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The *Fundamental Constitutions of Carolina* as a Tool for Lockean Scholarship

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The *Fundamental Constitutions of Carolina* is the ugly duckling of Lockean scholarship. Writers treat Locke's other political and historical relationships at great length but discuss this potentially very useful source only superficially. The *Fundamental Constitutions*, written in 1669, can be read as a practical statement of political beliefs that Locke later enshrined in his *Two Treatises on Government* and *Letter on Toleration*. Despite the composite nature of its authorship and despite its being written before what is generally considered Locke's political maturity, the *Fundamental Constitutions* is very similar to his philosophy, and deserves a deeper consideration than it generally receives. In the *Treatises*, Locke only sketches his beliefs; in the *Constitutions*, he gives a clearer image. Analyzing this work together with the *Two Treatises* and the *Letter on Toleration* helps to clarify Locke's statements on religion, the form and extent of government, and the connection between property and civil rights, colonization, and slavery.

The proprietors meant the *Fundamental Constitutions* to be the permanent governing document of Carolina, the province granted them by King Charles II. Ill-fitted to the needs of a rough new colony and lacking avenues for change, the document lasted no more than eight months in its original form. After four revisions over a period of years, it was finally abandoned. Our concern here is the July 21, 1669 version which, according to Parker (1963:128), was "an apparently complete copy," written in Locke's hand and sent to the colony. The proprietors later claimed that it was only a draft and that the March 1, 1670 version was official (Parker 1963:130–31). In Parker's version, the articles are often ordered differently from the version that appears in collections of Locke's work (1824), from which parallel citations will be provided.

Locke's shadowy personal life makes his relationship to his patron, Shaftesbury, difficult to ascertain. They met when Locke was called to treat a painful sore on the earl's back. He later became Shaftesbury's secretary and friend. When the proprietors received their land grant, Locke served as their secretary as well; no one contests that writing down the *Constitutions* was part of his duty. The controversies arise when scholars debate his contribution to the content, and the literature tends toward polarized views.

Louise Fargo Brown (1933), Shaftesbury's biographer, gives Locke no

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credit at all for the *Constitutions*. Even though she recognizes that, "the original draft of the *Fundamental Constitutions* is in Locke's hand," she considers it to "represent Shaftesbury's ideas set down by that philosopher." She goes so far as to say:

> At the time the *Constitutions* were drafted, he had been two years in Ashley's service, more in a medical capacity than any other. It was after and not before this time that his employment brought him in touch with the field of politics (156–57).

Brown's statements flout historical accuracy. Locke was thirty-seven years old in 1669 and had a year's political experience as a British envoy's secretary. He lacked neither political interest nor political conviction. Indeed, by 1660 Locke had written an unpublished essay defending the civil magistrate's right to adjudicate certain religious matters. The preface foreshadows, in many ways, the *Letter on Toleration*, published twenty-nine years later:

> I have not the same apprehension of liberty that some have, nor think the benefits of it to consist in a liberty to men, at pleasure, to adopt themselves children of God, and from thence assume themselves heirs of the world, nor a liberty to ambitious men to pull down well-framed constitutions, that out of the ruins they may build themselves fortunes; not a liberty to be Christians so as not to be subjects (King 1830, 1:14–15; cf. Macpherson 1962, 258–59).

The rhetoric may betray youth, as Brown implies, but it hardly betrays ambivalence. Certainly it shows that Locke considered post-Restoration political issues thoughtfully and that, at some level, his philosophy remained constant throughout his life.

Reducing Locke and Shaftesbury's friendship to a simple patient-physician acquaintance flies in the face of other evidence as well. The biographer Jean Le Clerc (1706), perhaps Locke's closest friend in Holland, mentions that Shaftesbury consulted Locke on all issues, considered medicine his least important accomplishment, and encouraged him to study "those matters, that belonged to the Church and State, and which might have some relationship to the business of a Minister of the States" (p. 6). Locke and Shaftesbury's friendship was close and deep; Shaftesbury would not have ignored or rejected out of hand Locke's views about the *Fundamental Constitutions*.

The eighteenth-century historian Alexander Hewatt's position contrasts with Brown's. Hewatt's sources include the South Carolina archives and papers owned by the Lieutenant Governor William Bell, scion of officeholders from the colony's inception. Hewatt (1779, 1:44) contends that the proprietors depended solely on Locke's ideas:

> A model of government, consisting of no less than an hundred and twenty different articles, was framed by this learned man, which they agreed to establish, and the careful observation of which to bond themselves and their heirs forever.

