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COMPROMISE AND ORIGINAL ACQUISITION: EXPLAINING RIGHTS TO THE ARCTIC*

By Cara Nine

Abstract: *Up until now, political philosophy has explained the acquisition of natural resources, in one way or another, through the terms of human settlement. An agent acquires natural resources by moving into the geographic area that contains these resources. Even how we make claims to the ocean floor depends on settlement — claimants must be adjacent to settled land. This essay extends original acquisition theories so that they can respond to cases that do not presuppose any conditions of human settlement. I suggest that resource rights in the deep sea may be created, alternatively, through acts of compromise. Compromise can alleviate conflict, allowing for claimants to move beyond stalemate to acquire goods. It also allows for a large degree of flexibility in the specification of rights, and thereby can explain nontraditional rights over areas of migration. The tricky part of a theory that grants rights through agreement is explaining why external parties, those not part of the agreement, have a duty to respect those rights. A compromise under certain conditions, I argue, places all persons under a duty to respect the rights created by the compromise. Thus, when two parties compromise, they may acquire goods from the commons — creating a duty for all others to respect the parties' rights over these goods. Importantly, rights created through compromise are constrained by a set of concerns for those excluded.*

I. Introduction

Who has a legitimate right to Arctic resources? Not only is this an urgent political question, but it is also a revealing and troubling question for political philosophy. For, up until now, the acquisition of original rights over natural resources has been explained, in one way or another, through the terms of human settlement. An agent acquires a natural resource by moving into the geographic area that contains that resource. Even rights to the ocean floor depend on settlement — the area that is the object of the right must be adjacent to settled land.[1] Norway can claim natural gas deposits off its shores, for example, but not deposits located on the floor of the Pacific Ocean.

Several factors now make the adjacency, or settlement, criterion irrelevant from a theoretical and practical perspective. First, technology and climate change have made it possible to control and extract resources

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[1] United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm, Part VI. A claim to up to 350 miles of seabed from a state's shore is also allowed.

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from extremely remote, uninhabitable areas, leading states to extend their oceanic claims as far from their shores as politically possible. Second, assertions of rights to the North Pole include such a large amount of uninhabitable area that reasons linking the justification of rights to the North Pole to rights to settled territory are spurious. Alaska's northernmost point is 1,291 miles from the North Pole; less distance separates France from Russia. At some distance, claims based on adjacency must become arbitrary. Finally, even if adjacency is relevant, it, at least theoretically, could be overridden by other important considerations.

This essay extends original acquisition theories so that they can respond to cases that do not presuppose any conditions of human settlement. I use two cases. In the primary case — the Arctic — the area is naturally uninhabitable and contains valuable resources. Russia, Denmark, Canada, and other Arctic states currently compete to expand their oceanic territories toward the North Pole. Since the North Pole has billions of tons of oil and natural gas deposits, a successful claim ensures exclusive access to these deposits in perpetuity. The area currently remains unclaimed because multiple parties have interests in exclusively controlling the same area. A unilateral push risks war with the other interested parties; competition creates a stalemate preventing acquisition. The second kind of case considers rights within areas that are occupied, but not in a way that occupation is traditionally understood in the European context, as is the case with many traditional migratory, clan-based groups. This latter kind of case captures examples of nontraditional rights held over lands and resources that are not explained well in existing entitlement or territorial rights theory. Considering rights of migrating groups helps illuminate the case of claims to the Arctic.

While the issue of full territorial rights, including political jurisdictional authority, remains prominent in these cases, I explore only the issue of rights to resources. The term "resource rights" denotes a bundle of rights that an agent holds over a particular resource. The bundle of rights can vary in kind and extent. For example, an individual can hold a resource right over an oil well, which includes a set of property rights over the oil. Resource rights might include a more extensive bundle of rights. For instance, when a state claims resource rights, this state-held bundle usually includes sovereignty rights over the resource. Sovereignty rights differ from mere property rights in that they also include jurisdictional powers to determine rights that others may claim over the resource. The power to legislate zoning laws over land is an example of state-held resource rights.[2] "Resource rights" in this essay designate a bundle of rights that falls somewhere in-between the individual property right over resources and full state sovereignty rights over resources. Here, a defense of the creation of resource rights refers to a bundle of rights including elements of

[2] Cara Nine, "Resource Rights," *Political Studies* 61, no. 2 (2013): 232–49.

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jurisdictional power (the power to determine rights over a particular set of objects) and elements of property claims (rights to exclusively access, use, alienate, trade, and so on), but stops short of a conclusive defense of full territorial rights.[3]

I argue that resource rights may be created through acts of compromise. Compromise can alleviate conflict, allowing claimants to move beyond stalemate to acquire goods. It also affords a large degree of flexibility in the specification of rights and thereby can explain nontraditional rights over areas of migration. The tricky part of a theory that grants rights through agreement is explaining why external parties, those not part of the agreement, have a duty to respect such rights. A compromise under certain conditions, I argue, places all persons under a duty to respect the rights created by the compromise. Thus, when two parties compromise, they may acquire rights over goods from the commons, creating a duty for all others to respect the parties' rights over these goods. Importantly, rights created through compromise are constrained by a set of concerns for those excluded.

The arguments proceed in three stages. First, I juxtapose the theories of John Locke and Samuel von Pufendorf to illustrate the need for original acquisition theory to address cases of acquisition without settled occupation. Rights over resources in circumstances without human settlement cannot be established by referring to legitimate state law because no state jurisdiction applies. This calls for the adoption of pre-institutional theory to establish moral rules without the existence of a state. The pre-institutional theories of Locke and Pufendorf stress the role of binding agreements in establishing rights. The second stage of the essay argues for a theory of compromise. I argue that a compromise is a uniquely valuable kind of agreement because of its role in preventing conflict and benefiting parties reciprocally. The distinctive significance of compromise allows us to acknowledge it as a valuable mechanism of original rights-creation without analyzing the content of the compromise itself. The value of compromise in cases of original acquisition explains why agents who are not a part of the agreement have obligations to comply with the terms of the agreement. Compromises made over items in the commons give rise to exclusive rights, subject to certain constraints, binding all others.

