

# Property and Sovereignty: How to Tell the Difference

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*Property and sovereignty are often used as models for each other. Landowners are sometimes described as sovereign, the state's territory sometimes described as its property. Both property and sovereignty involve authority relations: both an owner and a sovereign get to tell others what to do — at least within the scope of their ownership or sovereignty. My aim in this Article is to distinguish property and sovereignty from each other by focusing on what lies within the scope of each. I argue that much confusion and more than a little mischief occurs when they are assimilated to each other. The confusion can arise in both directions, either by supposing that property is a sort of stewardship, or that sovereignty is a large-scale form of ownership. One of the great achievements of modern (i.e., Kantian) political thought is recognizing the difference between them.*

## INTRODUCTION

Property and sovereignty are often used as models for each other. In introducing his account of rights, H.L.A. Hart describes a right-holder as a “small-scale sovereign.”<sup>1</sup> So, too, discussions of sovereignty often appeal to proprietary metaphors of ownership. These parallels are unsurprising, both historically and conceptually. Historically, early modern discussions of sovereignty, such

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1 H.L.A HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 183 (1982).

as those of Bodin<sup>2</sup> and Grotius,<sup>3</sup> viewed sovereignty in broadly proprietary terms. The sovereign was in charge of his territory, and did not answer to any higher authority. That made the sovereign's territory his property; the Grotian conception of political power made the inhabitants of that territory the sovereign's subjects, in the strong sense that they were subject to his will.

The historical origins of these parallels might seem to be reasons to do away with both of them, sobering reminders that too much of our repertoire of legal concepts consists in what Oliver Wendell Holmes called "revolting" holdovers from the time of Henry IV.<sup>4</sup> So, it might be thought, there is wisdom to be found in the Hohfeldian approach to both concepts, treating of property and sovereignty each as a bundle of disparate powers, which is to be assessed in isolation from all of the others on overall grounds of "justice and policy," and changed if found wanting.

Such a conclusion would be too hasty, however. Each of property and sovereignty has its own internal structure; neither is a mere concatenation of elements. The most important difference between them, I shall argue, is that sovereignty has an internal norm, which restricts the purposes for which it may be exercised, because the sovereign is supposed to rule on behalf of, and for the sake of the people; property, by contrast, has no internal norm. The owner of property can use it for any purpose whatsoever, subject only to external restrictions.

This fundamental difference does not eliminate the basic structural similarity between them. The core of both concepts is that what the owner, or the sovereign, says goes. If it is your house, you can ask me to leave; if it is your umbrella, you get to decide whether I can use it when it rains. So, too, with sovereignty: a state gets to determine what goes on within its borders, who is allowed across those borders, and what terms, from alliance to warfare, will structure its relations to other states. Once again, the scope of sovereignty is disputed, but those disputes appear to presuppose a core case in which exclusion is assumed, and then dispute the scope within which it can be exercised.

The same conceptual point could be put differently: both a property owner and a sovereign get to say to certain other people something of the general form, "that is not up to you; it is up to me. I am in charge here." Being in charge in this sense is content independent: others have to defer to the sovereign or owner. That does not mean that there are no reasons to which sovereigns

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2 JEAN BODIN, ON SOVEREIGNTY 51 (J. Franklin ed., 1981).

3 HUGO GROTIUS, DE JURE BELLI AC PACIS (1625), translated in THE LAW OF WAR AND PEACE (W. Whewell trans., 1853).

4 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

and owners should be attentive, only that their authority over others is not conditional on their attention to those reasons.

In order to characterize the internal structure of each, I proceed in what may strike some as an unduly old-fashioned or even naïve manner. Both property and sovereignty present themselves as reason-giving concepts. That is, they function not as explanatory concepts, but in the logical space of giving reasons: both property and sovereignty are invoked in response to questions of the general form “why do you get to decide?” Both are invoked in the process of giving answers of the general form, “I (or we, but *not* you) am (are) in charge here.” Typically, the question of why you, in particular, are in charge has a historical or procedural answer, and explains how you, in particular, came to be the one who is in charge — you acquired the land legitimately, or the Constitution confers the power on the President — rather than what might be thought of as a credentialed answer. The President is the president because he is the one who got the most votes in the Electoral College, not because he is the best person for the job, and the Constitution is the constitution because of the specifics of history, not because it is the best constitution. This is so even if he is the best person for the job or it is the best constitution. You are the owner because you acquired it from the previous owner who had good title, not because you will make better use of it than anyone else, or have any special skills with respect to managing it. Of course, we want constitutions to enable the people to rule themselves, and we want elected officials to be good at their jobs, and at least one reason for holding elections is to help select ones who will manage affairs of state well. But when the state, acting through its officials, exercises its sovereign authority, what it says goes, not because it knows best on the specific question before it, but because it is sovereign. So, too, with property: as against other private persons, the owner gets to decide what happens on his or her land and with his or her chattels. Although we want owners to use their property wisely, no expertise is expected or required.

In many cases, answers of the form “I am in charge here” can and should be challenged. I argue that any such challenges are essentially retail rather than wholesale, challenging this or that specific claim rather than the very possibility of an official being in charge of a set of questions, or of an individual human being in charge of land or chattels. Although both concepts have a history, I assume that having a history is not an obstacle to having a rational structure. Nor shall I entertain the possibility that nothing ever has a rational structure.