Brown and Hewatt take extreme positions; no extant physical evidence resolves the conflict precisely. Yet a middle ground may be confidently held. As Brown admits, we have a copy of the *Fundamental Constitutions* in Locke's own hand; further, Locke placed a note next to Article 96 in a copy he sent to friends. He disclaimed writing that article, saying it was placed in the final draft against his judgment and over his objections (Locke 1824, 9:194; Laslett 1960, 30). This proves conclusively that Locke did not compose the *Constitutions* alone; it also proves that he had a critical voice in its composition and implies that he agreed with the other articles. Although the issue will never be settled, a comparison of the *Constitutions* with his other works shows how Locke's philosophical writing echoes his political life.

RELIGION AND GOVERNMENT

One of Locke's most resounding themes is the demarcation between the religious and the secular, the civil and the ecclesiastical power. In his *Two Treatises of Government* (Laslett 1960), Locke surmises that civil government sprang from the human need to secure property. Originally governed only by the law of nature, humans were absolutely free to preserve their persons and possessions in any manner they chose, as long as they did not impair "the Life, the Liberty, Health, Limb or Goods of another," without valid reason (*Second Treatise*, 42). When they move into civil government, people surrender no more of their freedom than is absolutely necessary. As Locke says, "Government has no other end but the preservation of Property" (*Second Treatise*, 94). In all other matters not pertaining to government's proper role, each individual is autonomous. Thus, wrote Locke, "Law, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under the Law the end of Law is not to abolish or restrain, but *to preserve and enlarge Freedom*" (*Second Treatise*, 57).

The general good being limited to the preservation of property, Locke's government is theoretically restrained from legislating religion. Locke's *Letter on Toleration* (here after referred to as *Letter*) specifies that people join government to advance their "life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like" (Locke 1824, 5:10). The Church, by comparison, is "a voluntary accord, in order to the public worshipping of God effectual to the salvation of their souls" (*Letter*, 5:13) God taught people to worship but did not establish a government; people created civil society, not a framework for religion. Each institution has its realm, separate and distinct. "He jumbles heaven and earth together" (*Letter*, 5:21) who attempts to combine their jurisdictions. Locke's

thesis in the *Letter on Toleration* thus encompasses freedom from encroachment on religious worship both by individuals and by the state.

Although the Church may confuse heaven and earth as easily as government may, Locke directs his energies in the *Letter* toward discrediting government-established religion. He holds that the people grant civil magistrates power only to enforce laws and punish. "And upon this ground I affirm, that the magistrate's power extends not to the establishment of any article of faith, or forms of worship, by the force of his laws" (*Letter*, 5:12). Such power is both unnecessary and irrelevant. Physical force is "impertinent" (*Letter*, 5:12), impotent against religious conviction. While force might successfully make people change an outward form of worship, "true and saving religion consists in the inward persuasion of the mind and such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force" (*Letter*, 5:11). Moreover, Locke believes that God wants only worship founded on inner belief: "Faith only, and inward sincerity, are the things that procure acceptance with God" (*Letter*, 5:28). Those who dictate religion therefore offend God, for "the end of all religion is to please him, and . . . liberty is essentially necessary to that end" (*Letter*, 5:30).

Even granting for the sake of argument that inner conviction can be affected by physical force, Locke contends that belief does not ensure salvation. Only God knows which of all the world's professions is the right and true one; the very proliferation of religions shows that no human being can be sure. Therefore, granting the magistrate power to establish and enforce a particular faith does not help the people, and precludes them from searching for and perhaps finding the true religion themselves. Moreover, people's faith should not be determined by their residence; "that which heightens the absurdity, and very ill suits the religion of a deity, men would owe their eternal happines or misery to the places of their nativity" (*Letter*, 5:13).

In his *Third Letter for Toleration*, Locke noted that the nature of civil power not only prevents the magistrate from imposing religion, but requires him to safeguard freedom for all religions as well.

> For force from a stronger hand to bring a man to religion, which another thinks the true, being an injury that in the state of nature every one would avoid; protection from such injury is one of the ends of a commonwealth, and so every man has a right to toleration (5:212).

The *Fundamental Constitutions* afforded an opportunity to establish Locke's rather uncommon principles. Many elements of the *Fundamental Constitutions*'s position on establishment of religion and toleration can be found in the *Letter on Toleration*. Article 87 embraces the thesis that civil peace requires religious freedom:

> But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance, or mistake gives us no

> right to expel, or to use them ill; and those who move from other parts to plant there, will unavoidably be of different religions, the liberty whereof they will expect us to have allowed them, and it will not be reasonable for us on this account to keep them out; that civil peace may be maintained amidst the diversity of opinions and our agreement and compact with all men may be duly and faithfully observed; the violation whereof, upon what pretense soever, cannot be without great offence to Almighty God, and great scandal to the true religion, which we profess; Therefore, any seven or more persons agreeing in any religion shall constitute a church or profession, to which they will give some name, to distinguish it from others (Locke 1824, 9:97).