II. Agreements in Social Contract Theory

Within pre-institutional rights theories, rights over goods are explained in different ways. A prominent difference lies between those who argue

[3] Another limitation of this essay is its lack of engagement with the difference between collective and individual rights. I assume that collectives may be agents with the moral facility to acquire resources from the commons. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Paperbacks, 1986); Cara Nine, *Global Justice and Territory* (New York: Oxford University Press).

that property rights exist in nature, independent of any prior agreements between persons, and those who argue that property rights only exist when persons make an agreement. I use the theories of Locke and Pufendorf, respectively, as illustrations of these theories. Both theorists hold that binding agreements can be made in the state of nature. Yet, as they stand, these theories cannot sufficiently explain acquisition through agreement without settled occupation.

A. John Locke

In Locke's theory, there are two ways to establish full private property rights: through original acquisition and through transfer. On the first method, Locke explains, when a person mixes her labor with an unclaimed good that person acquires a full property right over that good. When one applies her labor to a natural object, she mixes herself with the object to create something of value – for her and for the rest of humanity. Through this valuable labor-mixing, any agent is justified in taking exclusive control over natural goods.[4]

Individuals also have the power to transfer many of their rights to others. Ada and Brian are adults in the state of nature. Ada has the power to transfer rights over her property to Brian, and vice versa. Ada also has natural powers to create laws for herself and over her property through the exercise of her will. In the state of nature, she does not have unilateral powers to create obligations for others (unless they are her nonadult children); she cannot rule over Brian.

On the standard Lockean view of agreements, one has the power to transfer rights only over preexisting property. When Ada and Brian agree to exchange goods, their authority to exchange rights over their goods comes from their respective, preexisting rights. Property rights can be transferred, but not created originally through agreement. This feature of the theory produces uneasy results; in certain cases, agreement may be the only viable means to create property. For instance, after a successful season, two farmers decide at the same time to expand their respective holdings into the same nearby field. Each farmer wishes to claim the entire field. They cannot make an agreement, for example, to divide the field in half, because neither farmer has a prior title giving the authority to do so. Locke's theory seems to leave each farmer with limited options. One could rush to claim the land through labor-mixing before the other. This method ushers in conflict or sabotage, as each would have sufficient motivation to physically prevent the other from claiming the land. Alternatively, not wishing to incite war with the other farmer, each may refrain from using

[4] John Locke, "The Second Treatise of Government" in *Two Treatises of Government and A Letter Concerning Toleration*, (New Haven, CT: Yale University Press, 2003 [1690]), chap. 5, sec. 27. (Hereafter, *Treatise*).

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the space entirely. (The current standoff between parties wishing to claim the Arctic is analogous. No party wishes to push too far into exploiting Arctic resources for fear of inciting retaliation from the others.)

An intuitive option is for the two farmers to compromise, to come to a peaceful settlement regarding their respective claims to the field. Yet this option does not appear to be justified on the Lockean story when the circumstances are similar to the Arctic case. First, compromising over the field (to divide it in half, for instance), presupposes rights over the field. The farmers cannot agree to divide up rights that they do not have. Second, other persons, external to the compromise, would not have any reason to respect the farmers' agreement if the agreement only regards the farmers' individual liberties. On Locke's theory, all persons have natural liberties to access the commons and to mix their labor with it. The farmers, then, possess liberties to the field over which they may legitimately bargain. Ada could agree to give up her liberties to access part of the field in exchange for Brian's agreement to do the same. The agreement creates a special claim, a claim of each party only against the other party to the agreement. This agreement binds each from accessing part of the field, allowing for labor on the commons and alleviating potential conflict. Nevertheless, the farmers have little motivation to enter into this contract if it does not also bind others. If other potential competitors are poised to preempt Ada's and Brian's move to labor on the land, then the terms of the compromise guaranteeing a benefit for Brian are insecure. These conditions escalate in areas where labor-mixing takes preparation and time, such as in the Arctic. While one party is investing in preparations (surveys, engineering models, and so on) to work on the ocean seabed, another with faster engineering teams may move in. Parties lack sufficient reason to compromise over their liberties if they have no guarantee external others will respect the terms of their agreement.

In social contract theory, agreements are important because they allow for us to engage in trade and to develop society. While Locke emphasizes the importance of agreements in the state of nature, he passes over the possibility of agreements as a means to avoid stalemate.[5] Locke's response to these conflict scenarios in the state of nature is that humans should contract themselves into a civil state. The state may claim legitimate authority over the farmers and over the open field,[6] and by creating rule of law over all persons in the territory, impose obligations on those persons to respect a compromise made between Ada and Brian. But as noted, this option remains closed for the purposes of resolving the cases motivating this essay, because these cases do not involve parties who can feasibly

[5] See a discussion in A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1993), 27.

[6] A. John Simmons, "On the Territorial Rights of States," *Philosophical Issues: Social, Political and Legal Philosophy* 11 (2001): 300–326.

come together to form a civil state. Yet, Locke insisted on both the value of acquisition from the commons and the value of binding agreements. It seems theoretically consistent with Lockean theory that certain kinds of agreements could give rise to legitimate property claims, if these agreements avoid a stalemate that prevents valuable acquisition.

One avenue for Lockean theory is to embrace the idea that global consent may create legitimate property acquisition. Locke allows for goods to be acquired from the commons by agreement, as long as everybody who has a liberty regarding the good is included in the agreement. Regarding original acquisition of goods from the commons, global consent is required. If we all globally consent to a particular division of goods from the commons, then this agreement creates rights over those goods following that division. As Locke points out, this method of determining original rights over goods is unfeasible and counterproductive, for "If such consent as that was necessary, man had starved, notwithstanding the plenty God had given him."[7] Nevertheless, I argue that the extension of universal consent to property acquisition methods can be feasible and constructive. For help modifying a pre-institutional theory of property rights by agreement, it is useful to turn to Pufendorf, who was a major influence on Locke's thinking.