I compound this naïveté by insisting on a distinction between questions of right and questions about the effects of an action on others.<sup>5</sup> Both sovereignty and property purport to confer entitlements; they are deontic ideas that encode a distinction between affecting others and wronging them. This distinction between those who do and do not have a claim is a difference in kind, and not dependent on anything like the degree of impact.<sup>6</sup>

Property and sovereignty are also conceptually parallel in participating in the form of generality particular to deontic concepts: a general concept figures in the justification of its instances. I have to stay off of your property because it is yours. This form of generality contrasts with the merely empirical generality of rules selected and modified on the basis of their effects. John Rawls characterizes this empirical idea as the “summary conception of rules,”<sup>7</sup> because the justification of the general is inherited from its particulars; the general rule doesn’t justify its instances; it instructs the rule-follower about how best to get to a result that is justified without reference to the rule; the instances are sufficiently alike that you can economize on time and effort by looking at the rule instead. A summary theory of property would justify its structure by showing that most of the time things go better if people stay off the property of others, where the dimension along which they go better makes no reference to any property-like concepts. As Rawls points out, the summary conception permits or even invites deviation from the rule when things will go better without it.<sup>8</sup>

Rawls himself contrasts the empirical or summary conception with what he calls the “practice conception,” in which the general rules themselves rest on some still further form of generality that is not itself rule-governed

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5 Morris R. Cohen’s classic Essay *Property and Sovereignty* is predicated on collapsing the distinction between the two by collapsing the distinction between questions of wrongdoing and questions about the effects of an act on others. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

6 I thus perhaps still further compound my naïveté by rejecting what might be called the Quine/Nietzsche thesis. See Willard van Orman Quine, *On What There Is*, 5 REV. METAPHYSICS 21 (1948) (“To be is to be the value of a bound variable.”); FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 551 (Walter Kaufman ed., Walter Kaufman & R.J. Hollingdale trans., 1967) (“A thing is the sum of its effects, synthetically united by a concept, an image.”).

7 See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

8 The same structure can be redeployed at the level of rule-following in general, focusing on the usefulness of binding distrusted or unreliable decision makers through rules that are unreliable generalizations, but more reliable than the decision makers. See FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

or even rule-like.<sup>9</sup> The practice conception contemplates two distinct and fundamentally un-mixable levels of justification. The general justification of property, promising or punishment is a justification for accepting the ordinary rules of these “practices” as binding in an exceptionless way. David Hume introduces this idea in his treatment of property and promising: the rule of property is “abstinence from the possessions of others,” which is adopted not because abstinence as such is “approved” but because a single exceptionless rule is required.<sup>10</sup> On this view, the underlying justification is of philosophical but not practical interest. It is offered to explain the bindingness of an otherwise puzzling (because sometimes counterproductive) norm, but the underlying justification cannot be consulted in the application of that norm, on pain of defeating the norm’s justifying purpose. For Hume, the benefits of the property convention (or convention of promising) have no place in deciding what to do. On this two-level understanding, the justification of property does not provide it with an internal norm; an owner can destroy property at will, or refuse to use it in ways that benefit others, without raising any moral issue, because the justification applies only to the practice as a whole, not to its individual instances. This inflexible distinction between the rule and its justification is required to prevent the justification from underwriting violations of the rule in cases where the result would be better achieved, or the practice better upheld, through its violation, either directly, by producing a result, or indirectly, by manufacturing a crisis.

The practice conception is offered as a justification of the naïve norm of property, rather than as a rationale for limiting it. Because it supposes that the rationale for the rule excludes considering it as a rationale for compliance, I treat it as equivalent to the stronger position according to which the basic normative structures of interest to legal and political philosophy are rule-like all the way down. Perhaps the view articulated here could participate in what Rawls later called an “overlapping consensus”<sup>11</sup> with the “practice” view, provided that the object of that consensus was the naïve norm of property.

Having drawn attention to the conceptual suggestiveness and historical pedigree of the parallels between property and sovereignty, my aim in the remainder of this Article is to argue that the assimilation of one to the other rests on a tissue of confusions. I explicate those confusions in several stages: In Parts I and II, I focus on a fundamental feature of each of sovereignty and property that the other lacks. I have already remarked on the role of both

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9 See Rawls, *supra* note 7.

10 DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. 3, pt. 2, § 2, at 489 (L.A. Selby-Bigge ed., 1888).

11 JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION* 164 (4th ed. 2011).

property and sovereignty in giving reasons, and drawn attention to the way in which the forms of thought in which they figure identify some person or body as being in charge of some question. The owner is the one who acquired it in the right way; the sovereign is the one who was appointed through the right procedures. The core difference between them is to be found in the explanation of why it is that anyone is in charge of any of these questions. But the grounds for having owners and having sovereigns are fundamentally different.

In Part I, I argue that the correct way to understand property as a normative structure of human interaction requires abstraction from the purposes for which property is used. Property has an external norm — keep off — because it has no internal norm. Sovereignty, by contrast, has an external norm — don't interfere — because of the specific internal norm that it has. I then turn to sovereignty in Part II, arguing that it necessarily attaches to officials, who have a specific type of mandate. That mandate requires them to act on behalf of their citizens. Far from owning its subjects, in the exercise of official power a legitimate sovereign is required to act on behalf of its subjects. Nor does the sovereign own its territory; its territory is more nearly its body, its manifestation in space.<sup>12</sup> So despite the distinguished pedigree of the thought that the study of the individual can illuminate the study of the *polis* and vice versa,<sup>13</sup> sovereignty and property are very different. Insofar as the analogy has any benefit, it isn't about property at all.

I fill out these contrasts by considering two prominent approaches that collapse the distinction between property and sovereignty in two opposite directions in Parts III and IV. The idea of sovereignty developed in the seventeenth century by Grotius, and defended in the middle part of the last century by Carl Schmitt, treats sovereignty in exclusively private and proprietary terms. Although Schmitt talks at length about “the people,” creating the impression that he attaches sovereignty to a collective, Schmittian collectives act only privately, and their relation to both their members and their territory is fundamentally proprietary. From the opposite direction, an idea of property, fundamental to Thomistic natural law tradition, and developed

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12 Hence the state's right to territorial integrity. That does not mean that territory cannot be in dispute; only that when it is, it is in dispute in a certain way: the contending sovereigns each claim that it is theirs in a way that precludes alienation by sale or gift. If the state's territory were its property, the familiar moral and legal idea that defensive war can be legitimate to protect the state's territorial integrity would be in tension with the equally familiar idea that potentially lethal force may not be used to protect property.

