the duty of man to accept the fact that, on entering political society, his ancestors consented to a 'disproportionate and unequal possession'.[104] Some people are more industrious, or more talented, than others and had evidently done better than others at that foundational moment. The need for just compensation of injured property rights, whether through acts of government or of neighbours, is entirely consonant with this requirement of consent. Grotius, in relation to the concept of 'eminent domain' (a term that Grotius apparently coined) had written of the need for compensation to the citizen.[105] Paragraph 140 of TTG2, as extracted above, has, as Michael Taggart has claimed, 'been taken (fairly or not) to reflect Locke's view of the eminent domain power' as well as of taxation.[106] Eminent domain, it has been well said, differs from taxation, because of the disproportionate burden that falls on one, or on a small group of, property holders. In what follows, it may be seen to have something more in common with Locke's idea of taxation than this might suggest.

[101] Andrew (2015), above n 11, 15, 26.

[102] Waldron, above n 100, 240.

[103] R Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (Cambridge, CUP, 2003) Ch 8.

[104] MJ White, *Political Philosophy: A Historical Introduction*, 2nd edn (New York, OUP, 2012) 281–82; Waldron, above n 84, Ch 6.

[105] H Grotius [1625] *The Rights of War and Peace*, 3 vols, trans J Barbeyrac and J Morrice (R Tuck (ed)) (Indianapolis, Liberty Fund, 2005) III, 1540, referenced in M Taggart, 'Expropriation, Public Purpose and the Constitution' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford, Clarendon, 1998) 93.

[106] ibid 93.

The disproportionate and unequal possession of which Locke speaks is, of course, chilling to our contemporary sensibilities. Chilling as it is, it is also invigorating for those in a position to take advantage of it. The members of Locke's college would have regarded this as a 'least worst' situation.

Property and Privacy

Rather than providing a ground for redistribution from rich to poor, with Locke, property forms the foundation of a modern privacy, of a modern freedom. This privacy amounts to the establishment of an opposition between the private realm, of the hearth and of the household, and the public realm of the state. It can, moreover, be extended outwards, to all who aspire to that way of living.

Locke develops a 'modern' privacy distinct from the ancient one. Modern privacy is the chief characteristic of modern freedom. Modern freedom (writes Alan Ryan), unlike the Aristotelian freedom, is 'essentially private; it … [is] the ability to pursue our private economic, literary, or religious concerns without having to answer to anyone else. It … [is] freedom *from* the political sphere rather than freedom in the political sphere'.[107] Property, especially the fee simple estate (or 'freehold') is the guarantee of privacy because of the exclusionary control that the fee simple confers on its holder. This is what Locke's theory can prove. Locke himself says, that Filmer's cannot. Locke writes:

> … [S]upposing the *World* given as it was to the Children of Men *in common*, we see how *labour* could make Men distinct titles to several parts of it, for their private uses; wherein there could be no doubt of Right, no room for quarrel.[108]

The common-law nature of the property right means that, whilst the squire in his manor house—or hall—can enforce the exclusive character of his property against the outside world, such an exclusive right does not protect the squire's copyhold tenant in his cottage. In fact, along with the squire, all free tenants are within the scope of this protection. Copyholders are not because, unlike the squire, they hold their property rights not of the crown but of the manor.[109] Leaseholders are different from both because their right, though a property right, is subject to different rules as to duration.[110] Common-law property rights are what matter.

[107] A Ryan, *On Politics: A History of Political Thought from Herodotus to the Present* (London, Allen Lane, 2012) xvii, 109, 524.

[108] TTG2, para 39.

[109] Copyhold tenure was not abolished until 1926.

[110] Prior to 1926, the lease had developed into a hybrid real/personal property right called a 'chattel real'. The Law of Property Act 1925, s 1, made it 'capable of subsisting' as one of only two common law estates in land (the other, of course, being the 'fee simple absolute in possession').

The natural law origin of the property right means that, in turn, the squire in his manor house both shoulders the burden, and takes the benefit, of the law of nature within his household, a household that extends to the cottage of his copyhold tenant. Because property is a natural, not a conventional, right, and because it has survived the institution of the state with its natural proprietary qualities intact, property retains its natural character albeit often regulated.[111] Indeed, Locke's argument in effect is that the Filmerian doctrine, since it is not based on property, reduces the state to a household. The 'manor of England' is a state of nature. It is in the squire's legal relations with his peers, and in the boroughs, that the rule of law is to be encountered.

The private realm, founded as it is on property, is not a realm of no law but of natural law, strengthened as necessary by the common law. Indeed, the common law is the 'positivisation' of natural law. These Lockeian ideas continue to be heavily contested.[112] Where positive laws do not reach, however, the law of nature prevails.

GOVERNMENT AND THE SOCIAL CONTRACT

Locke's theory of property (and of taxation) requires limitations on the scope of governmental action. The principal such limitation is the need for the consent of the governed. That consent is to be given either in person or through the consent of representatives. Representative consent can be given by a majority of representatives.

Limits on Governmental Action

It follows, given the association between property and privacy, that Locke promulgates a boundary between the public and the private. The public is the proper sphere of legislation in political society. The private is the sphere of positive law that embodies and reinforces the law of nature.

The boundary between public and private is determined by the effect of property rights. Property rights are exclusive and empowering (whether to sell or retain, the decision is an individual's). Property rights are also stable.[113]

The private sphere is impregnable as long as these understandings hold. Excisemen, for instance, operate outside it. They work in market places and

[111] Langford, above n 6, 289; JW Gough, *John Locke's Political Philosophy* (Oxford, Clarendon, 1973) 81; R Wacks, *Privacy: A Very Short Introduction* (Oxford, OUP, 2010) 33–34; Waldron, above n 100, 238.

[112] Ryan, above n 107, 915; Wacks, above n 111, *passim*.

[113] K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, OUP, 2009) 99, 102–03.

smugglers' cottages. Inside it, there are no land tax men and a gentleman can agree his land tax assessment with his neighbours, with his local assessors and collectors.[114] Manorial tenants are outside the private sphere being shadows of their landlords. Women are 'shadows' of their husbands[115] and fathers. Manorial lords are inside it, being public men only in a public capacity.

All of this is so because of the legacy of man entering into political society. Natural rights were preserved and, logically, must be preserved, because that is the reason for political society in the first place. Public right must only go so far as to support them.

Hobbes had also considered that levying taxes was justified as the price of protection.[116] However, the almost fundamental contradiction implicit in these concepts never goes away. Richard Epstein,[117] when looking at the US tax system from a Lockeian viewpoint, also comments on this: taxation is '… the power to coerce other individuals to surrender their property *without* their consent. … [It] authorizes the sovereign to commit acts of aggression against the very citizens it is supposed to protect' and is 'institutionalized coercion'. The dilemma is 'how to preserve the power of taxation while curbing its abuse'.[118] Locke, when read in context, was aware of this dilemma, hence his stress on the need to adhere to a majority decision, although this could mean that a sizeable minority might disagree, having 'a distinct interest, from the rest of the Community'.[119] However, they must still abide by the decisions of their elected (majority) representatives and cannot take individual action as that would undermine the security of property. Governments too cannot take property away arbitrarily, as this would have the same effect:

> For a man's *Property* is not at all secure, though there be good and equitable Laws to set the bounds of it, between him and his Fellow Subjects, if he who commands those Subjects, have Power to take from any private Man, what part he pleases of his *Property*, and use and dispose of it as he thinks good.[120]

The town-dweller knows this, if not the tenant of the manor. The town-dweller has private business and a sphere of private affairs governed, at least in part, by the common law.