In words very close to the *Letter on Toleration*, this article recognizes that individuals do nothing unlawful when they profess disparate faiths. They do only what every individual has a natural right to do, attempt to save his soul. This article departs from Locke's position only slightly. The proprietors declare their religion the true one, whereas Locke considers orthodoxy empty; "for every church is orthodox to itself; Whatsoever any church believes, it believes to be true; and the contrary it pronounces to be error" (*Letter*, 5:19). Yet Locke was not concerned that the proprietors believed theirs the "true religion." The crucial point was that they recognize others' right to believe the same.

Some apparently less permissive elements of the *Fundamental Constitutions* can also be seen in the *Letter on Toleration*. Locke places restrictions on toleration, and so does the *Constitutions*. Although one might be free to worship God in any form, disbelief could not be permitted. Atheism shakes the very foundations of Locke's political system. A person who does not believe in God can never feel bound to the social contract, which is a sort of promise before Him. Disbelief endangers civil society. Locke is painfully explicit:

> Lastly, those are not at all to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all (*Letter*, 5:47).

Locke recognized the deep commitments faith can produce and the respect for authority it engenders. Religion is the bond that holds people to their word and their contract. When the issue is community safety, not individual souls, religion becomes the magistrate's concern. The *Letter on Toleration* says, "A good life, in which consists not the least part of religion and true piety, concerns also the civil government: and in it lies the safety both of mens' souls and of the commonwealth" (5:41).

While the government may not establish religion, laws concerning religion may have a valid secular purpose. We can trace that belief to Article 86 of the *Fundamental Constitutions*, which provides that "no man shall be permitted to be a freeman of Carolina or to have any estate or habitation within it, that doth

not acknowledge a GOD; and that GOD is publicly and solemnly to be worshipped." The rationale for Article 91, which states that no person above age seventeen will have protection of the law unless such person is a registered member of a church, also becomes clear. Article 94, prohibiting seditious talk at religious meetings, does not erode religious freedom, but protects it (Locke 1824, 9:100, 101, 103). Freedoms and restrictions together ensure society's safety. Thus far Locke and the *Fundamental Constitutions* agree.

The general consistency between the *Fundamental Constitutions* and Locke's political beliefs compelled him to point out where they deviated. Thus, as mentioned above, he disclaimed Article 96 (1670 version), which made the Anglican church the official religion for Carolina:

> It shall belong to the Parliament to take care for the building of Churches and the public Maintenance of Divines, to be employed in the Exercise of Religion according to the Church of England, which, being the only true and Orthodox, and the National Religion of the King's Dominions, is so also of Carolina, and therefore, it alone shall be allowed to receive public maintenance by Grant of Parliament (Parker 1963, 181).

This article does not appear in the 1669 "draft," lending credence to the argument that Locke did not write it or wish it included in the *Constitutions*.

Religious toleration was probably the most heated issue of 1669. Charles II may have been a secret Catholic, but the Church of England was nonetheless the church of state, all English officials swearing by its tenets. Yet the faraway colonies wished to vary that strictness. The Carolina proprietors' motive was almost certainly commercial. Like many colonial investors, they guaranteed religious freedom in their charter, then advertised it to attract disgruntled immigrants from England and the Puritan colonies (Kaye 1905, 33; Seliger 1968, 116n). Hence, they felt simultaneous pressure to carry toleration into their constitutions and to conform to England's censorious codes. Thus Article 96 went into the *Constitutions*, despite Locke's antipathy. This direct establishment of religion directly offended Locke's sentiments. Yet the conflict between the two documents highlights the more basic agreement between them, that property is government's correct province.

FORMS OF GOVERNMENT

Locke clearly held that government's only role was to protect property (in the large sense of both one's body and possessions), and could make no claims beyond that. All other actions derive from that role, as we saw with the civil magistrate's part in religion. The preeminence of property, and the hierarchy it creates, is easily discerned in and consistent with the *Fundamental Constitutions*. When Locke considered the formal elements of a legitimate government,

he stated that consent, not a specific political form, was his concern. The *Second Treatise on Government* says "that, which begins and actually *constitutes any Political Society*, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society" (99). Originally vested with the power to choose their government, they may "so accordingly . . . make compounded and mixed Forms of Government," ranging from perfect democracy to hereditary monarchy, "as they think good" (132). 'Commonwealth' to Locke meant "not a Democracy, or any Form of Government, but *any independent Community* which the *Latines* signify by the word *civitas*, to which the word which best answers in our Language is *Commonwealth*, and most properly expresses such a Society of Men, which Community of Citty in *English* does not . . ." (133). Although the Two Treatises appear democratic, Locke places more emphasis on executive power and gives political participation over to a select group of men.