13 The parallel dates at least from Plato's *Republic*. For a recent formulation, see CHRISTINE KORSGAARD, *SELF CONSTITUTION* (2009).

in different ways by Medieval writers such as Thomas Aquinas, and, more recently, John Finnis, understands it as a form of stewardship, a task given to an assignable individual so that the earth and its fruits might be preserved and maintained. This view treats property as restricted in the way in which I suggest sovereignty must be.

In drawing attention to these contrasts, I do not deny that a sovereign authority, acting on behalf of its citizens as a collective body, is entitled to place restrictions on the use of property, or impose demands on owners of property, by taxing them, making them shovel public sidewalks, and so on. These familiar features of a public legal order are instances of a state acting on behalf of all of its citizens. My claim about the distinctive nature of property is much more restricted: I claim only that ownership is a status that private persons have as against each other. Individual human beings are not required to use their property to advance or accommodate the private purposes of others, even if their property can be conscripted in the service of public purposes from which others benefit. Once this contrast is clear, I argue in Part V that it provides a more powerful illumination of the multiple ways in which a public authority can legitimately restrict and encumber property rights, such things as antidiscrimination law, common carrier rules, and taxation of private transactions.

## I. PROPERTY

What I call the naïve norm of property is both simple and familiar: if something is not yours, you must not interfere with it. The structure of the naïve norm is more transparent than its justification. In contemporary literature, two broad strands of justification compete (or, in some instances, collaborate) to explain it. On one view, it is in the service of something called “autonomy,” and property serves to provide the owner with a resource for self-development and self-fulfillment. Your property rights build a wall around you, providing you with a space within which others must not interfere. On the other, property is in the service of something that might be called “usefulness,” that is, one or more of the efficient allocation of resources, the use of usable things, and the preservation of valuable things.

Each of these strategies of justifications for the naïve norm of property is both under- and over-inclusive in relation to the norm it purports to justify. Each of them represents the naïve norm as an instrument in the service of values that are not themselves essentially connected with it or any other rule. Instead, the autonomy account focuses on the good that ownership does for owners; the competing use account focuses on the aggregate good that

ownership achieves in the long term. The extreme version of the autonomy account — Nozick's libertarian theory of property can be pressed into service here<sup>14</sup> — imagines that any restriction on property is a violation of the owner's inner citadel of freedom. This extreme view invites extreme refutation: everything anyone does stops others from doing what they otherwise might.<sup>15</sup> Less extreme versions of the autonomy account have less extreme conceptions of autonomy, but gain plausibility on that score at the cost of supposing that interferences with property that do not interfere with the owner's agenda are not interferences after all.<sup>16</sup>

Use theories have parallel difficulties. Although they aspire to explain the naïve norm in terms of making usable things more available or seeing to it that they are used effectively, these ideas have a different type of generality than the naïve norm they purport to explain. In particular, although it may in general be true that a general rule empowering owners to determine what happens with or on their property makes for more useful things in the long run, the generalization on which the rule rests is riddled with exceptions, as any rule based on long-term effects must be. Thus the naïve norm is presented as an approximation, based on epistemic or institutional limitations that stand in the way of direct or complete achievement of the purpose it is supposed to serve. Such an approach has the surprising consequence that what might have appeared to be paradigmatic instances of the naïve norm — keeping land for future development, bargaining over the price at which you will sell something to someone who can make better use of it — are treated as hangers-on.

The difficulties of the autonomy- and use-based accounts are in fact much more general, because the naïve norm of property stands in the way of achieving the values that those accounts contend it is supposed to serve. Neither autonomy nor the usefulness of usable things (or their preservation, efficient use, and so on) participates in the fundamental distinction of which the right to exclude is a central instance, between misfeasance and nonfeasance. That distinction reflects the difference between doing something *to* another person, or the object of that person's right, and failing to do something *for* that person, or the object of that person's right. In the case of property, the distinction tells the owner that he or she does not need to use his or her property to assist others in any way; most notably, an owner does not need to use property so as to enable another person to better use or even preserve

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14 ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

15 See, e.g., G.A. Cohen, *Freedom, Justice and Capitalism*, 126 *NEW LEFT REV.* 3 (1981).

16 Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 *U. TORONTO L.J.* 275 (2008).



his or her property. Nor, for that matter, does an owner need to use it in ways that preserve another person's life, that is, the seat of that person's autonomy. The owner does not need to do any of these things because the status of owner is in the first instance the entitlement to determine, to the exclusion of other private persons, the purposes for which the item of property is used. That in turn entails that it does not need to be used in a way that best serves the global purpose of maximizing or increasing overall autonomy or usefulness.

In putting things in this way, I am not, at least so far, making a normative claim about the justification of property, or even about the justifiability of the distinction between misfeasance and nonfeasance. Instead, I am making a conceptual claim. Anything that would qualify as a justification of the naïve norm must share at least this much in common with that norm: it must explain why the misfeasance/nonfeasance structure applies even when diametrically opposed to (as opposed to merely under-inclusive in relation to) its underlying value.