[114] C Brooks, 'Public Finance and Political Stability: The Administration of the Land Tax, 1688–1720' (1974) 17(2) *Historical Journal* 281.

[115] See, for a disturbingly recent judicial use of this idea, *Caunce v Caunce* [1969] 1 WLR 286, ChD.

[116] See D Jackson, 'Thomas Hobbes' Theory of Taxation' (1973) 21(2) *Political Studies* 175, 176–77.

[117] RA Epstein, 'Taxation in a Lockean World' (1986) 4(1) *Social Philosophy and Policy* 49.

[118] ibid 50.

[119] TTG2, para 138.

[120] ibid.

Consent of the Governed

The principal limitation on governmental action is the need for electoral consent. Consent is conceived of in terms of Locke's contractarian theory, in his version of the social contract. The subject's consent may be given in person or via the subject's elected representative. Consent is only required from the elector, that is to say, from the holder of the property qualification of 40 shillings of freehold.

It is important to recall that the potential for government action is limited. The raising of taxes is the main one. It is true, nonetheless, that there is a widening range of other possibilities in the 1690s, the most important of which, such as press freedom, recoinage and poor relief reform, have already been mentioned. More important, more pressing, though, was war with England's Absolutist Catholic enemies, which needed to be paid for. Pincus paints a dramatic picture of Tory protest at the progressive land tax introduced, first, in 1689, then in 1692.[121]

With Locke's social contract, though consent is fundamental, it is nowhere defined, and it is difficult sometimes to distinguish it 'from compliance'.[122] However, it is fundamental. A man would 'have no *Property* at all', he says, if anyone had 'a right to take [his] substance, or any part of it from … [him], without … [his] own consent'.[123] For Locke, uniting into a community means that individuals must surrender power to the will of the majority, agreeing to abide by a majority decision, in return for which they will receive the benefits available to community members—protection of life, health, liberty and property. This is Locke's form of social contract theory, though other writers had a different idea of what this might mean.[124] Consent in political society is not, however, a universal requirement in relation to taxation. First, taxation, as Andrew emphasises, referred to hearth taxes and land taxes, not to excise duties and customs duties. Duties of customs and excise were paid, or so it would appear, by everyone, regardless of whether they had the vote and thus of whether they were in a position to give their representative consent. As already hinted, Locke had an explanation for this apparent discrepancy. However, it is clear that representative consent was not required of wives, children, poor people, subjects resident in the colonies, etc.[125] Consent in relation to taxation, as Andrew says, is therefore a 'slippery' concept.[126]

[121] Pincus, above n 5, 384.
[122] Andrew (2015), above n 11, 20.
[123] TTG2, para 138; Andrew (2015), above n 11, 16.
[124] Grotius, Hobbes, Pufendorf, Rousseau and Kant all had different views from Locke, particularly in terms of the issue of political authority. See also P Riley, 'The Social Contract and Its Critics' in M Goldie and R Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge, CUP, 2006) 347.
[125] Andrew (2015), above n 11, 19.
[126] ibid 22.

The idea that the consent must be personal, or representative, follows from the quotation extracted above: 'But still it must be with his own Consent [Locke insists], *ie* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them'.[127] A peer of the realm gives personal consent, on behalf both of himself and of those who are his shadows.[128] A representative Member of Parliament gives consent, not as such on behalf of his constituents, but on behalf of those holding the right to vote, and following a personal judgement about the interest of the nation as a whole. Arbitrary expropriation is:

> not much to be fear'd in Governments where the *Legislative* consists, wholly or in part, in Assemblies which are variable, whose Members upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest.[129]

Our point that consent is required only of those holding the property qualification is at variance with that of many distinguished commentators. On the one hand, Locke does not mention the basis of suffrage in the *Second Treatise of Government*. Tully and others have taken this as a cue to argue that Locke supported 'universal manhood suffrage'.[130] On the other hand, in recent years, various scholars have uncovered evidence that, at the very least Locke wanted to retain the 40-shilling suffrage in the shires while relaxing it somewhat in the boroughs. In TTG2, as Andrew points out, Locke does not say anything about 'a property qualification for the franchise', so TTG2, paragraphs 157 and 158 become key. Knights makes made what Andrew calls 'a significant scholarly advance in the interpretation of paragraphs 157 and 158'.[131] Andrew cites Knights's reports of how Locke had marked up a 1679 parliamentary bill unifying the urban voting qualification, so that, in boroughs, the vote would be had by those who paid the 'scot and lot', that is, the 'church rates and poor rates'.[132] He concludes that, since the markings-up made no reference to the bill's aim to increase the franchise in the counties from 40 shillings to 40 pounds, the matter in which Locke was really interested was what Knights dubs 'a radical petty-bourgeois reform'.[133]

> We can now say definitively [writes Knights] that Locke sought to correlate borough representation with local taxation, at the same time as removing the customary variations in the franchise (a measure not achieved until 1832) and

[127] TTG2, para 140; Andrew (2015), above n 11, 16.
[128] Andrew, above n 11, 16; a 'representative peer' was a later invention (1707 onwards).
[129] TTG2, para 138; Andrew (2015), above n 11, 16.
[130] ibid 15.
[131] ibid 16, 17.
[132] Knights, above n 10, 70.
[133] ibid 79.

> leaving the county franchise alone. At a stroke this provision would have defined the urban electorate as the relatively better-off, economically independent but by no means rich inhabitants.[134]

We accept Knights's conclusion because it adduces archival documentary evidence in support that goes beyond an idiosyncratic reading of the published Lockeian texts. 'The right to vote for a parliamentary representative' (representation) and taxation are tied to Locke's foundational ideas of the right to property and 'consent to government'.[135] Against Knights, Andrew argues that, as we shall see, Locke understood the incidence to fall in its entirety on landholders.[136] Locke would not have thought non-freeholders were entitled to the vote if he had thought 'that representation should be proportioned relative to tax payments'.[137] This, says Andrew, is borne out by the provisions of the much-revised *Fundamental Constitutions of the Carolinas*, where Locke stated that only those with 50 acres of freehold land should have the vote.[138] However, this does not dispose of Knights's argument, because Knights finds Locke to be addressing a specific juncture in the development of the English state, one not yet attained in the Carolinas.

Majorities and Consent

The context of Locke's majoritarian consent, so far as historical events were concerned, has been surprisingly little noticed. Majority decisions in Parliament, so Mark Kishlansky has written, had only become frequent in the parliamentary session of 1646, immediately following the First Civil War.[139] Locke accepts the need for majorities but admitting them to his theory seems inconsistent with the primacy of consent as analysed above. This does not matter, however, in the terms of Locke's argument, because his theory of government is shaped by the overriding need to protect the landed interest.