B. Samuel von Pufendorf

Our farmers, Pufendorf says, would prefer to avoid conflict and instead seek to resolve disputes peacefully and sociably. "Nature allows not that upon every Occasion we should betake our selves to violent Means . . . we are first to try, whether the Matter may not be composed after a milder Way, either by an amicable Reasoning of the point in Question between the Parties themselves, or by a free and unconditional Compromise . . . ."[8] In whatever particular way their compromise plays out, if the farmers successfully reach an agreement, then their agreement can determine claims to the land. A pre-state community of families constitutes a background of peaceful development, motivating members to respect their obligations to live and settle their disputes peacefully.[9] Indeed, for Pufendorf, the key mark of humanity is our sociability. The law of nature directs us to act in ways that ensure our peaceful relations with each other. Importantly, our sociability involves maintaining reciprocal relations with others — when we benefit from others, we should return benefit.[10] Agreements are

[7] Locke, *Treatise*, chap. 5, sec. 28.

[8] Samuel Pufendorf, *On The Duty of Man and Citizen According to the Natural Law (1673)*, ed. James Tully, trans. Michael Silverthorne (Cambridge: Cambridge University Press) book ii, chap. 1, passage 11. (Hereafter, *De Officio*.)

[9] Alin Fumurescu, *Compromise: A Political and Philosophical History* (Cambridge: Cambridge University Press, 2013), 221.

[10] Pufendorf, *De Officio*, i.8.2.

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essential to social relations, because they clarify our expectations of each other. When we make agreements, we have a mutual understanding and expectation of each others' actions, and we know how to fulfill our duties of sociability.[11]

Further, for Pufendorf, property is only possible through agreements. Obligations bind the will, and as such can only be created by an act of will. A superior may oblige us to do something. But without an overarching state, there are no superiors. Consequently, an obligation can only be created by an act of one's own will — the only will that has authority over that person. Persons create original property rights by making agreements to divide portions of the commons between them.[12] Their agreement creates obligations to respect the new property rights.

Here, then, we have a possible solution for Ada and Brian. When they agree to divide the field between them, they create obligations for each other to respect their respective property. Ada and Brian do not need to have prior entitlements to the field in order to create property rights from the commons through their agreement. Agreements have the power to create private property, because agreements form a precondition of sociability, which all persons have a natural duty to uphold.

Nonetheless, Pufendorf must explain why outsiders are obliged to respect an agreement between two farmers. An agreement is only binding if one consents to it. At first blush, an external party is not bound to respect rights created through agreements made by others.

Pufendorf recongizes this problem, and responds by claiming that all outsiders give *tacit* consent to these agreements. Through their tacit consent, outsiders agree to the obligations imposed by private property. This explains how it is possible for one person to acquire property rights from the commons. When a person seizes and occupies a portion of land, the person signals to everyone else that this land is in use as a means for the possessor to preserve himself and his family.[13] Pufendorf limits the size of acquisition to what can be used by the possessor, and as long as no one overtly protests this occupation, it is presumed that everyone tacitly agrees to it. The supposition of universal tacit consent to original acquisition is grounded in the premise that, to put it in Locke's terms, enough and as good is left for others. All others in the state of nature will give their consent to the removal of goods from the commons, because there is enough remaining for them likewise to acquire.[14] This condition places restrictions on the amount and kind of goods that can be exclusively acquired.

[11] Ibid., i.9.2.

[12] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo [1672]*, trans. C. H. and W. A. Oldfather (New York: Oceana Publications, 1964), iv. 4. 6. (Hereafter, *DJNG*).

[13] Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (New York: Clarendon Oxford University Press, 2002), 102.

[14] Pufendorf, *DJNG* iv.4.6.

A person cannot acquire the only water hole in the desert, for example, because others will not perceive this acquisition as leaving enough water for them. Acquisition is restricted to those amounts and goods that are perceived by all others to be put to beneficial use. When these conditions are met, it is often rational for others to consent to the acquisition.

The presumption of universal tacit consent is also based on reciprocity: outsiders to Ada and Brian's agreement want Ada and Brian to respect their agreements to which Ada and Brian are excluded. For Pufendorf, each person has a natural duty to be sociable and to act reciprocally. This means that if I want my claim to my share of the Earth to be respected, I must respect similar claims of others.[15] This part of the theory supports Pufendorf's background condition that makes agreements possible: the joint "seizing" of lands in order to make agreements.[16] Groups may seize goods from the commons, on the condition that this seizure would be tacitly consented to by all others. After seizing and occupying the areas containing the goods, the group may then determine through agreement a division of property rights between members. Because the initial seizing of the goods has the tacit consent of external parties, these external parties also have a duty to respect the individual property rights created by the group. The rationality and reciprocity conditions can be put together into a principle that limits one's acquisitions to those that can be reasonably endorsed by a principle of reciprocity that we can reasonably presume all others to endorse. This principle limits the acquisition of goods to those that are perceived to be used beneficially, in broad terms.

The theory could now be used to explain Ada's and Brian's claims. They may jointly seize the land, clearly declaring their intent to acquire the land after they have concluded their agreement. As long as no one explicitly protests their claim, and they proceed eventually to occupy and to use the land within a reasonable time, it follows that others have given their tacit consent to this removal of goods from the commons.

Unfortunately, this theory cannot be used to explain cases of acquisition without settlement. Pufendorf's premise supporting universal tacit consent is that all others recognize that the acquisition of resources is for beneficial use. This condition applies to the size and kind of good acquired: (1) the parties will only take what they can "use," and what they can use is limited. And, (2) all persons generally agree that the parties' use of the land is appropriately connected with self-preservation and sociability.

In the case where competing interests prevent acquisition from the Arctic commons, neither of the above conditions holds. First, in this case it is unlikely that the claimants of Arctic resources would meet the condition to limit acquisition to what can be used, in the sense that "use" should be interpreted as defining small acquisitions to which others would be indifferent.