The prospects for either account doing so seem to be poor, because the concepts on which it depends are, as Leif Wenar has remarked of the concept of an interest, like butter, semisolid at room temperature.<sup>17</sup> If frozen into appropriate chunks, the idea of autonomy or the usefulness of land can figure in a justification, but not of the rule of exclusion; when melted it can be poured into other normative containers, such as the naïve norm of property. Like any other liquid, it assumes the shape of its container and so provides no explanation of that shape. Even if autonomy is made to conform to the contrastive entitlement that the owner, rather than others, be the one who decides how the thing is used, it cannot explain that contrast. Nor can usefulness explain the idea that the owner, in particular, decides how a thing will be used. Either strategy would import the norm of exclusion into the concept that is supposed to justify it from outside.

I want to suggest a different way of thinking about the justification of the naïve norm of property, what might be called a naïve justification of it. The naïve justification begins with the recognition that the distinction between misfeasance and nonfeasance is fundamentally relational, as is its specific instance in the right to exclude. The difficulty comes in trying to represent your relation as an approximation of a question of degree. No doubt relations do sometimes admit of degrees — something can be further to the left along an array than some other thing, but neither is left or right to any degree except in relation to some point fixed as an origin. The difficulty with interests, or even with autonomy understood as a monadic form of self-relation, is that they are not appropriately relational.

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17 Leif Wenar, *The Nature of Claim-Rights*, 123 *ETHICS* 202, 228 (2013).

On a purely relational account of property, the only justification that it can receive turns on the relation in which the owner and non-owner stand, a relation in which the owner is entitled to be independent of the non-owner, rather than to be independent in any more robust sense. It is not that the power to exclude is somehow delegated (by whom?) in the service of maximizing the owner's autonomy or ability to make decisions. Any such proposal would inevitably run into difficulties explaining why priority was attached to the autonomy of the owner over that of those the owner is entitled to exclude. Instead, the right to exclude is in the service of a moral idea that can only be expressed contrastively: the owner is entitled to determine the purposes for which the property is used, rather than having its use constrained by the purposes of others. It is not in the service of some idea that each person is in charge of him or herself; it is instead in the service of the idea that no person is in charge of anyone else. In a system in which no person is in charge of another person's property, this basic norm is not something added in the service of something else; it just is that system. Just as I am not permitted to use your property without your authorization, so, too, conversely (but ultimately equivalently) you do not need to make your property available for my use, or to use it in the way that best suits my preferred purposes, whatever they might be. These reciprocal constraints just are what it is for the property to be yours. Just as I do not get to determine directly the purposes for which it is to be used (by using it without your authorization), so I do not get to determine those purposes *indirectly* by requiring you to use it yourself in the way that best suits my own preferred use of my property. The moral idea to which they give effect can only be expressed by reference to the relation between the form of your choice and mine.<sup>18</sup>

Such an account may seem circular in the way in which the molten versions of the other accounts are. But the circularity of those accounts was a problem because they purported to explain the relational right to exclude in terms of something non-relational. Circularity is a fatal flaw in any attempt to explain something in terms of something else; explanation fails if the *explanans* presupposes its own *explanandum*. It is less obviously a vice of a theory that aspires to display a normative structure perspicuously.

If no person is in charge of another, then a distinctive way in which separate persons can have claims in relation to things becomes available: no person is in charge of another person's things. The not-in-charge-of relation is formal; it does not depend on the particular purposes of either the person in charge or

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18 In this it differs from the focus on accommodation of another person's particularity discussed in Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

the one not in charge. So, if it is extended to things other than each person's own body, it takes the form of the norm of property: do not use or interfere with another person's possessions without *that* person's permission. No doubt there are reasons for restricting the operation of this way of interacting. But that does not entail that it is not presumptively justified merely by the fact that no person is in charge of another. That is, the naïve norm of property can be made to look troubling or baffling. But in fact, it is just a familiar feature of naïve morality. There are, no doubt, some sophisticates who are dissatisfied with anything naïve, and others who are dissatisfied with any hint of morality.<sup>19</sup> But the beginning of wisdom and thinking about property is thinking about property.

Property has one other important distinguishing feature: it is, by its nature, transmissible. By this I do not mean to deny that historically there have been restraints on alienation, or to claim that the idea of a fee tail is not an idea of property. My claim instead is that when property passes from one person to another, the same constraints on the conduct of others pass over to the new owner intact. The structure is familiar in easements and covenants that run with the land, but also figures in the sale of chattels. It is not, as first Fichte<sup>20</sup> and later Hohfeld contended, that the entire world of relationships between individuals with respect to their actions shifts every time somebody buys a newspaper, so that duties owed to one person are replaced with radically independent duties now owed to others. For Fichte, all specific property claims are terms of a multiparty social contract, and must be reconfigured after every transaction;<sup>21</sup> for Hohfeld, each transaction recombines new legal relations each of which is to be assessed in isolation from those that preceded it on "grounds of justice and policy." Instead, others are subject to the "it is not yours," norm with respect to an item of property even if the one person to whom it belongs changes.<sup>22</sup>

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19 See, for example, the suggestion that beyond the "the salient marker" of the prohibition on gratuitous killing, moral and political questions are "uncharted wastes," in W.V.O. QUINE, *QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY* 5 (1987).

20 JOHANN GOTTLIEB FICHTE, *GRUNDLAGEN DES NATURRECHTS NACH PRINZIPIEN DER WISSENSCHAFTSLEHRE* (1797), *translated in* JOHANN GOTTLIEB FICHTE, *FOUNDATIONS OF NATURAL RIGHT* 171 (Michael Baur trans., Frederick Neuhouser ed., 2000).

21 *See id.*; Allen Wood, *Fichte's Philosophy of Right and Ethics*, in *THE CAMBRIDGE HISTORY OF MORAL PHILOSOPHY* (Sacha Golob & Jens Timmermann eds., forthcoming 2017).