So, representative consent can be given by a majority of representatives: consent does not have to be unanimous. A division, or majority, is not necessarily to be welcomed, for sure. It had not, traditionally, been Parliament's way of proceeding. 'Parliamentary practice had relied upon the deliberative process, through debates and committees, to arrive at resolutions that

[134] ibid 70, 72.
[135] Andrew (2015), above n 11, 16.
[136] ibid 17.
[137] ibid.
[138] ibid.
[139] MA Kishlansky, *The Rise of the New Model Army* (New York, CUP, 1979) 119–38. John Snape would like to record that he was prompted to follow up this reference by attending the seminar held on 10 December 2015, at the Department of History, University of Warwick, by Dr Bill Bulman (Lehigh University).

expressed the sense of the whole House.'[140] The use of majorities—or divisions—means that the representative assembly is not of one mind. Maybe one or other side of the argument has failed to discern the will of God. However, Locke allows for the expediency of majority decisions. That had been recognised in 1646. 'The deliberative process with its practiced speeches and persuasive debates was entirely too cumbersome when confronted by the need for rapid policy formulation and executive control'.[141] Locke, too, recognises that parliamentary business will likely have to be conducted quickly.

The question arises of 'what price?' the vaunted consent if a majority will serve its turn. Andrew points out that majoritarian consent is hardly a working-through of the argument that all expropriations must be consented to personally or through a representative.[142] He quotes John Dunn's conclusion that Locke here makes an 'extraordinary elision between the consent of each property-owner and the consent of the majority'.[143] There is, writes Dunn, '[a]n air of massive bad faith … over this whole area of the argument'.[144] Ross Harrison elaborates the problem:

> These representatives, once elected, may not happen to agree on a particular matter of taxation with some or all of the majority that elected them. So even an individual member of the electing majority may lose effective consent … [t]hen, typically, these representatives themselves will decide by majority vote rather than by unanimous decision. So, since their representative may be in the minority, even an individual who agrees with their representative may lose effective consent …[145]

Moreover, it is not clear whether 'the Consent of the Majority' in TTG2, para 140, refers to a majority of the nation as a whole or only to a majority of those with 'taxable estate' or to the representatives of those individuals.[146]

For us to worry about the consent of the majority, however, is somehow to ignore the purpose of Locke's theory of government in its widest implications. First, the subject's gift, via the representative, is subject to the implied condition that, in the absence of unanimity among the representatives, the gift will be made on the basis of the wishes of the majority of them. Secondly, the landed interest, for Locke, is worthy of special treatment in the commonwealth. 'The landholder['s] … interest [he wrote] is chiefly to be taken care of, it being a settled unmoveable Concernement in

[140] ibid 120.
[141] ibid.
[142] Andrew (2015), above n 11, 21.
[143] J Dunn, 'Consent in the Political Theory of John Locke' (1967) 10(2) *Historical Journal* 153–82, quoted in Andrew (2015), above n 11, 20.
[144] Dunn, above n 143, quoted in Andrew (2015), above n 11, 21.
[145] Harrison, above n 103, 222.
[146] Andrew (2015), above n 11, 21.

the Commonwealth'.[147] Why is this? It is because Locke believes that the landholder occupies a unique place in England's political order, having the most to lose if the Revolution fails. So the landholder should be treated with consideration.

> [T]he Landowner, who is the person, that bearing the greatest burthens of the kingdom, ought, I think, to have the greatest care taken of him, and enjoy as many Privileges, and as much Wealth, as the favour of the Law (with regard to the Public-Weal) confer on him.[148]

So, Locke is not so much an oligarch, or regime-man, but one who thinks that the values that the regime promotes can benefit all those who are, or who might hope to be, involved in the political life of the nation. Landed values are, for the time being at least, consistent with those of the merchant. It is just a matter of getting lord and squire to accept that. Voegelin reminds us of the kind of man or woman who would assent to this close identification of the 'Public-Weal' with the interest of the landholder: the one who zealously guards his property, refrains from damaging anyone else's and who has created a particular idea of God as conforming to human ideals.[149] Though Voegelin's language is highly rhetorical, he seems to be absolutely on point. He has identified, at one and the same time, the radical views held by Locke and his circle, and the fact that their sympathies were not confined to the landed interest.

JUST AND UNJUST TAXES

If, as suggested, Locke's theory does not suggest a role for taxation in the redistribution of wealth, what is the sense of justice that it embodies? That justice is encapsulated in his formulation of what has come to be known as the 'benefit principle'. It has a number of features that, absent later readings, are unexpected and suggestive.

Justice in Taxation

In the light of what has been said, the question arises of whether Locke's theory embodies a sense of justice and, if so, what sort of justice it is: it is not distributive at the level of the state but the individual—and it focuses on incidence.

The benefits of civil society must be paid for by individuals on whom the incidence of taxation falls. This is the limited sense of justice in taxation

[147] Locke, above n 65, quoted in Andrew, above n 11, 23.
[148] ibid.
[149] Voegelin, above n 26, 147.

to be found in Locke. There is an inherent contradiction in the idea that a government's primary function is the 'preservation of Property'[150] while at the same time having the right to take it away. The citizen's agreement to this, by a voluntary alienation of rights, is at odds with his right to private property. Locke is aware of this contradiction. The 'end' or aim of government is to preserve property and the reason for men entering into a community, so loss of property as a result of doing so is 'too gross an absurdity for any man to own':[151] the only way of reconciling this is by the assumption that individuals are prepared to pay out of their own assets because by doing so they will be contributing to their own protection.

Locke's theory, as mentioned, is not redistributive in favour of the poor at the level of the state. In other words, a redistribution from rich to poor is no part of justice in Locke's view of taxation.[152] In a famous and much-contested passage, not from TTG2, but from TTG1, Locke writes:

> As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise …[153]

As Edwin Seligman explained,[154] Locke's theory focuses on the incidence of taxation. He professed to believe, as mentioned, that all taxation ultimately fell on the landed interest. Andrew suggests that, besides wanting to protect the landed interest, Locke may have had two other things in mind.[155] First, such a theory would incentivise the country squires, who sat in the House of Commons, to scrutinise the more zealously crown receipts and expenses. This is a very worthwhile observation. Secondly, it might make the same gentry more enthusiastic about paying land and hearth taxes. This seems less worthwhile, however. More accurate might be that, believing he knew where the incidence of taxation lay, Locke wanted to mollify those people whose support was so fundamental. A huge amount of public revenue needed to be raised. There was only one place where it could be found. Distaste for taxation, as Pincus says, was widespread among the landed gentry. Locke was well aware of the association in the minds of his Whig friends between duties of customs and excise and Stuart absolutism: the proceeds of these duties had financed the military and judicial operations against the Duke of Monmouth in 1685.[156]

[150] TTG2, para 138.
[151] ibid.
[152] Andrew (2015), above n 11, 26.
[153] TTG1, para 42.
[154] ERA Seligman, *The Shifting and Incidence of Taxation*, 2nd edn (London, Macmillan, 1899) Ch 5.
[155] Andrew (2015), above n 11, 23.
[156] ibid.

Locke's Benefit Principle

This has five aspects, involving considerations as to the nature and scope of taxation, who must pay it, what is a just amount to pay, why justice does not depend on 'ability to pay', and how it is Locke's property theory that both makes the benefit principle crucial and the ability to pay principle otiose.