Before outlining his legitimate government, Locke reiterates that the state of nature has three great weaknesses: it lacks an established, consistently followed law; a known and impartial judge; and power to support and execute sentences. Government requires legislative, judicial, and executive authority to remove those liabilities. But Locke absorbs the judiciary into the executive as an implicit complement to the latter's punitive power. He also relegates the federative power, which deals with other states, to the executive. He makes it a broad discretionary power, "left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good" (174). When the jurisdictional dust settles, only the executive and legislative branches of government remain. How much power does each have in relation to the other?

Locke emphasizes that "the *first and fundamental positive Law* of all Commonwealths, *is the establishing of the Legislative* power" (134). The people, giving over their natural power of self-preservation to the government, vest that power in the legislative as long as the government exists. The legislative becomes "*the supream power* of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it" (134). The executive's enforcement role is necessarily subordinate: "what can give Laws to another, must needs be superiour to him" (150).

Yet if the legislative is supreme because it gives laws to the executive, what of the executive's power extempore? The executive fulfills its federative duties not solely according to standing law, as we saw earlier, but through 'prudence and wisdom'. Moreover, Locke recognizes extralegal power in the executive itself. "For the Legislator not being able to foresee, and provide, by Laws, for all, that may be useful to the Community," the executive may use its discretion to act without legislative permission, "as the publick good and advantage shall require" (159). The public good may require the executive to transgress the law as well, where observing it would harm the public weal. "This Power to act according to discretion, for the publick good, without the prescription of the

Law and sometimes against it, *is* that which is called Prerogative" (*Second Treatise*, § 160; cf. Strauss and Cropsey 1963, 459).

The *Fundamental Constitutions* embodies the dominant executive that Locke describes. Proprietary government in Carolina was equally a corporate and feudal system. It established a board of directors within a grandiose and complicated oligarchic hierachy, and a property system characterized by feudal land laws. Each proprietor controlled some aspect of government, and the two most powerful bodies, the Palatine's Court and the Grand Council, together directed them.

The eight proprietors acted as the board of directors and composed the first tier of nobility. The eldest proprietor was made the chairman, or Palatine; he presided over the Palatine's Court, which simply consisted of himself and the seven other proprietors. Each proprietor had his own court as well, with duties corresponding to his title: Chief Justice, Chancellor, Constable, High Steward, Treasurer, Chamberlain, and Admiral. The *Constitutions* gives the titles Landgrave and Cacique to the men composing the second tier of nobility. These held the adjuvant or 'Councillor' positions in the proprietary courts, and each had an equal voice in his respective court.

Executive powers were parcelled out among the seven proprietary courts. Three courts controlled the federative power. The High Constable's Court "shall order and determine of all military affairs by land, and all land forces, arms, ammunition, artillary, garrisons, and forts, etc., and whatever belongs unto war" (Parker 1963, 36; Locke 1824, 9:39). The Admiral's Court managed war on the high seas, as well as "all cases in matters of trade between the merchants of Carolina amongst themselves, arising without the limits of Carolina; as also, all controversies in Merchandising that shall happen between denizens of Carolina and foreigners" (Parker, 37; Locke 9:41,42). The Chancellor's Court facilitated peaceful foreign policy and treaties "with neighbor Indians or any other" (Parker, 34; Locke 9:50). Although the executive did not hear all minor judicial cases, the Palatine's Court chose all judges. The proprietors' courts heard appeals for civil and criminal cases; murder, treason, and capital offenses were treated by a semiannual roving commission appointed from the Grand Council. While the proprietors had wide discretion over their own courts, the Grand Council, which comprised all members of the executive—the eight proprietors, twenty-eight landgraves and caciques, and fourteen freeholders—oversaw the most important aspects of government. The Grand Council was to judge any controversies among proprietors or among the proprietor's courts; declare peace and war; issue orders to the Admiral's and Constable's courts regarding raising and disposing of troops. Most importantly, it set the agenda for parliament and itself passed all bills before they could be considered there. The Grand Council also dispensed the money that parliament allotted to specific uses (Parker 160, Article 46, as revised in margin notes; Locke 9: , Article 50). Since all the nobles had a vote both in their court and in the Grand

Council, the power of Carolina was effectively reserved to a small group of men; among them, however, compromise was undoubtably necessary.