[15] Ibid., ii.3.15.
[16] Pufendorf, *De Officio*, i.12.6.

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Suppose the Arctic nations came to a compromise regarding territorial divisions of the Arctic, assigning exclusive rights to each country. Because the Arctic is uninhabitable, these rights are resource entitlements — entitlements to exclusively control access to and withdrawal of resources from the area. Technological advancement has made it possible for one agent to use vast quantities of the Earth's resources, outstripping what would be considered a reciprocal share for other similar agents. Additionally, it is unclear what an appropriate use of the ocean floor and its contents would be. Since humans do not have much experience with Arctic use, there is no analogy in this case to the farmer's field. That is, we cannot presume that all persons agree to a similar set of appropriate uses of the Arctic commons that accord with the dictates for self-preservation and sociability. The disagreement over what may be considered to be an appropriate use of Arctic resources would undermine any assertion that all persons tacitly consent to the removal of these resources. Finally, in this and similar cases where large amounts of valuable resources are at stake, the protest condition is not met. Many others (for instance, environmental activists and some non-Arctic nations, like China) protest the claims of Arctic nations. In sum, there is no reason to presume that all others have given their tacit consent to the removal of vast Arctic resources from the commons.

Likewise, in the case of clan-based people's claims to large migratory areas, neither of the above conditions holds, and the presumption of universal tacit consent is not warranted. Before they were forced onto a reservation and their movement restricted, the Navajo tribe in the American southwest lived seasonal migratory lives, covering an area stretching hundreds of square miles. Their form of life did not lend itself to European-style occupation of lands. Their patterns of land use left the group's traditional lands unoccupied for stretches of time. As a consequence, to external persons, the area is not "seized" — not claimed, but rather left in the commons. On Pufendorf's theory, a migratory family would lose a claim to its land when it ceased to occupy it for the season. Further, the Navajos did not have a centralized government, and so a general agreement between all Navajos to create a nation issuing rights over lands within their territory did not exist.[17] As an analogy, suppose Ada and Brian decide to use the disputed field for organized hunting — they regard an organized hunt as more beneficial for them than cultivating the field as farmland. The conditions of their agreement are binding for them — they must co-manage it as a hunting ground, and neither is allowed to unilaterally claim the land. But the land still remains unacquired from the perspective of (European) outsiders; it has not been seized, occupied, or labored upon. It seems that each person not party to Ada and Brian's agreement retains the liberty to

[17] This case is discussed in Anna Stilz, "Occupancy Rights and the Wrong of Removal," *Philosophy and Public Affairs* 41, no. 4 (2013): 324–56.

move into the field and acquire it as private property. That is, although Ada and Brian have agreed to a set of rights to the land, they have not yet removed that land from the commons. They have not used it in a way that is perceived by all others as fitting or appropriate exclusive use, and so their method of use does not constitute a removal from the commons.

Moreover, the Navajo's use of land and resources highlights a vital flaw in Pufendorf's theory of tacit consent; Pufendorf's theory relies on the assumption that there is a general conception of appropriate use of natural resources beyond merely what is necessary to preserve oneself. Even if we can assume that appropriate use of resources should be interpreted in some way as modest use, the terms of this conception differ greatly between cultures and circumstances. While the indigenous people made modest use out of their areas, they did not condense that use. By European standards, the American Indians had claimed areas too large to be appropriate for their own use. If, in modern Europe, a family can make use of thirty acres without spoilage, then it is reasonable to assume that there is enough and as good left over for others to take their own thirty acres from the commons. In contrast, when a tribal clan claims over three hundred miles of land as theirs to control, then the "enough and as good" assumption, from the European perspective, may not seem to obtain. In Pufendorf's theory, there is a presumption that all persons share similar conceptions of appropriate land use, such that we could perceive that a certain kind of taking from the commons is appropriate, and other kinds of taking are not. This presumption is essential for the possibility of universal tacit consent. All persons must be able to perceive that the kind of removal from the commons in question is appropriate.

This problem plays out in contemporary debates over variant conceptions of a "resource."[18] A resource is something that is useful. While all can agree that a potato is useful to nourish a human body, once we go beyond basic sustenance, people find different sets of objects useful, and they also vary in their conceptions of use. Given Pufendorf's view that acts of sociability are duties of nature, building and respecting social traditions and customary practices count as duties of nature. This explains, for example, why we regard burial grounds as removed from the commons, even though this is not a productive use of land.[19] Pufendorf recognizes that these practices will be contextualized — different for each society.[20] One group's conception of a valuable use of a resource could be drastically different than another's. A holy mountain, for example, retains its

[18] Avery Kolers, "Justice, Territory and Natural Resources," *Political Studies* 60 (2012): 269–86; Margaret Moore, "Natural Resources, Territorial Rights, and Global Distributive Justice," *Political Theory* 40, no. 1 (2012): 84–107.

[19] I mean "productive" here in the literal sense. The land does not produce anything new of value, as would be the case in, for example, agricultural use.

[20] Pufendorf, *DJNG* iv.4.4

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value if it is not accessed, while the mountain has alternative value if it is mined for copper. This does not mean that different conceptions of valuable use cannot be communicated and understood. What it means is that these conceptions are not *shared*. And that makes universal tacit consent impossible.

Indigenous uses of land present Pufendorf with alternative conceptions of resource use not easily embraced by his theory. While indigenous groups made use of their land, they did not use it in the way Europeans thought appropriate. Consequently, Pufendorf's theory faces a dilemma: either the indigenous people are not using their lands appropriately, and hence do not have any exclusive claims to them, or Pufendorf's idea that there is a universal conception of appropriate land use cannot be maintained. On either horn of the dilemma, Pufendorf's theory explains neither what are generally considered to be strong rights of indigenous populations to control their migratory areas, nor possible rights to the Arctic.

