

## Phil 176/276G: Historical Philosophers—American Philosophy

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### Handout #4: A Lockean Analysis of the US Constitution

#### 1. The Preamble

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

**Lockean Analysis:** The desire to “perfect the Union” is an expression of dissatisfaction with the Articles of Confederation and therefore focused to a large degree on features unique to the American experience. But establishing an effective judicial system, insuring peace and security from both domestic thieves and foreign invaders, promoting the good of the society at large, and protecting “liberties” (not detailed in the preamble) are the functions or duties assigned gov’t in the social contract as Locke describes it.

There is, of course, some question as to what “promoting the general welfare” amounts to. How far is this supposed to extend beyond protecting the lives and property of citizens with police, courts, prisons and the military? How much taxation might be justified on this basis?

Recall that Locke insisted that additional taxes beyond those necessary for moving/keeping the population out of the state of nature must have the consent of the people (as indicated by the approval of their representatives). But this idea is not contained in the preamble. Instead, it is discussed in Article 1 below.

## 2. Racism and Article I

**Lockean Analysis:** Article I describes the institutions that are to be entrusted with the power to make laws. The idea that these legislatures should be elected (representative governance) and the idea that they should differ from those individuals entrusted with the power to execute, interpret and enforce laws and policies with violence (division of powers) are clearly Lockean. Bicameralism—the division of the legislature into a more directly representative house and a less directly representative senate—were features of the Kingdom of England (House of Commons v. House of Lords), though not distinctively Lockean, and the founders seemed to have a conservative and broadly aristocratic justification for it – the senate being older and wiser and therein a “moderating influence” on the younger, more foolish, less wealthy House. The more specific details of apportionment, age and residency requirements are largely explained by the American context. One of these details is worth mentioning, however, insofar as it bears on our assessment of Charles Mills’ theory of the racial contract.

Recall that we previously distinguished in lecture between two common narratives regarding the relation of Lockean (liberal democratic) ideals to American history.

**The Optimistic Narrative:** Locke elaborated basic rights to life, liberty and property justly acquired or received, where property right is limited by obligations to take care of those suffering from lack of property. The “liberty” of which Locke wrote included religious freedom, freedom of movement, freedom of assembly, freedom of expression, etc. And Locke used the idea of a social contract to argue for the incorporation of democratic ideals into governmental structures by arguing from said contract to limitations on gov’t power, a ban on taxation without representation, a division of powers, etc. (including the five political principles you wrote about in your essay). These Lockean political ideals were articulated in our founding documents: the Declaration of Independence and the US Constitution. Though Lockean natural and political rights were initially limited to relatively wealthy European men, through the struggles of slaves, women, native peoples and their descendants, these rights were eventually expanded to realize the promise of “equality under the law” that Locke conceptualized.

Recall that Jefferson’s **rough draft of the Declaration**

<https://www.loc.gov/exhibits/declara/ruffdrft.html>

provides some evidence for this optimistic narrative, for it is as if Lockean ideas were forcing Jefferson, on pain of inconsistency, to acknowledge the injustice of the American practice of slavery that benefited him economically.

**The Pessimistic Narrative:** The main function of Lockean ideas in early American history was a rationalizing one. The colonists revolted against British rule for reasons that had little to do with Locke's idea of natural rights, the social contract and the normative political principles he derived from these philosophical constructs. Proclamations of the natural, pre-civil rights of men to life, liberty and the pursuit of happiness were really "lipstick on the pig." The pig is a metaphor for slavery, indentured servitude and the economic interests of those powerful men who were pursuing their economic interests when arguing for revolution and then the unification of the states into one nation with a central gov't granted the power of taxation without constitutional limit. The history of America is most accurately described as the use of Lockean rhetoric to help conceal capitalist, anti-Lockean, anti-Democratic practice. The early Americans were not united by a social contract in Locke's sense, but a racial contract in Charles Mills' sense: an application of Lockean ideals to a limited group of men united by a common racial and socioeconomic identity.

Just as the rough draft of the Declaration provides evidence for the optimistic narrative, Article 1 of the US Constitution provides evidence of the pessimistic narrative. First, the plan for apportioning representatives describes natives, African slaves and their descendants as "persons" but it dictates that they are only to be counted as 3/5 of what they are (i.e. persons) by those entrusted with apportionment.

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

Question: Does this mean that the framers of the constitution conceptualized

each slave as 3/5 of a person? What does that even mean?