In case there was any doubt about who really controlled the government, Article 32 reserved a large prerogative to the Palatine's Court. With the consent of the Palatine and three proprietors, the Court had

> power to call Parliaments, to pardon all Offences, to make Elections of all Officers in the Proprietors' dispose; . . . power, by their Order to the Treasurer, to dispose of all public Treasure, excepting money granted by the Parliament and by them directed to Some particular public use; and also, shall have Negative upon all Acts, Orders, Votes, and Judgements of the grand Council and the Parliament, . . . and also, shall have a Negative upon all Acts and orders of the Constable's Court and Admiral's Court relating to wars; shall have all powers granted to the Proprietors by their patent from our Sovereign Lord the King, except in such things as are limited by these fundamental connstitutions. (Parker, 157, Article 32, as revised in margin notes; Locke 9: , Article 33.)

All these prerogative powers of the executive seem quite acceptable to Locke's theory. It raises again the question yet unanswered: Which power, legislative or executive, reigns supreme?

In Locke's theoretical outline for legitimate government, the legislative holds supremacy by virture of being the original power of government; without a legislature, the executive would not exist. Yet, shading in his outline, Locke envisions a government in which the executive legitimately holds a kind of preeminence. He says,

> In some Commonwealths where the *Legislative* is not always in being, and the *Executive* is vested in a single Person, who also has a share in the Legislative; there that single Person in a very tolerable sense may also be called *Supream* . . having also no Legislative superiour to him, there being no Law to be made without his consent, which cannot be expected should ever subject him to the other part of the Legislative, he is properly enough in this sense *Supream* (*Second Treatise*, 151).

Thus the legislature will not always be the supreme branch of government. "It is not necessary, no nor so much as convenient, that the *Legislative* should be *always in being*. But absolutely necessary that the *Executive Power* should, because there is not always need of new Laws to be made, but always need of Execution of the Laws that are made" (153).

Locke's statement describes the *Fundamental Constitutions* almost perfectly. On first sight, the legislative power appears strangled by the executive's prerogative grip. Parliament consisted of "the Proprietors, or their deputies, the Landgraves and Caciques, and one Freeholder out of very precinct" (Parker, 65; Locke, 9:71), sitting in one chamber, each with one vote. It met biannually unless called more often, but the Palatine could dissolve it at any time with

consent of three proprietors. Each parliamentary act had to be ratified by six proprietors and the Palatine before it became law.

Yet despite the executive's controls over parliament, the latter body held one card that illustrates Locke's vision of the legislative power. Parliament held the power of the purse, the ability to guide or limit the executive's actions through the raising and spending of money, the ability to grant money to 'some particular public use', as the *Constitutions* said. Only parliament could raise taxes; and if it directed money to some use, the Palantine's Court could not override it. These arrangements with respect to taxing and spending reflect Locke's concern that the greatest danger in government is that the executive might usurp its members' property to support an overbearing rule. Therefore, although Locke thought everyone should pay taxes consonant to his wealth,

> 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 (Second Treatise, 140).

Even though executive prerogative limited the Carolina Parliament's power to legislate, it could still obstruct the executive's plans. It could refuse to accept a burdensome tax or refuse to appropriate money for government at all. Parliament did not have to bend to an overbearing executive. It could easily protect its position and force a compromise. The *Fundamental Constitutions* and the *Second Treatise on Government* maintain the same critical balance between the two branches of government, guide and executor.

POLITICAL STATUS AND PROPERTY

While the structural balance survives, neither the *Second Treatise* nor the *Constitutions* in any way favors egalitarianism. The concern in the *Second Treatise* for protecting the legislature reflects Locke's deeper concern to protect property. The *Second Treatise* specifies that man has an equal right to "the Acorns he pickt up under an Oak" (28) or the land he tills. Equal right to property does not, however, mean equal quantity of property. God "gave it to the use of the Industrious and Rational . . ."(34). One who can use the land has every right to it, no matter how disproportionate the amount, "the *exceeding of the bounds of his* just *Property* not lying in the largeness of his Possession, but in the perishing of any thing uselessly in it" (46).

Locke considers the use of money a further sanction of disproportionate goods, money being "tacit and voluntary consent" that "a man fairly possesses more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to anyone" (50).