In what remains of this essay, I use the basics of Lockean and Pufendorfian pre-institutional theory to develop an account of original acquisition in cases without typical human settlement. The theory extends Pufendorfian principles of universal tacit consent and demonstrates how certain kinds of compromise can give rise to resource rights. Because compromise itself realizes certain benefits, we can presume that outsiders would give tacit consent to the compromise, regardless of the content of the compromise. By focusing on the nature of the kind of agreement, rather than the nature of the use of the resource, this theory helps clarify when original acquisition of resources in unoccupied areas is beneficial.

III. Compromise

In modern contract theory, there are few distinctions made between different kinds of agreements (transactions, contracts, compromises, and so on).[21] Distinguishing "compromise" from other forms of agreement proves fruitful for understanding original acquisition of resources in unoccupied areas.

A compromise is identified by its process and outcome. The process involves mutual respect and acknowledgment of the other as an autonomous moral agent with her own point of view. The outcome of a compromise is defined by mutual concession and mutual benefit. Each party to a compromise agrees to compromise something that she values. This feature distinguishes a compromise from a mere transaction. In a transaction, a buyer in a shop sacrifices a sum of money to purchase a good. No doubt the buyer would prefer not to sacrifice the sum of money, and rather to receive the good for free. But the transaction proceeds and the buyer pays.

[21] Fumurescu, ibid., 195.

Even though the buyer and the seller have both lost and gained something, they have not compromised.

Compromise requires that each party feels that she has given up something of value. This characterization alone is not yet able to distinguish compromise from other kinds of transactions, because, for example, the buyer values her money and yet she has given up a sum of it to obtain something she values more. A compromise distinguished from a mere transaction usually involves the sacrifice of something more deeply felt, such as failing to act on a normative principle. Both the buyer and seller agree on the principles governing their exchange, and their transaction happens without any discussion over what a fair price or a fair transaction entails. A compromise, by contrast, would involve a sacrifice of principle — to give up on what one personally considers to be fair in order to gain something else of value.

Ada believes that she morally deserves the entire vacant field because she worked hard to be successful the previous season. She believes that Brian is lazy and merely benefited from good luck; Brian, Ada estimates, deserves no part of the field. Brian, conversely, believes that gaining the entire vacant lot is the only way to honor his father's memory, and he feels a strong moral duty to do so. Ada and Brian cannot both act on their personal moral principles. For Ada, this is the principle of desert, and for Brian, this is the principle to honor his father. If they compromise and divide the field, they will have failed to act morally from each personal perspective. A compromise is a personal loss, a non-fungible negation that remains after the receipt of benefits.[22]

These features distinguish a compromise from other kinds of agreements. Many agreements, for example, can be made without any reflection on the point of view of the other party, as long as the other party agrees. A compromise, by contrast, is only struck if each party respects the others as legitimate bargainers with independent points of view. Often the need for compromise "stems from disagreements about matters of fact which no empirical knowledge currently available can hope to settle, or from an irreducible arbitrariness in the application of shared principles."[23] As such, compromise is often the only means for a joint resolution regarding problems with no "right" answer. Only by respecting the other's point of view as the basis of legitimate claims could agreement be reached. Ada will only be able to listen to and recognize Brian's reasons if she sees him as a person capable of deserving some part of the field. And Brian must see Ada as a source of legitimate claims at least as worthy as his duty to his father. A precondition for compromise of this sort is that all parties

[22] Chiara Lepora, "On Compromise and Being Compromised," *The Journal of Political Philosophy* 20, no. 1 (2012).

[23] Philippe Van Parijs, "What Makes a Good Compromise?" *Government and Opposition* 47, no. 3 (2012): 479.

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sincerely agree to sacrifice something of personal moral value, and to negotiate with the other parties. The complexity of the divergent reasons motivating the parties requires that each listens to and considers the other's perspective, beliefs, and reasons.[24]

IV. Compromise and Obligations

To compromise is to make a binding agreement; parties to the compromise are morally obliged, *ceteris paribus*, to comply with its conditions. The obligation is generated from an act of the person's will — a declaration of intent to do something, and this obligation cannot be unilaterally dismissed by the person making it.[25] For instance, only the receiver can dismiss the obligation in the case of a promise. In the case of a joint agreement, only the group together has this power. If I promise to meet you at the park at 3 p.m., and you promise likewise to meet me, I cannot unilaterally get out of my obligation. Only you have the power to release me from my obligation to you, and vice versa. The strength of the obligations from agreement lies in the inability of the obligation holder unilaterally to get out of the obligation.

Compromise to establish original acquisition has two stages corresponding to two different sets of rights and obligations for members and for external agents (i.e., those not part of the compromise). In the first stage, negotiation, a determinate group of agents bargains toward a mutually acceptable resolution. In order for negotiation to be possible, the group must have the authority to determine rights over the disputed object of the compromise. In other words, the group must have exclusive powers to determine rights over the object, and external parties have an obligation to refrain from interfering in the group's authority. Because this stage establishes the original exclusive claim, it is the initial point of exclusion. The obligations of the parties to the compromise are owed only to the other members of the group, and are fixed by the conditions of the compromise — to follow appropriate procedures or mutual respect in seeking an acceptable outcome. In the second stage, the compromise is complete. The parties to the compromise leave the negotiation table with a set of rights over an object or objects determined in the previous stage. In this stage, when negotiations have ceased, the parties no longer collectively hold powers to determine those rights. Parties to the compromise have an obligation to respect the conditions of the agreement. However, as discussed, this general obligation only ensues if we can presume universal tacit consent to the first stage of compromise when goods are initially removed from the commons.

[24] Robert Goodin and Geoffrey Brennan, "Bargaining over Beliefs" *Ethics* 111, no. 2 (2001).

[25] For a discussion of joint agreements and obligations, see Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1989), 380.