Taxation, in mid-seventeenth-century England was limited in scope and designed to address exceptional contingencies always of a military nature. O'Brien and Hunt[157] comment, for example, that the fiscal system established after the 'Glorious Revolution' provided funds to protect not only Britain, but also her 'hegemony over the international economic order'. Locke did not dissent from this. He was not interested in redistribution from rich to poor but in raising funds for war against a possible Stuart restoration after 1689.[158]

Everyone bears a burden of taxation but its incidence for Locke is, as mentioned, limited to the landed interest. Whilst Locke accepted that those unrepresented in the system paid duties of customs and excise, he strongly believed that the burden of all taxes, in a landed society, finally fell upon land:

> This by the way, if well considered, might let us see, that taxes, however contrived, and out of whose hands soever immediately taken, do, in a country, where their great fund is in land, for the most part terminate upon land. Whatsoever the people is chiefly maintained by, that the government supports itself on: nay, perhaps it will be found, that those taxes which seem least to affect land, will most surely of all other fall the rents. This would deserve to be well considered, in the raising of taxes, lest the neglect of it bring upon the country gentleman an evil, which he will be sure quickly to feel, but not be able very quickly to remedy. For rents once fallen are not easily raised again. A tax laid upon land seems hard to the landholder, because it is so much money going visibly out of his pocket: and therefore, as an ease to himself, the landholder is always forward to lay it upon commodities. But, if he will thoroughly consider it, and examine the effects, he will find he buys this seeming ease at a very dear rate: and though he pays not this tax immediately out of his own purse, yet his purse will find it by a greater want of money there, at the end of the year, than that comes to, with the lessening of his rents to boot: which is a settled and lasting evil, that will stick upon him beyond the present payment.[159]

[157] PK O'Brien and PA Hunt, 'The Rise of a Fiscal State in England, 1485–1815' (1993) 66(160) *Historical Research* 129, 170.

[158] Andrew (2015), above n 11, 27.

[159] Locke, above n 65. Andrew (2015), above n 11, 22. This became the target of David Hume's arch scepticism in his essay 'Of Taxes' (1752) in EF Miller (ed), *Essays Moral, Political, and Literary* (Indianapolis, Liberty Fund, 1987) 342.

As Andrew points out, Locke must have known, as a former Registrar of the Excise, that excise duties raised, along with customs duties, much more than the land tax.[160] However, he believed that, notwithstanding this, 'labourers pass[ed] on excises in higher wages and merchants pass[ed] on customs duties as higher prices'.[161]

A just amount of taxation to pay depends on the level of protection received by the taxpayer from the state. To reiterate, ''tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it'.[162] This is one version at least of what is nowadays referred to as the benefit principle. Locke himself describes it as 'the true proportion', which is 'in proportion to the assistance, which it affords to the publick'.[163] Indeed, it is more than that. If the monarch convened Parliament on that basis, he could not:

> be judg'd, to have set up a new Legislative, but to have restored the old and true one, and to have rectified the disorders, which succession of time had insensibly, as well as inevitably introduced. For it being the interest, as well as intention of the People, to have a fair and *equal Representative*; whoever brings it nearest to that, is an undoubted Friend, to, and Establisher of the Government, and cannot miss the Consent and Approbation of the Community.[164]

It should now be clear why, when the benefit principle is mentioned in the debates of our own day, it provokes such vehement partisanship, for and against. If you believe Locke's argument, since arguments based on ability to pay transgress a priori the right to property, it is simply unjust. Again, if you believe Locke's argument, since that right to property is coincident with a right to privacy, implementation of the ability to pay principle marks an illegitimate incursion of the legislative competence of the state into the private sphere.

So, paying tax is almost a kind of 'subscription fee' for the membership of a political society. Locke stresses that it is only a legitimate government which can impose taxes and can take part of a man's 'estate' in payment. Any other sort of taking away of property, even by a government, is wrong.[165] Taxing land is particularly conducive to this consensual approach.[166] With land tax, the person assessed knows how much he is paying, whereas the purchaser of a commodity typically does not know how much of the price is taxation.[167] Furthermore, land tax is self-assessed and the amount is

[160] Andrew (2015), above n 11, 27.
[161] ibid.
[162] TTG2, para 140; Andrew, above n 11, 16.
[163] TTG2, para 158.
[164] ibid.
[165] ibid.
[166] Andrew (2015), above n 11, 24.
[167] ibid.

agreed between gentlemen (Andrew notes that Locke himself tried to get his land tax assessment lowered by getting a friend to suborn an official, but we have not examined this).[168]

Unexpected and Suggestive

On the reading of Locke promulgated here, note what his theory does, and does not, do. First, it relies on an abstract and common-law oriented conception of property. Secondly, it contains no mandate for redistribution from rich to poor. Rather, thirdly, in the guise of an argument about tax incidence, the less well-off are the incidental beneficiaries of a theory that, without reliance on ability to pay, seeks to places the chief burden of taxation—by consent—on the landed interest. Anyone reading the accounts of Locke's political thought in Tully, Ashcraft or Hughes will find this unexpected. However, this is the older understanding of Locke and it is more closely in line with Macpherson's and, even Waldron's, readings than any of these other three. This is a subtle variation on the conclusion that Andrew reaches in relation to Locke and taxes.

There remain the suggestive elements in the light of this last point. This reading might explain why, in a property and jurisprudence conditioned by Locke's thought, a special treatment subsequently grew up for the trusts and tax treatment of charities. Charity is at a premium when justice is so narrowly defined. None of those objects with which charities' law has traditionally concerned itself,[169] on this view of the world, fall within the scope of the state's responsibilities. At the same time, all are worthy of special treatment in the Lockeian view of political society and the role of property rights and of taxation within it. The traditional four charitable objects, 'trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads',[170] all fit within the Lockeian categories of political thought elaborated here. Of them, the advancement of religion is perhaps the most striking for its Lockeian definition. 'I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another', said the Master of the Rolls, Sir John Romilly, one day in May 1862: 'They are equally bequests which are included in the general term of charitable bequests'.[171] Locke's college would have nodded in assent.

[168] ibid.

[169] These were expanded and somewhat modified in the Charities Acts 2006 and 2011.

[170] *The Commissioners for Special Purposes of the Income Tax v John Frederick Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

[171] *Thornton v Howe* (1862) 54 ER 1042, 1044.