Note that slavery is explicitly protected by Article I:

“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

Note: “Person” is applied to slaves here too.

And the right of slave-owners to have their slaves returned to them is articulated in Article IV:

“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

Question: Does this mean that the framers of the constitution denied slaves the natural right to their bodies Locke granted to all men created by God? Does it support Mills’ claim that the US social contract was a racial contract?

### **3. The Lockean Elements of Article I**

There are several other philosophical ideas that might be gleaned from the provisions of article I. E.g. the idea of publishing the proceedings of the legislature has a democratic rationale, as do protections of the speech of legislators, protections from arrest during debate, and obligations to regularly assemble when in session.

The Emoluments clause is meant to prevent corruption and the appearance of corruption, where, as we saw when discussing Breene and Green, an

extreme aversion to corruption was a major component of the rhetoric the colonists used when justifying the war for independence. The sixth and seventh limitation of legislative power in section 9, and a key provision of section 10, concern corruption of this sort.

“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”

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The veto power of the president is a “check and balance” on legislative power though it can be overridden. It is therefore broadly Lockean in character, though not unique to Locke by any means. Some theorists trace the idea to Aristotle, though Montesquieu invented the term “tripartite system.”

Interpretive Thesis: The Lockean character of Article I is most apparent when we look at the enumeration of legislative powers it contains.

(1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(2) To borrow Money on the credit of the United States;

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

- (4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- (5) To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- (6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- (7) To establish Post Offices and post Roads;
- (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- (9) To constitute Tribunals inferior to the supreme Court;
- (10) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- (11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- (12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- (13) To provide and maintain a Navy;
- (14) To make Rules for the Government and Regulation of the land and naval Forces;
- (15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- (16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Questions: Can these powers be justified on Lockean grounds? Are they more or less limited than those powers Locke thinks are transferred to the gov't when the social contract is instituted? What about the third enumerated

power: i.e. the so-called “commerce clause”? Can it be derived from Locke’s theory of natural rights and the institution of a civil society through a social contract consistent with those natural rights? Or is it instead unique to the American attempt to unify disparate states without altogether destroying their autonomy?

Further question: Recall Hamilton’s arguments in the Federalist against expressed (constitutional) limitations on taxation. Hamilton based his case on the “open-ended” nature of security needs and the self-evidence of the instrumental principle. Are these considerations reflected in the final provision to section 8?

“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Note, though, that this power is expressly limited in section 9.

(1) The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

(2) No Bill of Attainder or *ex post facto* Law shall be passed.

(3) No Capitation, or other direct, Tax shall be laid, unless in the Proportion to the Census of Enumeration herein before directed to be taken.

(4) No Tax or Duty shall be laid on Articles exported from any State.

(5) No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

Question: Which, if any, of these limitations can be justified on Lockean grounds? How much do more historical or contextual features come into play? For example, (4) is a wholly economic provision intended to unite the states in commercial exchange. It’s therefore hard to see the influence of ideas of natural right except in the limited sense in which such exchange is allowed by Locke as just and good: i.e. a transference of property right.

#### **4. Lockean Analysis of Article II**

Article II begins by specifying the means by which the president is to be elected. These are incredibly indirect insofar as the states get to appoint a number of electors proportionate to their populations and these electors then send prioritized lists to the federal gov't, which is supposed to select a winner on their basis. The role of people who are not members of state gov't is limited to whatever role they play in electing their representatives in the state gov'ts.

Question: Does this undercut the democratic character of the constitution? Is it an impediment to Democracy today?

There are several philosophically interesting aspects of article II. For one, the executive must swear to an oath.

“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Question: What does this oath entail? Does it justify a president's use of violence to prevent the secession of a state or confederacy of states? Does assigning importance to oaths betray theological assumptions?

#### **5. Lockean Analysis of the Rest**

Article III sets out the judicial powers; Article IV sets out the powers that are reserved by the individual states; Article V articulates the mechanism for amending the constitution; Article VI provides a guarantee to all of the debts issued by the US under the articles of confederation and gives precedence to federal law over state law, requires office holders to swear to uphold the constitution, and prohibits the erection of religious requirements for public office.

Again, it is hard to find any “new” philosophical ideas here. Many of these provisions have a relatively salient Lockean origin and the others seem explained by historical or contextual needs and negotiations.