22 James Penner, *On the Very Idea of Transmissible Rights*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 244 (James Penner & Henry Smith eds., 2013); Adolf Reinach, *Die Apriorischen Grundlage des Bürgerlichen Rechtes*, 1 *JAHRBUCH*

Some writers have suggested that the way in which the norm of property survives changes in ownership makes the owner into a sort of minor official, an officeholder who happens to be the current occupier of the office.<sup>23</sup> When contrasted with Hohfeldian bundle views, the suggestion marks a genuine advance. It is nonetheless misleading, because the concept of an office only sheds light on the structure of property if it contrasts with something. Ordinarily, an official is charged with advancing or protecting the purposes of the institution in which that office is found. By contrast, an owner typically has untrammelled discretion with respect to the purposes for which the property will be used. “Do whatever you want” is not a mandate. Again, an officeholder is typically appointed to his or her office, and does not have untrammelled discretion with respect to the appointment of his or her successor. Instead, there is a procedure for appointment, even if the procedure confers some discretion on those making the appointment. “Choose whomever you want!” is not a procedure. Various restraints on alienation — ideas of primogeniture, fee entails, and more generally the very idea of a system of feudal estates — may seem to be counterexamples to this, but I take it that they are very different from more familiar and seemingly paradigmatic examples of property. More significantly, the modern understanding of property gives the owner rights and powers entitling him or her to decide what purposes to pursue with it.

Moreover, the power to appoint a successor in office — to alienate — is not appended to a more specific job description. It is just an instance of its open-ended “it-is-up-to-you” structure. The contrast with premodern structures is clear in that, unlike modern forms of ownership, they came with a detailed job description: the owner is required to preserve the land, not to waste it, and so on.<sup>24</sup> He or she is put in charge of it for the sake of the land. Ownership that is encumbered in these ways looks like it does have an internal norm; like other offices, you hold it in trust for — for whom (or what)? Your successors in title? Some broader set of stakeholders? The land itself? The distinctiveness of these arrangements serves as a reminder of the conceptual space between the idea that someone is in charge of something and the very different idea

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FÜR PHILOSOPHIE UND PHÄNOMENOLOGISCHE FORSCHUNG 685 (1913), *translated in* Adolf Reinach, *The A Priori Foundation of the Civil Law*, 3 *ALETHEIA* 1 (John F. Crosby trans., 1983).

- 23 See HART, *supra* note 1, at 208 (attributing to Bentham the view that “[t]he old owner . . . appoints the transferee to the ‘office’ of owner of the property”); Christopher Essert, *The Office of Ownership*, 63 *U. TORONTO L.J.* 418 (2013); Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 *MCGILL L.J.* 47, 78 (2010).
- 24 See Larissa Katz, *Property’s Sovereignty*, 18 *THEORETICAL INQUIRIES L.* 299 (2017).

that someone is charged with the care of something. In the limiting case, these can be seen as examples in which, rather than the people inheriting the land, the land instead inherits the people; they are *adscriptus glebae*.

## II. SOVEREIGNTY

It is less straightforward for me to contend that I am offering a naïve theory of sovereignty. It has meant too many different things to too many different thinkers. So I must begin more indirectly, with the norm that I contend organizes property, that is, the idea that no person is in charge of another, or, as Roman law puts it, that each person is *sui iuris*. I want to suggest that this idea, what Kant calls the “innate right of humanity”<sup>25</sup> that each of us has in his or her own person, restricts the possible content and exercise of any acceptable form of sovereignty. A sovereign does not own its subjects; although they are in its charge, it is not in charge of them. Many of the most familiar themes of political philosophy reflect this idea. Worries about the legitimate basis of the exercise of public power, the justification of particular exercises, either through substantive norms or democratic procedures, as well as the most familiar of the enumerated rights captured in postwar constitutional documents, all turn on the idea that the exercise of state power is limited because of each person’s right not to be a mere means for the private purposes of others.

Still, if the view I defend is not as impeccably naïve as I might hope, it is certainly very old. In *On Moral Obligation*, Cicero represented the “guardianship of the state” as “a kind of trusteeship.”<sup>26</sup> Hobbes wrote of the “office of the sovereign” which “consisteth in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people.”<sup>27</sup> Examples could be multiplied.<sup>28</sup> All of them rest on the thought that

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25 IMMANUEL KANT, *Rechtslehre [The Doctrine of Right]*, in *DIE METAPHYSIK DER SITTEN [THE METAPHYSICS OF MORALS]* (1797), translated in IMMANUEL KANT, *The Metaphysics of Morals* (1797), in *PRACTICAL PHILOSOPHY* 353 (Mary J. Gregor ed., 1996).

26 MARCUS TULLIUS CICERO, *DE OFFICIIS* 44, (44 BCE), translated in MARCUS TULLIUS CICERO, *ON MORAL OBLIGATION* 69 (John Higginbotham trans., 1967).

27 THOMAS HOBBS, *LEVIATHAN* 231 (Richard Tuck ed., 1996) (1651). For discussion see EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* (2011).

28 Martti Koskenniemi offers an example that is both surprising and, on reflection, perfectly familiar:

Even that most insistent representative of absolutism, King James I of England, in *The Trew [Law] of Free Monarchies* [1598], received his divine right from the Bible and from natural law by which he became “a

sovereignty comes with a specific mandate of the sort that property lacks. Kant goes further, putting the point in terms of the impossibility of free beings giving themselves a master, in the sense of someone with untrammelled discretion or entitled to make arrangements for the master's own private purposes.<sup>29</sup> The impossibility of which Kant speaks here is not factual but normative: the only moral powers that citizens could confer on public officials are those consistent with each person's innate right of humanity, because no one could confer any powers on another inconsistent with his or her innate right.