This reading may also show how the reason why taxation is not required to facilitate redistribution from rich to poor is that the theory elevates political necessity (the primacy of the landed interest) while excluding significant social obligations from the public sphere. So, providing for the poor is about personal charity, not political justice, and the only class of people who legitimately command our charity are those who cannot work: the individual can choose what to do. As Peter Laslett writes, '[i]n his published works he [Locke] showed himself the determined enemy of beggars and the idle poor, who existed, he thought, because of "the relaxation of discipline and the corruption of manners"'.[172] Andrew notes that, 'following a long correspondence pressing his reluctant agent, Cornelius Lyde, to evict a widow from one of Locke's properties, Locke cited the Pauline dictum that those who do not work do not deserve to eat'.[173]

The reading of Locke's theory of taxation elaborated here also suggests why Locke's theory establishes or reaffirms a role for the private sphere and minimises the gravity of tax impropriety. Andrew suggests that 'the view of taxation as a voluntary gift may justify tax avoidance strategies, as Locke himself practised, which impair the ability of liberal-democratic governments to raise revenues to meet its [*sic*] level of expenditures'.[174] This may well be a matter for debate, but Lockeian thought is certainly consistent with an almost impermeable private sphere around which the tax system operates and with which it interferes only minimally. The reading finally might explain why many people are so unconcerned about inequalities perpetuated by the tax system. Again Voegelin's comments are relevant: 'Locke, while not representing the most desirable features of bourgeois society, certainly is a part of it, and there are millions like him who accept his principles as the standards of political order'.[175] So, if not forbidden by positive law, by public law, the avoidance of taxes may nonetheless be subject to natural law. With Locke, as Voegelin writes, the public sphere does not acknowledge 'the spiritual personality of man', and 'the public person of man' is entirely defined by Lockeian property rights.[176] Though it may appear a little too harsh, this in essence is an absolutely plausible version of the Lockeian position. Common law protection of the private sphere is, at one and the same time, both the guarantee of large tax revenues and the enemy to the overweening power of the taxing authority. The understanding and appreciation of this point, not just among the gentry, but also among those who hope to better their condition, is central to a new understanding of the nature and purpose of taxation in post-Revolution England.

[172] P Laslett, 'Introduction', in Locke, above n 17, 3–126, at 43.
[173] Andrew (2015), above n 11, 26.
[174] ibid 28.
[175] Voegelin, above n 26, 152.
[176] ibid 151.

CONCLUSIONS

Locke's taxation theory comes out as uncompromising stuff. The distinction between taxation and expropriation, so Locke warns us, is perilously fragile. However, all is not lost. Property rights, for him, embody a morality capable of reinforcing that distinction. Such rights, he says, can be alienated by consent. Representative consent, an admittedly awkward political counterpart for personal consent, will nonetheless suffice. What makes taxes just is not, primarily, the distribution of burdens but the benefit received in return. Locke is, in a real sense, the benefit principle. The implications of all this are, as shown above, surprising and even shocking.

It remains for us to sum up the key elements of our argument and, in the process, to show how it differs from and, in important senses, develops, the arguments about consent and possessive individualism in Andrew's two recent articles. Our argument starts from the intuition that Locke is correctly associated with the philosophical isolation of private life from public life. His rather secretive ways of living, his idea of man being his own proprietor, and his emphasis on consent as the only valid basis on which property rights should be alienated, each support this intuition. All of this is Locke's intellectual response to a turn in ideas, and twists in historical events, that had seen the denial of the rights of property holders, in different ways, both by radical movements during the Civil Wars and by apologists for absolutist—or patriarchal—kingship in the decades afterwards. The perilously fragile distinction between taxation and expropriation can be weakened still further in various ways by invasive notions of either a kingly state or a levelling society; by the denial of the moral possibility that an individual might pursue his, or her, own ends without responsibility for others similarly placed; and by the downgrading and corruption of ideas of consent. Locke is not a Whig oligarch as such, but someone who thinks that the spread of Whig values would benefit everyone. His ideas carried great sway in eighteenth-century England, just as a version of them does in twenty-first century America.

The underlining of the distinction between taxation and expropriation—the force of Locke's intellectual response to levelling and to kingly tendencies—is grounded in Locke's common-law conception of property rights. The common law of property, correctly understood, he suggests, can do all that is required to reinforce the distinction. First, the common law of property is a form of positive law, and that positive law is older than the societal tensions that have thrown up the royal and communistic ideas of the seventeenth century. Secondly, because the common law of property is indeed law, it stands in contradistinction to prerogative, to kingly will. Thirdly, because it is wise, the common law has artificially imitated the principles of the law of nature in those limited areas of human endeavour into which it has extended its reach. Fourthly, because, as the law of a civil society, the

common law draws its morality from the pre-political law of nature, the common law of property is also moral. For Locke, the presumption is that those who today hold property rights do so justly, in direct descent from those who, before the institution of political society, first took the spade to the turf, and began to dig. The common law of property rights is therefore not, as the Levellers and Diggers would have people believe, evil and oppressive, nor, as the divine-right monarchists would have us think, superfluous or outmoded. Moreover, for Locke, the morality that the common law of property embodies precludes, almost by definition, any sense of contingent entitlement, any sense of a rival morality that would dictate progressive taxation and redistribution, even if that were possible with government and tax system as they were in late seventeenth-century England. Common-law property rights are, in the clearest sense, the absolute entitlement of their individual holders. Moreover, the common law of property has a distinctive quality that is the guarantee of a new privacy, of a new type of apolitical freedom. The jurisdiction of the common law of property extends only to those holding property rights recognised by common-law courts. The holders of those property rights are subject only to the law of nature within the physical spaces over which those property rights confer absolute control, most importantly, the household. Property rights, in short, embody a morality capable of reinforcing a distinction between the life of the statesman—of the state, of politics—and the life of 'any private Man'—of the household, of economics.

Philosophical distinctions, such as those just enumerated, inform and condition Locke's treatment of taxation. Taxation, it will be recalled, at this late seventeenth-century juncture, referred pre-eminently to land tax, and also to hearth taxes, but not to duties of customs and excise. Those most concerned about taxation were those who held the common-law property rights and, in doing so, had holdings of a considerable value. The nature of those property rights contributes significantly to these people's understanding of the nature of taxation. Taxation, for Locke, in no way defines property rights a priori: rather, it entails the alienation of some of those rights, according to a measure of justice. This understanding of taxation explains why, on the reading propounded here, Locke's theory of taxation is 'deontological' rather than 'consequentialist'. Murphy and Nagel put the point with characteristic terseness.[177] They focus on the property rights that, on a consequentialist view, taxation modifies. With Locke, the deontological thinker, by contrast, 'property rights are in part determined by our individual sovereignty over ourselves, … by a right of individual freedom that does not need' any other 'justification'.[178] That, for Locke, is the essential

[177] Murphy and Nagel, above n 96, 43.
[178] ibid.

moral strength of those rights. Alien to Locke would be the idea 'that property rights are [instead] justified by the larger social utility of a set of fairly strict conventions and laws protecting the security of property'.[179] Locke therefore stands in stark contrast to David Hume, for example. Moreover, were Locke's theory a consequentialist one, its radicalism would not have been so apparent to those who read TTG1 and TTG 2 in the 1690s. The radicalism of Locke's property theory is, and ever will be, its deontological character.

Property rights can, as discussed, be alienated by personal consent or by representative consent. Taxation can only be by consent. Personal consent would be *ideal*. Representative consent *will have to do*. In the foregoing pages of this chapter, we have acknowledged the problems of representative consent, noted the doubts expressed by those unconvinced by it, and attributed Locke's accommodation with those problems to the overwhelming need, within his system, to support the landed interest to the benefit of everyone. Moreover, having rehearsed the arguments from the earlier part of the chapter, it is now possible to underscore that political justification with a distinctively jurisprudential one. When Locke's subject consents to taxation (or not), via his representative, he does so—implicitly or explicitly—by authorising his representative to consent (or not), irrespective of the three difficulties with majoritarian consent referred to above. Harrison would object that, nonetheless, the difficulty is a real one and, no doubt, had Locke himself been challenged, this what he would have said.[180] However, what Harrison does not draw out, is that Locke's response would not have been the glib retort of the casuist but one informed by the self-evident logic of a common law of property replete with fine distinctions and carefully-wrought conditions. Such a response would have been entirely consistent with a theory of property and of taxation that holds to the virtues of the common law. In the subsequent half-century, conditions of this kind, express or implied, would become commonplace in an increasingly sophisticated mercantile law of contract.