## 6. The Bill of Rights

### **AMENDMENT [I]: Freedom of Religion, Speech, Press, Assembly, Petition to Government**

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Lockean analysis: This amendment places sharp restrictions on legislative power even when a majority of the citizens (and/or their elected representatives) approves of that legislation. It therefore uses the notion of natural rights to place constraints on governmental power. Is the right to speech and expression and the wider communication enabled by publication itself one of the natural liberties Locke posited? How might it be derived from those natural rights and conditioned by the social contract established by the US Constitution? People often try to argue for a right to free speech on the grounds that it is essential to Democracy. The idea being that people cannot elect representatives who will legislate in their interests unless they can evaluate a range of proposals for securing their natural rights and advancing whatever they take to be the “common good.” And some scholars have argued that freedom of speech was a principle respected in democratic Athens in the late 6<sup>th</sup> or early 5<sup>th</sup> century. Note, though, that the English Bill of Rights (or the Bill of Rights of 1689) reflected Locke’s ideas in the *Two Treatises* and it included “freedom of speech in Parliament.”

What about the freedom of religion? Scholars tell us that the Roman Republic (509BC-27BC) valued both freedom of speech and freedom of religion. So there’s nothing new there. (We know how much the founders were influenced by classical literature of Cicero et al—book about Rome and Romans.) But how is the later freedom related to Locke’s doctrine of natural right, natural law and the social contract as he articulated them in his *Two Treatises*? Is an assumption of natural rights by the framers inconsistent with the right here granted to religious freedom? Can one believe in natural rights without making religious assumptions? If one can’t then the constitution is an irremediably religious document in theory if not

practice. At any rate, it would seem that the colonial experience is more relevant to the freedom of religion than Locke's philosophy or any other, as colonies were founded by Puritans (Massachusetts Bay), Quakers (Pennsylvania), Catholics (Maryland), etc. who were fleeing religious persecution.

### **AMENDMENT [II]: Right to Bear Arms**

"A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed."

Note: How does this comport with Locke's claim that the signatories to a social contract must give up the right to enforce rights with violence to an independent, neutral sovereign? Note that the English bill of rights gave Protestants the right to bear arms "when Papists [Catholics] were both Armed and Employed [employed] contrary to Law." And it allowed Parliament rather than the king to regulate arms, but these ideas don't seem to be very closely related to the idea of the social contract. They seem more particular to the aversion felt by the English Protestant majority toward their Catholic king James.

### **AMENDMENT [III]: Freedom from Military Occupation of Homes**

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Note: This seems a fairly contextual one: a direct manifestation of the aversion of colonists to the practice of English soldiers leading up to the revolution. But you might consider whether it might have some Lockean justification as well given Locke's views on property right. Note that will before Locke's Treatises, Sir Edwrad Coke, in Semayne's case (1604) stated, "The house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."

### **AMENDMENT [IV]: The Right to Privacy against Agents of Gov't**

"The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Note: This also seems a fairly contextual one: a direct manifestation of the aversion of colonists to the practice of English soldiers abusing “writs of assistance” in the period leading up to the revolution, though, again, the idea is expressed by Coke in 1604 and was therefore part of the ideology of the more literate colonists.

**AMENDMENT [V]: The Right to Procedural Justice I (Right to Grand Jury in Capital and Infamous Crimes, Right Against Double Jeopardy, Right Against Self-Incrimination, Right to Due Process, Right to Compensation for Gov’t Seizure of Property)**

”No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Note: Amendments 5-8 all concern what we might call “procedural justice” the procedures the gov’t must follow to justly punish someone accused of criminal wrongdoing or someone embroiled in a financially significant civil dispute. I’m not going to give these a Lockean analysis. Instead, I’ll leave that to you on the final. But please notice the use of “life, liberty or property” in the 5<sup>th</sup> Amendment above. This is too Lockean to ignore.

**AMENDMENT [VI]: The Right to Procedural Justice II (Speedy, Impartial Trials, Right to Confront Witnesses, Right to Adequate Representation)**

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

**AMENDMENT [VII]: The Right to Procedural Justice III (Jury Trial in Civil Cases)**

”In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

**AMENDMENT [VIII]: The Right to Procedural Justice IV (Ban on Cruel and Unusual Punishment)** “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

**AMENDMENT [IX]: Retention of All Natural Rights by the People not Explicitly Mentioned in Bill of Rights** “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

**AMENDMENT [X.] Retention of All Natural Rights by the People not Explicitly Mentioned in Main Body of Constitution** “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Questions: In what respects do Amendments IX-X bear the stamp of Locke’s political philosophy? This will be a question on the final.