A focus on what people could do, rather than what they have actually done, is required by the distinctive nature of the state, a nature that makes it unlike any voluntary private organization. States are involuntary in a number of familiar senses. First, in the ordinary course of events, people are born into a particular state, and are not, as a matter of course, entitled to choose whatever state they would like. Second, the state comes as a package: individual citizens do not get to pick and choose which of the state's multiple laws apply to them. Nor can they negotiate a special package of rules just for themselves.<sup>30</sup> Instead, the rules apply to everyone. These differences entail that the terms of social life are non-voluntary. Voluntary arrangements, at least if they are agreed to under fair background conditions, bind those party to them, merely because they so agreed. No such voluntarist conception is available in the case of the state.

How could a non-voluntary arrangement bind those over whom it exercises power? There are at least two requirements. The first is that the arrangement, or some such form of arrangement, be morally necessary, that is, that it addresses and at least partially solves moral problems that would be pervasive in its absence. The second is that it does so on behalf of everyone. The Kantian thread in liberal thought insists that the problem that it solves is unilateralism

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naturall Father to all his Lieges at his Coronation." But as he immediately added, "his fatherly duty is bound to care for the nourishing, education and vertuous government of his children." One tends to think of absolute sovereignty as "arbitrary" freedom — but as any parent knows, nothing is further from the parental relationship.

Martti Koskeniemi, *Conclusion: Vocabularies of Sovereignty — Powers of a Paradox*, in *SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT* 222, 224 (Hent Kalmo & Quentin Skinner eds., 2010).

29 KANT, *supra* note 25.

30 Or if they can, it is recognized as deeply problematic. See Tsilly Dagan, *International Tax and Global Justice*, 18 *THEORETICAL INQUIRIES L.* 1 (2017); Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, *N.Y. TIMES*, Dec. 29, 2015, <http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html>.

in action, judgment, and enforcement. No private person needs to defer to the private actions, judgments, or enforcement efforts of another. That is just what it is for each person to have an innate right to independence of another person's choice. But the only way out of these problems is for human beings to enter what Kant calls a rightful condition, a condition in which public institutions make, apply, and enforce law. On this understanding, the purpose of the state — the moral basis of its sovereignty — is simply to provide a rightful condition for its members. But it can only do that by acting exclusively for the purpose of providing a rightful condition. It does not have any further, private purposes, certainly not the purposes of any (or all) of its members. It presupposes further that the provision be for everyone — that everyone is a full member on whose behalf the state acts.

This makes for the fundamental contrast between property and sovereignty. A property owner has a kind of authority over others, in the sense that he or she can, by mere say so, determine whether others may permissibly use or acquire the item of property. The property owner can do this for any purpose whatsoever. The right to exclude is formal in two respects: first, the scope of the authority the owner enjoys does not depend on the purpose for which it is being exercised.<sup>31</sup> Although others might criticize the owner's purposes or priorities, the naïve norm of property has no conceptual space through which such concerns can so much as be expressed. That is, it is not just that nobody has the legal power or standing to enforce such judgments; the naïve norm of property is that such judgments are entirely external to property. Second, the property owner's authority is purely negative. The owner can permit others to, or forbid others from, using the thing. But an owner cannot impose affirmative obligations on others. That is just the distinction between misfeasance and nonfeasance.

The sovereign, by contrast, has a fundamentally different type of authority. The sovereign is charged with providing a rightful condition for its citizens. Where the property owner can act for any private purpose whatsoever, the sovereign can act for no private purpose whatsoever. Again, the word "can" here is normative, not empirical. Any casual observer of the world and its history will be aware that sovereigns frequently act for private purposes. There is, however, a word for those who do so: corrupt. The availability of the concept of corruption reveals the familiarity of what I am describing as the basic norm of sovereignty. The sovereign has a specific task, and pursuing private

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31 This is so even in cases in which someone uses property to harass another; the difficulty is with the means — setting up a conflict with a neighbour's use — not the end for which they are used. I discuss this in ARTHUR RIPSTEIN, *PRIVATE WRONGS* ch. 6 (2016).

purposes rather than that specific task is failing to do its job appropriately. That is, the normative principle governing the exercise of sovereignty is internal to the concept of sovereignty. The contrast with property could not be sharper: the concept of property excludes any conceptual space for a norm assessing internal exercises of it. That is because the basic norm of property just speaks to others, telling them that they must defer to the owner. So any evaluation of the purposes for which an owner acts is extra; contrarily, an internal mode of evaluation is available for exercises of sovereignty.

The idea that the state must act on behalf of everyone gives rise to a characteristic form of reasoning and, from that, to an internal standard of self-assessment: it must act for exclusively public purposes, on behalf of everyone, rather than for the private purposes of its rulers or even a majority. Moreover, it is under a duty to perfect itself in relation to that role.

The internal standard that applies to the state requires it to take up an end, but to do so in a specific way. The state only acts through its officials, and, indeed, because it can only act in this way, it does not need to consciously entertain an end or have a mysterious inner life of its own (whatever that would be). And the officials themselves need not make serving that end their conscious end either; as long as they act within the mandate of their respective offices, they might well care only about finishing early and collecting their pay.<sup>32</sup> But the legal system is subject to its own norm of providing a rightful condition for its citizens, and the coordinate prohibition on acting for the private purposes of its officials. The internal standard for a rightful condition just is this distinction between private and public purposes; as such, its internal standard is to create, sustain, and perfect its own public nature. Familiar public purposes are essential means to that provision, rather than ends that matter apart from it.

This internal mode of evaluation is particularly familiar in the case of corrupt public officials. They can be removed from office and imprisoned for corruption. Looking around the world, it is not difficult to worry that many official attempts to root out corruption are themselves corrupt. These unfortunate facts may remind us of Kant's caution that nothing straight can ever be made from the warped wood of humanity;<sup>33</sup> they also remind us that the standard for evaluating exercises of sovereignty is specific to sovereignty.