What makes taxes just, given majoritarian representative consent, is neither redistribution, nor ability to pay, but the benefit received by the taxpayer. Those with the most to lose in an Absolutist Catholic invasion, and post-1690 Stuart restoration, were those who held the great estates. They should therefore pay. It seems to Locke, in any event, that this is where the incidence of all taxes falls. If a merchant is taxed, he passes the burden on to his customer. Where his customer is only scraping by, the customer cannot pay his creditors. Notably, these include the customer's landlord.

[179] ibid.
[180] Harrison, above n 103, 222.

The landlord has therefore to accept lower rents or turn his tenants out on the highway. Let us therefore stop pretending, Locke seems to say, that duties of customs and excise fall on the customer and recognise that they instead fall on the holders of estates. Duties of customs and excise are opaquely redistributive from rich to poor. The system should not operate in this way. It should transparently tax the landed gentry. They benefit and so they should pay. This is Locke's benefit principle. Whether the analysis on which it is based be correct or incorrect, the principle is designed for the good of everyone. Merchants like it and, although it imposes an obvious burden on the gentry, it is better for them, too, because it recognises what Locke takes to be inevitable. The tax system has this limited redistributive role consistently with the fact that, in the seventeenth century, the overwhelming purpose of taxation is national defence. For an individual to pay taxes is for him to act justly. However, justice also requires that he will act charitably. In the context of charity, there is no point in the state differentiating between religious objects (unless Catholic or Islamic), or placing undue restrictions on charitable objects that aim at the relief of poverty. Religious sentiment is a sufficient prompter for individuals to relieve the poor. The latter will be provided for, though not by the state.

So the implications of all this are surprising and even shocking. It is politically controversial when, today, people cling to the ideal of the benefit principle. In its historical context, however, the principle's significance was very different. Nothing less uncompromising, or jurisprudentially robust, could have withstood the prerogative of a king, even a non-Stuart one, in the person of William III.

2

The Birth of Tax as a Legal Discipline

HANS GRIBNAU AND HENK VORDING

ABSTRACT

Adam Smith's taxation maxims found fertile ground in the Netherlands in the early nineteenth century—a time of national tax reform. But as the century drew to an end, progressive liberal thinking parted from its British inspiration. John Stuart Mill's 'equality of sacrifice' was rejected by Nicolaas Pierson, the leading political economist of his age, as being too individualistic. Instead, the German Historical School with its idea of an organic relation between state and citizens gave guidance, especially to Pieter Cort van der Linden's work on taxation. Borrowing from the German concept of *Rechtsstaat*, he laid the foundations for tax as a legal discipline.

INTRODUCTION

THE ACADEMIC DISCIPLINE of tax law as we know it today has its roots in the late nineteenth century. In the Netherlands, it emerged out of a confrontation between (predominantly British) classical political economy and German *Staatslehre* (theory of the state). This contribution analyses the impact of the relevant ideas on Dutch theorising about taxes. It is argued that tax law as a legal discipline is heavily indebted to the German tradition. This may help to explain why it has proven difficult to develop meaningful communication between tax lawyers and tax economists.

The focus of this contribution will be on the development of tax doctrine in the Netherlands over the nineteenth century. The starting point is the revolutionary era of around 1800. The Dutch Republic was very much *Ancien Regime*, in the sense that local law and custom impeded the development of a tax state. It was probably more *Ancien* than France itself, because there was hardly any tendency towards centralisation of political authority. When the Republic imploded (1795) in the slipstream of the French

Revolution, it left an enormous government debt and a wide array of local taxes. The next decade witnessed the development of a national tax system (introduced in 1806), with revenues now accruing to central government. The ideals of the French Revolution called for sensible government institutions.[1] A national tax legislator was seen as capable of developing a 'system' of taxation—a system that made sense in terms of fairness, effectiveness and economic impact. The debate on 'good taxation', relying on an economic analysis of taxes, was then fully developing in the UK and also in France.

The intellectual climate of the Dutch Republic had traditionally been focused on France. The well-educated would therefore speak and read French; the university professors read and wrote Latin in addition—English was definitely not the international language that it is today. English literature tended to trickle down through French writers and thinkers—Jean-Baptiste Say did much to make Adam Smith's thinking accessible on the continent. Broadly speaking, English was still a language of commerce. We may assume that among the Dutch merchant class, a working knowledge of English was present. And indeed the early tax theorists—Alexander Gogel, Gijsbert Karel van Hogendorp—read Smith in English.[2] Typically, neither of them visited a university. Later on, in the second half of the nineteenth century, English became more common, and John Stuart Mill was read in his own language. Nikolaas Pierson in particular, author of the first Dutch book on political economy and father of the first Dutch income tax, knew Mill's Principles of Political Economy intimately—though we will see that he did not agree with some of Mill's stronger conclusions on fairness in taxation and described him as an 'old-English' economist. Pierson was another man to never study at university—his doctor's title was earned by doctorates *honoris causa* at Leiden and Cambridge. Tax theory in the Netherlands in the nineteenth century was therefore largely developed by practical men, outside of academia. And it owed much, we will argue, to the English tradition in political economy, and especially to Smith and Mill.

But towards the end of the nineteenth century, there was a movement away from Smith's classical liberalism and from Mill's fairness/neutrality doctrine. Progressive liberalism (not to mention socialism) brought a broadening of state intervention in the economy. More than Pierson, Pieter Cort van der Linden marks the shifting orientation, away from political economy and towards the German debate on the proper role of state and law. As Webber and Wildavsky argue: 'Acting in response to public pressure,

[1] Article I of the French Declaration of the Rights of Man and of the Citizen (1789) reads: 'Men are born and remain free and equal in rights.' These rights of man were held to be universal—free individuals were thus protected equally by law.

[2] Concerning Gogel: S Schama, *Patriots and Liberators. Revolution in the Netherlands 1780–1813* (New York, Vintage Books, 1992); JA Sillem, *De politieke en staathuishoudkundige werkzaamheid van Gogel* (PhD thesis) (Amsterdam, Johannes Müller, 1864); J Postma, *Alexander Gogel (1765–1821)* (PhD thesis) (Hilversum, Verloren, 2017).

late nineteenth century legislatures derived authority to enlarge government power from the idea of legislative responsibility which had become the core of democratic theory.'[3] The ensuing increase in state intervention was an important determinant of the birth of tax as legal doctrine.

The chapter consists of three main sections. Section 1 discusses Adam Smith's maxims for taxation and their impact in the Netherlands. Section 2 discusses Nicolaas Pierson's position: critical of British political economy but still an economist unwilling to adopt the *Staatslehre* framework. Section 3 explores at some length how Pieter Cort van der Linden imbued the *Staatslehre* to lay the foundation for a legal analysis of taxation.