The *Fundamental Constitutions* likewise establishes an oligarchy of wealth. Although aristocratic language pervades the *Constitutions*, looking beneath reveals that property, not blood or merit, determines status. From the Palatine's Court to the roving judicial commissions, land is the key to sovereignty. As one of its first tasks, the *Constitutions* divides Carolina "into Counties; each county shall consist of eight Seigniories, eight Baronies, and four precincts; each Precinct shall consist of six Colonies" (Parker, 4; Locke, 9:3). Each barony, seigniory, and colony covered 12,000 acres. Proprietors owned the seigniories; landgraves and caciques, the baronies. The rest of the land would be divided "amongst the poeple; that so . . . the Balance of Government may be preserved" (Parker, 5; Locke, 9:4). This so-called balance was definitely weighted in favor of those with the most land. Rank corresponds to property, and to control: to qualify as a member of parliament or sheriff, a man must have 500 acres; to become a constable of a colony, 100 acres. Justices of the various courts required 300 to 500 acres: registers of precincts, 300 acres; and registers of a colony, 50 acres (Parker, 145 Article 66; 147, Articles 75, 78; 160–61, Articles 55, 57, as revised in margin notes; 163, Article 84 as revised in margin notes; Locke, Articles 61, 72, 91, 63, 85). The *Constitutions* provides that freeholders acquiring more than 3,000 acres of land could be granted the title of Manoral Lord. That a freeholder could achieve noble rank proves further that blue blood was not the dominating concern.

Parliament and the judiciary were not the only public roles restricted to landowners. The *Constitutions* linked property to suffrage. No man could vote for even a parliamentary representative "that has less than fifty acres of freehold within the said precinct" (Parker, 66; Locke, 9:72). Whether or not fifty acres was a nominal amount, the implication is significant. To have a legitimate interest in society, one must own property. Property was the centerpiece of the *Constitutions*.

Feudal requirements pertaining to freeholders and "leet" men furthered the sense that with property goes control. The *Constitutions* revived land tenure and the quitrent system, which hearken back to the fifteenth century. Quitrents, called "Chief-rents" in the *Constitutions*, were not themselves true rents. They were originally a consideration in lieu of the feudal villein's manoral duty. Instead of working the lord's land or relinquishing a percentage of his harvest, the villein paid a fixed sum. The term *quitrent* later came to represent any form of payment that "absolved or made quit" the tenant from his personal obligation of service. Similarly, Carolina's freeholders paid a fixed sum yearly to the proprietors; the amount never varied and was not connected to land values. The concept of service no longer motivated the relationship between lord and labor. The concept of work as a commodity has taken its place. Allowing the commutation made the English system more flexible, and long after other feudal systems had died or evolved, the American colonies functioned under proprietary government.

More than a source of revenue for the proprietors, quitrents were a tangible recognition of a hierarchy and subservience to the lord. The historian Charles Andrews (1919, 15–20) says, "Rent was the bond between the lord and the land, the symbol of territorial ownership." It meant essentially that every person in the province answered to the proprietors both as employee and as subject. That attitude emanated from the belief, consistent with Locke's, that land and political privileges are inseparable.

Leet men represented the serving class in the *Constitutions*. They were literally serfs, housed in the baronies and manors of the nobility. Freeholders could not have leet. The *Constitutions* specify that the lord was to assign each leet man or woman ten acres to work, "they paying to him therefore not more than one eighth part of all yearly produce and growth of the said acres" (Parker, 156, Article 25, as revised in margin notes; Locke 9: , Article 26.) The leet man was "under the jurisdiction of the lord . . . without appeal from him;" he did not "have liberty to go off from the Land of his particular Lord and live anywhere else without Licenses obtained from his said Lord, under hand and seal" (Parker, 155, Article 22, as revised in margin notes; Locke, 9, Article 25).

The first draft of the *Constitutions* incorporated a clause providing a hearing for complaints against the lord "in case the Lord . . . shall have made a contract or agreement with his tenants" (Parker, 137, Article 26). In revision, the clause disappeared and the accepted version does not mention contracts. The new clause did ensure, however, that no man would be a leet man "who has not voluntarily entered himself a Leet man in the registry of the County Court" (Parker, 156, Article 24; Locke, 9: Article 25). As long as the leet man retains the liberty to choose his servitude, rather than being forced into it, Locke's philosophy considers the arrangement valid. He says,

> the Authority of the Rich Proprietor, and the Subjugation of the Needy Beggar, began not from the Possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving. And the Man he thus submits to, can pretend to no more Power over him, than he has consented to, upon Compact (*First Treatise*, 43).

We find that though government is legitimate only if all men originally consent to it, their equal power to consent dissolves once civil structures are established. Government, created "that Men might have and secure *their Properties*" (*Second Treatise*, 139), belongs only to those who have the properties. Moreover, the size of the property determines the degree to which men may participate.