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Universal tacit consent can be presumed if it is proved that all persons would perceive that the removal of the object has happened in an appropriate way. As made apparent by the Navajo case, we should not assume that all persons will agree on what constitutes appropriate use of land and resources. While remaining neutral regarding what counts as a valuable use of resources, I argue that a compromise is a mechanism of removal that itself can be perceived to be appropriate. First, compromise over goods meets the condition that the removal creates value for persons, while allowing for competing conceptions of valuable resource use. This is possible because only the act of compromise, not the content of the compromise, is evaluated by outsiders. Second, the presumption that all others would approve of or be indifferent to the removal of goods through compromise can be justified if we understand this kind of compromise as having specific constraints. I will defend an account of appropriate constraints in Section V.

Compromise necessarily creates value for the persons making the compromise, from their perspective. For an agreement to be a compromise, the parties must consider the outcome reciprocally valuable. Thus, in a minimal sense, the compromise creates a shared value. Because compromise includes negotiation to secure an overall beneficial outcome for each party, it creates a Pareto improvement in each party's situation from her perspective. This ensures that the value of fairness between parties will be promoted through the compromise. In addition, compromise avoids conflict. Compromise is often the only way to resolve conflict. Its procedures demand genuine mutual recognition and respect between parties. In themselves, these features diffuse tension and temper the escalation of hostilities. Further, compromise gains valuable outcomes without requiring jointly shared concepts or values. As much as the flourishing of humankind depends on the possibility of peaceful property arrangements, removing goods from the commons in a manner that avoids conflict is valuable. As a mechanism, compromise resolves conflict and promotes shared value. The mechanism of compromise can be judged to be valuable without any evaluation of the content of the compromise. All others have reasons to believe that the removal of goods through compromise is, in this sense, valuable.

Beyond these features, a compromise regarding an original division of natural resources involves an agreement not only about the primary outcome and the division of rights, but also about the moral principles that support the reasons behind the division. The compromise over principles is valuable in that it *sets the conditions for what is a just division of goods* from the perspective of the parties to the compromise. Suppose that only China and Norway each desire a large claim of the Arctic seabed. Both endorse the claim that property rights should be governed by a stable system of rights and rights enforcement. That is, they recognize that any claim they make is only as good as the system of rights that is enforcing that claim.

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Since there is no system of rights governing property within the Arctic (or there is the possibility of massive reform of the existing system), the parties must also negotiate the terms of a minimal system of rights that will make secure their property claims. This requires that they agree to a minimal set of principles governing the terms of resource rights within the Arctic.

The negotiations over the conditions of a stable system of property rights will lead them to a compromise over moral principles. For example, on the one hand, Russia might insist on a system of Arctic property rights that ensures a fair distribution of goods per capita, entailing that the division of Arctic resources be divided between Arctic nations in direct proportion to the size of the national populations. On the other hand, Norway might insist on a strong democratic representational structure to democratically determine the division of Arctic goods. Because the implementation of a per-capita principle may conflict with a democratically determined division of goods, the principles may not admit of mutual implementation. A compromise over the rules of the system of rights engages the parties in a deeper discussion of political values. The compromise over these values sets the conditions of a just system of rights, in the sense that the reasonable compromise creates a system of rights to which both parties consent. On the basis of creation of shared value, then, a compromise to acquire originally natural resources involves the creation of value along several dimensions, and there are sufficient initial grounds for accepting the terms of the compromise as creating rights over goods.

V. Constraints

In 1494, the Portugese and Spanish signed the Treaty of Tordesillas. The Treaty established a compromise between the two colonial powers. It divided the entire world in half — one side for the Portugese, and the other for the Spanish. All lands and resources "discovered" within the Spanish half would belong to Spain, and those within Portugal's half would belong to Portugal. On a theory of compromise without constraints, Portugal and Spain would each claim legitimate title to half of the Earth. This conclusion seems to present an obvious counterexample to compromise as an appropriate method of original acquisition. It seems unreasonable that two parties to a compromise could gain rights over most of the Earth. The arguments so far have set up compromise as a legitimate means of original acquisition. Yet, as we learned from Locke and Pufendorf, when creating entitlements, there is an imperative to consider those who are excluded.

Recall that the theory of compromise is meant to extend existing social contract theories of original acquisition to cover cases without human settlement. On contract-based theories of acquisition, acquisition from the

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commons is permitted only when those excluded from the agreement would tacitly consent to the acquisition. Working from this position, I propose three constraints on compromise as a mechanism to remove goods from the commons. First, a compromise must be appropriately inclusive. This constraint includes the criteria that (a) the acquisition does not render others incapable of exercising their will; (b) the parties cannot better their own position by worsening the position of others; (c) the compromise must include all who wish to be included at the time of the initial negotiations, (subject to the below expediency constraint); and (d) the conditions of removal are made public. Second, the compromise should be expedient, involving objects over which the parties actually intend to act and have the capacity to perform this action. Third, the rights resulting from compromise are only those rights specified in the compromise itself.

Each constraint follows straightforwardly from minimal conditions of tacit agreement. The first constraint sets out conditions that must be met in order for tacit agreement to be possible and rational. The second constraint, regarding expediency, specifies a logical prerequisite for agreement to be rational: that the parties have the capacity and intent to perform the activities required by their compromise. Similarly, the third constraint clarifies the limitations of the duties of outsiders: to obey only what is covered by the compromise itself.

First, a compromise entails entitlement-creation if and only if it does not illegitimately exclude relevant parties to the compromise. Some agreements may give the appearance of a compromise by superficially meeting the process and outcome conditions, without being a genuine compromise that confers obligations on others to respect its terms. The Three-Fifths compromise in the U.S. Constitution infamously counts a slave as three-fifths of a person for the purposes of calculating the number of delegates from each state to the House of Representatives. At the time of the writing of the Constitution, the envoys from the slave-owning South proposed that slaves should count as a whole person. Because slaves could not vote, this would increase the representative power of free men in the South. Those from the free North did not want slaves to count in order to avoid this distribution of power to the slaveholders. In order to save the Union, the Three-Fifths compromise was struck between the two positions.