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32 I take this to be Kant's point in his remark in *Towards Perpetual Peace* that a "race of devils" could solve the problem of right. On the role of alienated officials as a topic for legal philosophy, see SCOTT SHAPIRO, *LEGALITY* (2011).

33 IMMANUEL KANT, *IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBÜRGERLICHER ABSICHT* [IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE], *translated in KANT: POLITICAL WRITINGS* 41 (H.S. Reiss ed., 1991).



Even if there is little hope that corruption will be entirely eradicated, the impetus to do so is contained in the concept of a public office.

The same structure also shows up in common law legal systems that permit a tort of misfeasance in a public office. The basic structure of that wrong involves a public official using his or her office for an improper purpose, that is, a purpose that lies outside the mandate for the sake of which the office was created. In so doing, the public official may even be acting in a public-spirited way; such an official still does wrong because in so doing he or she effectively treats the office as an item of property, a private domain the purposes of which he or she is free to determine.<sup>34</sup>

The existence of an internal standard binding on sovereigns in virtue of their role explains several other familiar features of sovereignty. Jeremy Bentham and John Austin (and, in a slightly different way, Thomas Hobbes) represented the sovereign as outside the law, legally unconstrained and, just as important, identified and constituted by facts about obedience by citizens, rather than through any legal norm. Critics, beginning with John Salmond<sup>35</sup> and, with rather more precision, H.L.A. Hart, have pointed to the incoherence of this representation of sovereignty. The core of Hart's objection is that the sovereign so characterized is crucially ambiguous between a factual and rule-governed concept. The fact of habitual obedience by the bulk of the population, which is supposed to ground the account, is empirical and factual, but the identification of the sovereign presupposes the idea of a legal power, and so can only be explained by recourse to the concept of a rule. In particular, the

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34 The possibility of a wrong of privatizing a public role has a much broader application. Antidiscrimination statutes require private citizens to participate in providing a fully inclusive economic and political order in which enumerated traits, including but not limited to race, religion, gender, and sexual orientation, do not provide any barriers to full participation. But the specific nature of the contribution exacted from employers and landlords is distinctive, reflecting the ways in which full participation requires being able to determine the specific other person with whom you will transact. (In this it differs from the familiar case of adequate material recourses, the entire point of which is to be available as what Rawls once called "all purpose means." To function in this way, they must be fungible.) Service providers are thereby turned into (very minor) public officials, charged with the public mandate, just as common carriers long have been, and, in a still smaller case, people required to shovel snow from in front of their homes have been. If they privatize the mandate by discriminating, they wrong someone in particular. I develop this point in more detail in Arthur Ripstein, *The Division of Responsibility 2.0*, Paper Presented at the Private Law Workshop, Tel Aviv Univ. (Mar. 15, 2017) (on file with author).

35 JOHN W. SALMOND, *JURISPRUDENCE, OR THE THEORY OF LAW* 52 (1902).

idea of a person with rulemaking power can only be specified by reference to the concept of a rule constituting the office. But this is just the difference between property and sovereignty: the sovereign is the one who makes the rules, but the sovereign is also the one who is identified by some set of rules, and can only act in accordance with those rules; anything else is defective as a sovereign act.<sup>36</sup>

Rousseau makes what I believe to be ultimately the same point when he says that sovereignty is necessarily inalienable.<sup>37</sup> Unlike the pseudo-office of property owner, the role of sovereign cannot be disposed of or transferred to another simply at will. It is not entirely surprising that Bentham should have held both the view that a sovereign is legally unconstrained and the view that ownership is an office; the two positions are alike in their conception of an office without an internal norm. But sovereignty is not like that. Instead, it is subject to procedures. Again, this is not to say that rulers have honored this principle.<sup>38</sup>

Sovereign authority is accompanied by the entitlement to impose affirmative obligations on its citizens. A sovereign is required to provide a rightful condition for its citizens; incidental to this obligation is the entitlement to use means necessary to provide it. That gives the sovereign the power to impose demands — taxing transactions, and property, conscripting people to fight wars and forest fires or clear the public sidewalks in front of their land, and regulating private transactions to ensure the conditions of full membership in society, that is, underwriting the state's claim to act on behalf of everyone.

### III. COLLAPSING THE DISTINCTION: SOVEREIGNTY AS PROPERTY

It might be objected that the idea that I am calling sovereignty is not actually the idea of sovereignty, but rather some sort of modern alternative to it. In support of this objection, a well-worn quote from Bodin might be brought forward as evidence. Bodin writes that “Law, used without qualification,

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36 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 604 (1958).

37 JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL, OU PRINCIPES DU DROIT POLITIQUE* bk. II, ch. 1 (1762), translated in JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed., 1977).

38 Kant's third preliminary article of perpetual peace forbids the sale, purchase and bequest of (something missing) in an existing state precisely for this reason. IMMANUEL KANT, *ZUM EWIGEN FRIEDEN. EIN PHILOSOPHISCHER ENTWURF* (1795), translated in IMMANUEL KANT, *Toward Perpetual Peace (1795)*, in *PRACTICAL PHILOSOPHY*, *supra* note 25, at 311.

signifies the just command of the person or persons who have full power over everyone else without excepting anybody, and no matter whether the command affects subjects collectively or as individuals, and excepting only the person or persons who made the law.”<sup>39</sup> He continues some pages later:

As to the way of law, the subject has no right of jurisdiction over his prince, on whom all power and authority to command depends; he not only can revoke all the power of his magistrates, but in his presence, all the power and jurisdiction of all magistrates, guilds and corporations, Estates and communities, cease . . . .<sup>40</sup>

This conception has had its defenders over the centuries, and I single out two: Hugo Grotius and Carl Schmitt. On their conceptions, sovereignty is something that private persons do not enjoy, but nonetheless, it is in another way fundamentally private.