Locke has drawn civil inequality from natural equality (cf. Macpherson 1962, 251). Ironic as it may seem, Locke has left no philosophical gap. His civil theory derives logically from his premise about the unlimited right to own property and the privileges which property brings to society. Locke did per-

ceive the shortcoming in his philosophy: believing that government exists solely to protect property

> necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by ent'ring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. *Men* therefore *in Society having Property*, they have such a right to the goods, which by the Law of the Community are theirs (*Second Treatise*, 138).

But Locke does not consider those men whose sole property resides in their bodies, those whom his supposition and requirement exclude. Locke dismissed unlanded laborers because his work concerned government, and their part was passive at best. The remarks he made in the *Second Treatise* concerning the servant's position he made almost in passing. It remained for the *Fundamental Constitutions* to illustrate how a Lockean government would function.

SLAVERY AND CONQUEST

Despite the unpropertied man's inferior position, he still had the natural right to accrue property and the civil right to sue for protection of his person to a civil judge. He would never be confused with slaves, who may not own property and are "subjected to the Absolute Dominion and Arbitrary Power of their Masters" (*Second Treatise*, 85). The slavery issue, one of Locke's most contorted arguments, causes great consternation among his reviewers. The *First Treatise* states, "Slavery is so vile and miserable an Estate of Man, and so directly opposite to the generous Temper and Courage of our Nation; that 'tis hardly to be conceived, that an *Englishman*, much less a *Gentleman*, should plead for't" (Wood 1974, 15n; Laslett 1960, 43). Yet the *Second Treatise* envisions a legitimate slavery.

All the proprietors agreed with black slavery: one was twice governor of Virginia, a slave-owning colony; three owned plantations in the Caribbean; five invested in the black labor trading companies. Locke himself held stock in the Royal Africa Trading Company. Without doubt, the proprietors desired to continue their practices in Carolina. Indeed, the *Fundamental Constitutions* mandates slavery, and Locke supported the mandate. Article 101 reads, "every freeman of Carolina shall have absolute power and authority over his Negro Slaves" (Parker, 164, as revised in margin notes; Locke, 9: Article 110).

Locke's defense of liberty, natural freedom, and civil right, though qualified, still seems incongruous against this unwavering support of slavery. If the thesis that the *Fundamental Constitutions* elucidates Locke's philosophy is to hold, we must somehow resolve the dissonance. It seems useful to view the conflict alongside Locke's ideas about colonization. Martin Seliger (1968, 118) claims that "Locke's justification of colonization is a flagrant and inane devia-

tion from his condemnation of foreign conquest. Its ostensible weakness might attest by way of contrast the strength of his humane principles, if those were not similarly impugned in his justification of slavery." On the contrary, Locke makes a sort of logical exception regarding colonization, which we can find in his discussion of slavery as well.

Locke speaks strongly against the legitimacy of conquest and of usurping property after conquest. "[H]e that *Conquers in an unjust War, can* thereby *have no Title to the Subjection and Obedience of the Conquered*" (*Second Treatise*, 176). A conqueror has no legitimate right to their property either, keeping it only by virtue of superior force. Even in a just war, one where the defender is victorious, reparation due to the conquerer "will scarce give him a *Title to any Countrey he shall Conquer*. For the Damages of War can scarce amount to the value of any considerable *Tract of land*, in any part of the World, where all the Land is possessed, and none lies waste" (183).

In Locke's thinking, conquering a populous country with an established government differs from colonizing a place like America, where land lies fallow. The distinction rests in Locke's definition of legitimate property. He makes the comparison between England and the New World:

> An Acre of Land that bears here Twenty Bushels of Wheat, and another in *America*, which, with the same Husbandry, would do the like, are, without doubt, of the same natural, intrinsick Value. But yet the Benefit Mankind receives from the one, in a year, is worth five *l*. and from the other possibly not worth a Penny, . . 'Tis *Labour*, then which *puts the greatest part of Value upon Land*, without which it would scarcely be worth any thing: . . . for all that the Straw, Bran, Bread, of that Acre of Wheat, is more worth than the Product of an Acre of as good Land, which lies wast, is all the Effect of Labour (*Second Treatise*, 43).

Wasteland is not limited to uninhabited land. Legitimate ownership lies in proper use and not simple inhabitation. Since the Native Americans had no civil government by Locke's definition and certainly did not tend their land properly, colonizing America was a legitimate, even necessary maneuver. "God, when he gave the World in common to all Mankind, commanded Man also to labour" (32). Men are almost obliged to tend all land lying unused.