There are several reasons to call this compromise morally repugnant.[26] For our purposes, the wrongness of the compromise can be explained by the illegitimate exclusion of certain parties from the compromise itself. Namely, the slaves were not represented in the compromise and yet were directly subject to it in a devastating way. No doubt if the slaves were

[26] Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton: Princeton University Press, 2010), 61. And, Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (New York: Routledge, 1999), 112.

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respected parties at the bargaining table, the negotiations would have gone much differently. Likewise, the Treaty of Tordesillas illegitimately excluded parties from the compromise who would be forced to become subjects of either Portugal or Spain.

In order for compromise to be an effective tool in removing goods from the commons, it must be exclusive. Assuming that an *explicit* compromise between all persons on Earth is impossible, this theory allows for the set of persons making the compromise to exclude others from the decision-making procedure determining rights distribution over goods. As discussed earlier, the removal must be susceptible to the *tacit* consent of all others, but this is different from participating in the compromise itself. At minimum, then, the compromise must not make others incapable of exercising their will; outside persons must be at least capable of consenting in order for the compromise to be a valid form of original acquisition. The capacity to consent presupposes an autonomous agent, capable of reasoning, forming plans, and enacting decisions based on those plans. Such capacity requires secure access to basic goods like food, water, basic shelter, relationships with other humans, and livelihood opportunities. Without access to these simple things, persons do not have the ability to make or to carry out plans for themselves.[27] If a compromise determined rights over goods in such a way that those excluded do not have secure access to basic goods, then it is implausible to presume that these persons would tacitly consent.

Understanding who should be included in the compromise requires knowing the kind of agent who should be party to the compromise. In our cases this means distinguishing between individuals and representatives of groups of individuals. Ideally, individuals would be able to speak for themselves in political decisions, but unfortunately many decisions would be difficult to legitimately administrate if made only by individuals. Under these circumstances, we introduce representative structures. In the Navajo case, for example, these kinds of decisions are most appropriately made by individuals in a personal dialogue, because the decisions are made by small groups that do not need to be in larger representative structures to secure their way of life. In the Arctic case, by contrast, the number of persons and complexity of the object of compromise suggest the need for a representative structure. Precedence in international law has given states, and sometimes native nations like the Inuit and Saami, this representative authority. The representative structure is legitimate if it speaks for its people. Thus, some democratic requirement should be enforced before states may be allowed in these kinds of compromises, (although I do not have space to pursue this line of reasoning here.)

[27] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, second edition (Princeton: Princeton University Press, 1980); Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (Cambridge: Cambridge University Press, 2012), 32.

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Another condition of appropriate inclusion regards the reasons a party is motivated to compromise and the origin of their reasons within the compromise. Suppose Russia takes hundreds of Norwegian tourists hostage and then tells Norway that the hostages will be released if Norway makes a deal to give Russia a large part of the section Norway wishes to claim. This method can be excluded by adopting provisos argued for by David Gauthier. Gauthier argues that this initial unfairness can be avoided by a proviso that "prohibits bettering one's position through interactions worsening the position of another." Further, no party should be worse off in the initial bargaining position than she would be in a context of no interaction.[28] This proviso tells us two things. First, the parties to the compromise should not be made worse off by entering into initial bargaining than they were without the interaction. This allows us to identify parties that may not have a position at the bargaining table over the Arctic, for instance. A compromise over the Arctic will grant not only rights, but also responsibilities to the parties. The compromise consists of a joint agreement that forms a responsible collective agent, liable for any wrongful action coming from the compromise, such as liability for climate-induced problems resulting from melting the Arctic ice cap.[29] Further, the basic costs of maintenance, such as policing and launching rescue missions, will be the parties' responsibility. Many nations, then, would be worse off as a member of the Arctic compromise. Those nations that do not have sufficient resources to reap the benefits of owning parts of the Arctic would still be responsible for the maintenance and actions of the compromising collective. The liability in many cases could outweigh the benefits. Second, the baseline bargaining position measuring the compromise between parties should not include harms done by parties to each other.

In addition, legitimately removing goods from the commons requires a compromise to include all those who wish to be a part of the compromise at that time. The timing is important — parties to a compromise must actually be there at the time. This is important for the compromise to be explicit, and also explains why native groups like the Navajo can enforce claims against European outsiders who show up much later. For the compromise to legitimately remove goods from the commons, all relevant agents must tacitly or explicitly consent. Thus, protesting agents must be included to provide their explicit consent. This may appear to bring us back to a stalemate; too many parties will desire a piece of the pie to make a compromise workable, especially a compromise over extremely valuable resources. However, for reasons expressed above, stalemate is not inevitable. Given the responsibilities and liabilities of the Arctic compromising collective, many states should opt out of membership. And additional limitations on membership can be found in the constraint of expediency discussed below.

[28] David Gauthier, *Morals By Agreement*, (Oxford: Oxford University Press, 1986), 16.
[29] Lepora, ibid.

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The fourth inclusion criterion concerns the notification of others of the intent to remove resources from the commons. Only when the intent to remove resources is made public could persons wishing to protest or to be included in the removal be known. It is tempting to interpret this condition from the perspective of the outsider, for the possibility of knowing about the removal seems to be a precondition for giving tacit consent. However, this interpretation of the publicity condition tends to undermine the possibility of removal of any good from the commons. If the outsider-perspective interpretation of the publicity constraint is adopted, the Navajo could not legitimately claim rights over their traditional lands. Because the Navajo did not notify the incoming Europeans of their intent to remove resources from the commons, the Europeans could never possibly give their tacit consent. And thus, on this interpretation, the Navajo could not legitimately acquire goods from the commons. Alternatively, a participant-perspective interpretation of the publicity constraint seems more useful. On the participant-perspective approach, the parties to the compromise are under an obligation to notify, using reasonable measures, all persons who have an interest in the removal of targeted resources. The identification of those persons should be carried out by the participants in a diligent, responsible way, making reasonable use of the information and technology available to them at the time. Thus, the Navajo, having no plausible means of identifying the incoming Europeans before they came to the region, cannot be held responsible for notifying the Europeans of the intent to acquire goods from the commons.