THE IMPACT OF SMITH: DUTCH THINKING ON TAXATION IN THE EARLY NINETEENTH CENTURY

Smith's Maxims for a Good Tax System

The early tax theory in the Netherlands relied heavily on Smith. His four maxims for a good tax system show up in the (still limited amount of) tax literature, even when not explicitly referred to. Smith's maxims are so well-known that a brief quotation will be sufficient:[4]

I. The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.

II. The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person.

III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributors to pay it.

IV. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state.[5]

[3] cf C Webber and A Wildavsky, *A History of Taxation and Expenditure in the Western World* (New York, Simon and Schuster, 1986) 299–300.

[4] A Smith, *An Inquiry in the Nature and Causes of the Wealth of Nations* [1776] (Indianapolis, Liberty Fund, 1981) V.ii.b, 1–6, 825–827.

[5] Smith refers to Henry Home, Lord Kames, *Sketches of the History of Man* (London, W Strahan and T Cadell, 1774); cf WC Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment* (The Hague, Martinus Nijhoff, 1971) 266–269. FK Mann, *Steuerpolitische Ideale* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1978) 156 argues that Smith's fourth principle comprises four of Home's principles which makes it quite miscellaneous. Mann offers an extensive discussion of Smith's principles—including the question of their originality.

Though his first maxim, on equitable distribution of the tax burden, is the most famous, legal certainty carries serious weight. In his own words: 'The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality … is not near so great an evil as a very small degree of uncertainty'.[6]

Smith's stress on the importance of legal certainty is easily explained. Without sufficient legal certainty every taxpayer 'is put more or less in the power of the tax-gatherer', who is at liberty to tax this person as he pleases.[7] Smith evidently wants to reduce arbitrary taxation—a pervasive phenomenon in the eighteenth century.[8] Legal certainty was not only endangered in the United Kingdom though. Alexander Gogel, who introduced a national tax system in the Netherlands, opined that 'however onerous the obligations of the citizen to the republic were, the state should be in a position to let him know the worst and assess the *limit* of the contribution'.[9]

Moreover, it goes without saying that arbitrary taxation frustrates any attempt to distribute the tax burden in a fair way. Without legal certainty, distributive justice remains illusory. In this sense, legal certainty is instrumental to distributive justice. And indeed, Smith uses the criterion of an equitable distribution of the tax burden to judge the quality of contemporary taxes. For example, he criticises the inequity of exempting from excise duty the product of private brewing and distilling, and therefore the alcoholic consumption of the rich. Consequently 'the burden of those duties falls frequently much lighter on the rich than upon the poor'.[10] Thus, as Ross argues, 'the exemption cannot meet the higher criterion of his first maxim of taxation'.[11]

Smith may best be understood, not as trying to define a remote ideal, but as making practical recommendations for improvements. His friend David Hume was very practical about tax equity, stressing convenience of collection and generality in application;[12] and we should consider Smith's views

[6] Smith, above n 4, V.ii.b,7, 827.

[7] Smith, above n 4, V.ii.b,4, 825. E Rothschild and A Sen, 'Adam Smith's economics' in K Haakonssen (ed), *The Cambridge Companion to Adam Smith* (Cambridge, Cambridge University Press, 2006) 354 observe with regard to British taxes: 'All were in varying degrees uneconomical. Some required a great number of officers' to collect. … Others created temptations of tax evasion … Yet others were vexatious.'

[8] cf N Phillipson, *Adam Smith: An Enlightened Life* (London, Allen Lane, 2010) 257: 'By Smith's days there were eight hundred separate acts of parliaments affecting custom duties.'

[9] Schama, above n 2, 385.

[10] Smith, above n 4, V.ii.k.45, 888–889. See for example E Anderson, 'Adam Smith On Equality' in RP Hanley (ed), *Adam Smith: His Life, Thought, and Legacy* (Princeton, Princeton University Press, 2016) 159, who argues that Smith is a moderate political egalitarian', who 'while not using the language of distributive justice, … often takes up distributive considerations in assessing institutions.'

[11] IS Ross, *The Life of Adam Smith*, 2nd edn (Oxford, Oxford University Press, 2010) 340.

[12] D Hume, *Essays Moral, Political and Literary*, EF Miller (ed) (Indianapolis: Liberty Fund, 1987), Part II Ch 8. cf J Snape, 'David Hume: Philosophical Historian of Tax Law' in J Tiley (ed), *Studies in the History of Tax Law, Volume 7* (Oxford, Hart Publishing, 2015) 421–464.

on taxation as 'largely an elaboration of Hume's'.[13] Smith's synthesis of eighteenth century ideas about equity, fiscal efficiency and organisational rationality was a response to the flawed tax systems of his time. Gradually a new rule-bound paradigm for taxing, spending and financial administration replaced the opportunistic policies and practices of earlier ages.[14] There is an interesting relation here to Smith's general idea of the role of government: 'liberty, reason and the happiness of mankind' cannot flourish without 'the authority and security of civil government.'[15] Firm government allows for the division of labour that creates general welfare,[16] which, by inference, arbitrariness of rules would destroy.

To summarise the point: Smith's main concern with taxation, much like Hume's, was to reduce arbitrariness by generality of taxation, not to base all tax systems on some principle of distributive justice—'a viable tax system was one that reflected the distribution of national wealth and was easy and cheap to collect; anything else would be seen as arbitrary and oppressive'.[17]

To our minds, his plea for legal certainty implied the demand for a uniform tax system enforced by a competent and disciplined tax administration bound by the law. The duty of the sovereign to protect every member of society and establish 'an exact administration of justice'[18] logically includes taxation—in that sense, Smith laid a foundation for the later juridification of taxation. More implicitly, his demand for equitable distribution of tax burdens had the same effect—under that banner, tax reforms of the nineteenth century replaced object-based taxes by more sophisticated taxes on individuals.

Dutch Thinking on Taxes: Gogel and Van Hogendorp

The legacies of the old Dutch Republic were an amalgam of local taxes with limited revenue capacity, a huge government debt, and limited effectiveness of central authority. Under strong French influence, a considerable centralisation of power was achieved within ten years. Article 210 of the Constitution of 1798 stipulated that the Executive Body was to make a proposal for a 'new system of general taxes to cover the expenses of the State

[13] Phillipson, above n 8, 234.

[14] cf Webber and Wildavsky, above n 3, 303. They point at the growing interest in individual rights during the seventeenth and eighteenth centuries, as a result of which taxes should be justified on equity grounds.

[15] Smith, above n 4, V.i.g. 24, 802–803.

[16] A Smith, *Lectures on Jurisprudence* (Indianapolis, Liberty Fund, 1982) 14 and 459.

[17] Phillipson, above n 8, 234.

[18] Smith, above n 4, V.i.b.1, 708–709. See also Smith, above n 16, 213: 'Written and formall laws are a very great refinement of government.'

and to service the debts of the entire Republic.' The constitution went on to give more guidance: the design of this new system of general taxes should achieve that everyone pay tax according to his relative abilities, as derived from his properties, revenues and observable expenditures. More specifically, Article 210 of the constitution stipulated that no tax can be imposed on basic necessities, and that taxes on consumption, if unavoidable, should be aimed at non-necessary goods. These provisions neatly express the contemporary feeling that excises on everyday consumption goods were much too high compared to other potential tax bases. This program resulted in the national tax system introduced in 1805/6 by Alexander Gogel.