As colonization is an exception to the moral rules governing a conquerer, so Locke makes an exception for the province in his stance against slavery. His description of slavery has almost no resemblance to the institution of slavery then established. Slavery, he avers, is "*the State of War continued, between a lawful Conquerour, and a Captive*" (24). When in the state of nature one person commits a crime against another, "the Offender declares himself to live by another Rule, than that of *reason and common Equity*" (8). Doing so, he forfeits his life to the one offended. By his natural right of self-preservation, the intended victim may punish the criminal as he will, "because such Men are not under the ties of the Common Law of Reason, have no other Rule but that of

Force and Violence, and so may be treated as Beasts of Prey" (16). By this right and the right to reparation, the one offended may "make use of him to his own Service, and he does him no injury by it" (23). If the slave wishes to end his captivity, he may commit suicide, rendering himself the punishment he deserves. His suicide does not break the human constraint placed on him by God because the slave has become morally a subhuman 'beast', forfeiting his capacity for ethical consent.

Yet slavery as practiced in the colonies bore no resemblance to the use of captives beaten in a just war. Two solutions present themselves. In the first, instead of fruitlessly trying to connect the two institutions, we consider the lacuna itself revealing. Locke discussed slavery in the first and second treatises within specific contexts that caused him to exclude black slavery. The slavery depicted in the treatises is slavery of political conquest. It is slavery on the order of the Roman form, slavery between two similar societies, slavery between two humans with the same rational nature. When Locke wrote the *Two Treatises* he had white men, Europeans, people capable of making contracts, in mind. But we can speculate that Locke did not believe that all people shaped like humans had the same capacities: "I think I might say, that the certain boundaries of that species are so far from being determined, . . that very material doubts may still arise about it. And I imagine that none of the definitions of the word *man* which we yet have, nor descriptions of that sort of animal, are so perfect and exact as to satisfy a considerate inquisitive person . . ." (Locke 1959, I, bk. 3, ch. 6, § 27, 78).

Whether or not the argument persuaded Locke himself, the fallacy would have been extremely useful. Arising from his intuitional perception, it facilitated a sort of syllogism: black slaves were property; so blacks must be somehow less than human and lack rational capacity. Given the physical similarities that seventeenth century writers found between blacks and apes, questioning the delineation of species made it easier to believe that although blacks looked and acted like men, they were not quite the same. That scientific justification would allow Locke to except blacks from his prohibiton of slavery. His not mentioning blacks in the *Second Treatise* tends to show that Locke did not consider the distinction worth mentioning. Winthrop Jordan (1968, 239) notes that "before the Revolution, the English colonists generally felt no need to expound or even mention the Negro-Ape connection." Locke certainly was willing to make exceptions when they suited his purpose, however, and he obviously found it convenient not to mention a slave's right to revolt. Far from being 'flagrant and inane', the slavery exception, like the colonization exception, supports the practices of the *Fundamental Constitutions* in America. Thus, colonizing America is permissible because it does not meet standards for a civilized country; black slavery breaks no prohibitions because blacks do not have the same capacities as men. Civil compacts and natural freedom do not apply to them.

Yet perhaps we need not resolve the conflict between liberty and slavery at all. In the second solution that presents itself, the tension between slavery and freedom in the *Two Treatises* is consistent with a similar tension in the *Constitutions*. Despite the undeniable fact of slavery, Article 98 provides a modicum of freedom for slaves:

> Since Charity obliges us to wish well to the Souls of all men, and Religion ought to alter nothing in any man's civil Estate or Right, It shall be Lawful for Slaves, as all others, to enter themselves and be of what church or profession any of them shall think best, and thereof be as fully members as any freemen. But yet, no Slave shall hereby be exempted from the civil dominion his Master has over him, but be in all other things in the same State and condition he was in before (Locke, 9:108).

The first sentence appears to consider slaves to be people having "civil Estate or Right"; the second sentence firmly places them in the "State and condition" of absolute obedience.

Considering the contradictory views of slavery held by the proprietors, is it so strange that Locke's writings are contradictory as well? The *Letters on Toleration*, concerned with the spiritual realm, held that God accepted no spiritual inequality. The *Two Treatises*, written in defense of property, needed to validate physical inequality. Though philosophically inelegant and analytically unsatisfying, Locke's position on slavery simply reflects the position that most of Britain held at the time.

CONCLUSION

Where Locke's philosophical writings leave us with questions, the *Fundamental Constitutions of Carolina* lends insight to fill in the gaps. Because of the space limitations and the nature of the *Constitutions*, this analysis has been necessarily superficial and tentative at points. Nevertheless, the *Constitutions* can usefully illustrate a practical application of Locke's philosophy. One hopes that the connections made here will provoke new and deeper analyses of both the *Fundamental Constitutions* and troublesome issues in Lockean scholarship.

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