The second, expediency, constraint restricts the object of the compromise to a reasonable domain within which the parties of the compromise are capable of and intend to act. Suppose Ada thinks that the moon should be mined for ice, and Brian thinks the moon should be colonized. They argue and come to a compromise: half of the moon should be mined, and half should be colonized. Since Ada and Brian are normal farmers, not equipped even to go to the moon much less extract resources, their compromise does not grant them rights. Legitimate original acquisition is ultimately tied to the goods' beneficial use. Agreements create obligations only in as much as they result in actual use. Rights acquisition follows the potential for actual effect. If it is impossible to fulfill obligations, the obligation does not hold. Likewise, if it is impossible to perform the conditions upon which the agreement is based, the agreement does not hold. As regards the moon itself, Ada and Brian's is an empty agreement. Inasmuch as it has no effect on the object, it is not an appropriate removal of the object from the commons.

Similarly, compromise grants parties the power to determine original rights over goods. The scope of the object of this power is limited to objects that the parties have the capacity to affect in the way that they intend. Suppose Ada and Brian each owned an advanced exploration company. Each has the ability to mine or to make habitats on the moon. They cannot mine

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and colonize in the same place, and neither has the ability to take either action over a large lunar area. To stay within guidelines of expediency, Ada and Brian must estimate how much of the moon they can actually affect. Rights would then be acquired over only those parts. Dividing the moon in half between them is insupportable — neither has the ability to utilize that amount of space.

The third constraint restricts the rights arising from the compromise. A compromise does not automatically give the parties full property rights; rather their rights are limited to only those that result from the compromise. When Ada and Brian enter negotiations over the field, they have the power to determine which rights over the field each will have (subject to the expediency restraint, above). When they have concluded the compromise, each party has only those rights agreed upon. In the second stage, after the compromise has been struck, the parties leave with only the rights over objects that were determined by the jointly held powers in the negotiation stage. A compromise is designed to be flexible, to allow the parties to the compromise to resolve their dispute in ways that they see best. Navajo lived in extremely dry areas and negotiated clan domains over precious canyon niches that reliably retained groundwater.[30] Within the group, it was understood that distinct clan-lines held exclusionary rights over fertile lands within particular niches. While these did not amount to what would be considered full property rights, clan claims involved provisions that others would refrain from planting seasonal crops or inhabiting particular areas during relevant seasons. Other clans expressed reciprocal claims over other areas. These claims were not full property rights, because it was permissible, for example, for others to inhabit the area during off-seasons. The exact nature of their bundle rights is determined by the content of the negotiated compromise.

Although they did not have full property rights, a strong right was held by the Navajo, as long as they maintained an ongoing negotiation aimed at reaching compromise. They retain the exclusive powers of the first stage of compromise, powers to determine rights over the object of the compromise. Sometimes, especially if the objects of compromise are complex (as in the case of overlapping claims made by migratory groups,) negotiations are continuous, and overlap with the second stage — completion — of compromise. The outcome of a negotiation over access to a water-rich area may depend on the outcome of the previous season's hunting and gathering success. Outcomes of this kind may not be known at the same time, and can have rolling effects, resulting in a series of conditional compromises (such as compromises of the form: "Your group can claim X as long as resource Y continues to be plentiful. If Y is not plentiful, then your

[30] J. Andrews, J. Tracy, "Ecological and Historical Perspectives on Navajo Land Use and Settlement Patterns in Canyons De Chelly and Del Muerto," *Journal of Anthropological Research*, vol. 47, no. 1 (1991): 39–67.

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group's claims will be revisited.") Conditional compromises give the joint parties to the compromise ongoing powers (decision-making authority) over the objects of compromise. External parties correspondingly have obligations to respect the exclusive powers of the group making the compromise. In an agreement, parties hold certain powers over each other, such as, the power to release each other from particular obligations. No one else holds this power. An external party cannot release one party from her obligation to the others. If an external party somehow forces the parties to release each other from the agreement, then this person has taken a position of illegitimate authority over them. If the object of our compromise were taken from the group by external parties, making it impossible to honor obligations, the members are absolved of their duties. Because this power of absolution does not appropriately belong to external parties, they fail to respect members of the compromising group as equal autonomous agents, taking a position of illegitimate authority over them. In compromises that involve ongoing special obligations regarding a particular object, the theft of the object violates the members' exclusive powers.

VI. Conclusion

Who has a legitimate claim to the Arctic resources? Nations willing to take on the responsibilities of compromise as well as the benefits of Arctic ownership may negotiate terms of acquiring Arctic resources. Keeping in mind constraints of expediency, parties should not claim expansive territorial rights that imply full jurisdictional control and ownership over an area.[31] Rather, parties could reach a compromise granting rights to smaller, strategic, environmentally supportable drilling and extraction sites on the seabed. Claims to resource extraction from the seabed need not include claims of exclusive access to the sea above — navigational routes and fishing rights could be negotiated and distributed separately. Scaling down the size and set of rights held by claimants significantly increases the likelihood of reaching a compromise by minimizing liabilities and maximizing benefits.

The rights resulting from the compromise are binding on external parties, such as nations that do not have the current capacity to bear the responsibilities of Arctic ownership. Even if in the future these excluded nations regret being excluded and want rights over Arctic resources, they are not entitled to these claims if they do not join the compromise when it is first struck. Further, if the collective of compromisers continuously negotiates elements of the system of rights over the Arctic between parties, then this

[31] Cara Nine, "Territory in a World of Limits: Exploring Claims to Oil and Ice," in *Environmental Philosophy: the Art of Life in a World of Limits. Advances in Environmentalism and Sustainable Justice*, ed. Liam Leonard (Bingley, UK, Emerald Press, 2013): 137–55.

collective continues to hold exclusive jurisdictional powers over the area to determine rights in the future. As long as the constraints on compromise continue to be observed, compromise can create original, lasting, exclusive rights over natural resources.

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