Gogel was an outsider to the Republic's oligarchy. Born in 1765 in the southern—catholic—part of the Republic, he spoke French fluently. That proved an advantage in Amsterdam's revolutionary circles—the place where he started a modest trading company in the 1780s. When the French Revolution came to the Netherlands in 1795, Gogel's career in politics took off. He specialised in financial issues—dealing with the government debt, but especially, tax reform. In the ups and downs of the revolutionary tides, his opportunity came in 1805. Nevertheless, the system that he introduced owed much to the past. Gogel used the French idea of *quattre vieilles* (taxes on land, on business, on windows, and on other signs of personal wealth) to relabel and reform existing taxes in the Netherlands; the main novelty was the 'patent', a business tax that followed the French example.[19]

Simon Schama, who devotes a full chapter of his *Patriots and Liberators* to Gogel,[20] suggests that he never felt much at ease in the higher social circles where his career brought him. And indeed, there is an admonition of a close colleague and friend, when Gogel had already obtained high office, that his cool treatment of people who deemed themselves to be too important to be ignored, earned him a reputation of pride and stubbornness.[21] When, in 1810, Napoleon appointed him as a member of the Empire's *Conseil d'État* (State Council), he wrote to the same friend: 'You know how I think about these offices. I do not have to explain to you how uneasy and almost sick I feel of obtaining a position, that hundreds of people fruitlessly strive for.'[22] Gogel was best left in quiet, making practical provisions for an effective national tax system.

[19] The *quattre vieilles* were adopted in revolutionary France to reduce the state's dependence on excises. Three of these had been enacted by the *Assemblee Nationale* in 1790: the land tax (*contribution foncière*), the tax on furniture (*contribution mobilière*), and the tax on professions (*patente*). In 1798 a window tax was added (*impôt sur les portes et fenêtres*).

[20] Schama, above n 2, 494–524.

[21] Quote from letter of Canneman to Gogel (1804) as published in Sillem, above n 2, 65.

[22] Letter of Gogel to Elias Canneman, dated august 1810, published online in resources. huygens.knaw.nl/retroboeken/gogel_canneman/#page=595&accessor=toc&source=1

As the political tide turned in 1813/1815, Gogel withdrew from public life. He refused to take office under the first Orange king, William I. But he was secretly consulted on the 1821 tax reform, and at that occasion, he wrote a number of reports and letters that look back on his involvement with the tax system.[23] It is interesting to see how, in evaluating Dutch tax policy since 1805, he closely follows all four of Smith's maxims.[24] He considered the 'patent' business tax the least successful part of his tax reform, putting much of the blame on changes after 1815—the tax had become too elaborate, its distinctions between professions too arbitrary, leaving the assessment of tax due a matter of tax officers' personal discretion in all too many cases. More generally, he criticised the course of tax policy under King William. It had been shaped by the unification with Belgium (to be undone in 1830), and by the king's fiscal needs. The Belgian economic interests were determined by early industrialism and, therefore, tariff protection against British produce. This caused evident tensions with Holland's interest in free trade. And the fiscal needs of the king required that the number and burden of excises be increased. Current tax policy, Gogel summed up, has put all the burdens on small business, to relieve the poor but especially the rich. In his view, landowners and portfolio investors lived on the efforts of others, while men of business created prosperity. But that was ignored in the policies of the day. Why, he asked rhetorically, was there so much political debate about taxing domestic servants, and riding horses used by the wealthy classes? Why not debate the taxation on rental value, that burdened productive business?[25]

While he claimed to prefer practical evidence over untested theories, his comments show that he did not consider taxation a purely practical exercise. Tax laws have to fit in with a society that provides opportunities to all its members.

> The more equality of wealth exists in a society, the higher the levels of general prosperity, of honesty and decency, the less poverty, and therefore, the more willing taxpayers one will find … If a government finds itself in the dismal condition of having to tax its citizens heavily, it has to take care that everyone pay according to his ability in a predictable way, that small businesses are not taxed even heavier to the relief of the rich, that the poor are not further suppressed by taxation, so

[23] In IJA Gogel, *Memorien en Correspondentien betrekkelijk den staat van's Rijks geldmiddelen in den jare 1820* (Amsterdam, Johannes Müller, 1844).

[24] This was not an era of referencing; nothing in the text refers to Smith. Smith's maxims had been translated into Dutch (again, without any reference) as early as 1782 in G Dumbar, *Vertoog over de algemeene grondregels* (Campen, JA de Chalmot, 1782). It is only Van Voorthuijsen's thesis on theories of taxation (E van Voorthuijsen, *De directe belastingen inzonderheid die op de inkomsten. Eene staathuishoudkundige proeve* ((PhD thesis) (Utrecht, Broese, 1848) that provides a full translation of the maxims, plus a discussion of comments in the English and French literature.

[25] Gogel, above n 23, 43.

> that they keep access to improvement of their lives, that labour be encouraged, commerce not deterred, that business remains free and unhampered, that the tax falls, as much as possible, on all that exceeds need, that represents luxury, and depends on free choice.[26]

Smith might not have disagreed; but the point here is that the notion of equity as used by Gogel was as open and flexible as Smith's. To Gogel, a tax system was good when it contributed to a good society. And, echoing Smith's second maxim (on certainty) Gogel stressed that tax law should be 'clear and understandable, and not require study to which most taxpayers are not capable.' By 'clear' he meant that laws can be applied in a straightforward way, leaving tax administrators no discretion.[27] To Gogel, tax administrators were much like Montesquieu's judges '*les bouches de la loi*': disinterested executors of the law code. The underlying idea of taxpayer protection seems to be that clear legislation and professional administration will do.

A comparable pragmatism with regard to equal distribution of tax burdens is to be found with Gijsbert Karel van Hogendorp. He was a contemporary of Gogel, but from a different social class and political affinity. Being born in an aristocratic family (connected to the Orange stadtholders), his ambitions in public life led to nothing in the era of Revolution and Emperor. Van Hogendorp's window of opportunity seemed to open up with the downfall of Napoleon. He operated as the kingmaker for William of Orange, and could rightly expect to become the new political leader under a constitutional king. King William, however, had a more pronounced role in mind for himself. The Constitution of 1815 gave extensive political power to the king and allowed him an astronomical yearly revenue. As a reward for his efforts, Van Hogendorp was created Count—but his leading position in government soon dwindled due to disagreements with the king. He became an ordinary member of parliament and a prolific writer of economic advices and comments. His favourite issue was the advantage of free trade, but he took up broader tax issues as well. He was familiar with the English political economy literature and shared its general worldview of free market liberalism.

The relevant point here is his pragmatic view on ability-to-pay as a guideline for tax legislation. The Constitution of 1798 had, in fact, laid out the dilemmas that were to linger on for a century. Taxation should be aligned to citizens' economic capacity as measured by their possessions, their revenues and their consumption; citizens were expected to fulfil their tax obligations in good faith; publication of their wealth and revenues was to be kept to the minimum. In other words: the proper tax base was fairly indeterminate, but intrusive tax administration was to be avoided.

[26] ibid 39.
[27] ibid 40–41.