Both Grotius and Schmitt develop their discussions of sovereignty primarily (though not exclusively) in the context of discussions of war. They are prominent defenders of what has come to be called the “regular war” tradition,<sup>41</sup> which views war as a procedure through which sovereigns that have no superior resolve their disputes. Everything that is troubling in those conceptions can be traced to their conception of the sovereign as proprietor. My focus here is not on war, but rather on the understanding of the relation between a state and its citizens, and, coordinate with that, the relation between states that their accounts presuppose.

The suggestion that Schmitt works with a proprietary conception of sovereignty may seem surprising to those accustomed to thinking of him as offering a distinctively political conception, but bear with me. He contends that the friend/enemy distinction is fundamental to politics, and that the sovereign is “he who decides the exception.”<sup>42</sup> For Schmitt, the grounds of that decision are not subject to any internal standard, based on the regulatory principle appropriate to the exercise of political power. Instead, it is merely private, that is, the decision of the one who decides the exception: for Schmitt, sovereignty is an office in the pseudo-sense in which property is one, but with even less

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39 JEAN BODIN, ON SOVEREIGNTY 51 (J. Franklin ed., 1981).

40 *Id.* at 115.

41 This term originates with Maurice Bourquin, *Grotius est-il le pere du droit des gens? [Is Grotius the Father of the Law of Nations?]*, in GRANDES FIGURES ET GRANDES OEUVRES JURIDIQUES [GREAT FIGURES AND WORKS OF JURISPRUDENCE] 77 (1948), and is discussed in detail in PETER HAGGENMACHER, GROTIVS ET LA DOCTRINE DE LA GUERRE JUSTE [GROTIVS AND THE DOCTRINE OF JUST WAR] (1983).

42 CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985).

internal structure: its holder unilaterally defines its own mandate, which is to say that it is not an office at all. He takes it to be a sociological feature of the modern world that sovereignty will appeal to popular sentiments, whether imperfectly through electoral politics, or ideally, through acclamation, in the form of street demonstrations and the like. But such features are presented as factual conditions of homogeneity, and, although they may affect the content of the decision taken, do not provide a ground or basis for it.<sup>43</sup> The sovereign who ignores street demonstrations (or decides which ones count as acclamation) does not abuse his office, because it is in the nature of the office to decide its own scope. Put differently, Schmitt's political thought is often described as a form of "decisionism." But decisionism just is the basic norm of property.

The same idea appears in Grotius's conception of sovereignty as the relation of a superior to a subordinate. He represents this relation as entirely unrestricted because any restriction would be inconsistent with the superior status of the sovereign, that is, the sovereign's being subordinate to no other.<sup>44</sup> In this structure, then, sovereignty has only one dimension: what the sovereign says goes, and the subordinate must do it. This is a conception of legally unconstrained sovereignty, but the sovereign is not (precisely) outside the legal order. Instead, the sovereign is not the one who is obeyed, but rather the one who must be obeyed.

I have described this as a private conception of sovereignty, and I hope my reasons for that characterization are becoming clear. For Grotius, the sovereign stands as proprietor with respect to his territory and subjects. Like a property owner, the sovereign has no authority whatsoever over anything he does not own, but complete and untrammelled discretion with respect to what he does. So, for Grotius, sovereignty can be alienated.

A private conception of sovereignty necessarily supposes that no standard applies to the sovereign. This strong claim can be distinguished from two weaker ones. The first of these is that no person or institution is competent to oversee the sovereign's conduct. Critics of judicial review sometimes say things that sound like this, and a familiar reading of Kant's opposition to revolution makes a similar claim. Kant argues that Hobbes goes wrong in concluding

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43 DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY* (1997).

44 GROTIUS, *supra* note 3, bk. I.III.VII.1 ("A man may by his own act make himself the slave of anyone . . . why then may a people not do the same, so as to transfer the whole right of governing it to one or more persons?"); *cf. id.* bk. II.V.XXVII.2. There are other passages in Grotius pointing to different conceptions; my point in singling out Grotius here is to illustrate a way of thinking about sovereignty, not to claim to fully represent the nuances of his work.

from the fact that citizens have no *coercive* rights against the sovereign that citizens can have no rights whatsoever against it.<sup>45</sup> On this view, the sovereign can do wrong, but nobody is entitled to sit in judgment on behalf of the people. A more moderate version of the same view might allow that a court could sit in judgment of legislative and executive action, but can only do so as a legal institution, and so cannot stand outside the constitutional order, because no such body could claim to act on behalf of the people. (Thus, the court might judge the legislature and executive in the way in which an individual human being's conscience judges his or her legislative and executive functions.)

A still stronger view that does not go all the way to Schmitt's view of sovereignty as essentially private can be found in Hobbes. Hobbes supposes that there are standards governing the ways in which the sovereign properly acts; the sovereign must provide the way out of the moral nightmare that is the state of nature.<sup>46</sup> But nobody other than the sovereign is entitled to do anything about meeting those standards.

Schmitt takes this position even further, treating the role of the sovereign as "deciding the exception."<sup>47</sup> By this he does not mean being the person designated to decide should an exceptional case, not fully contemplated in the Constitution, arise. Instead, the sovereign is the one who decides whether there is an exception, a power that is by its nature not only unregulated, but inherently impossible to regulate. Any case in which a situation is treated as other than exceptional is an exercise of the same sovereign power, which can be exercised in either direction. The sovereign must decide the substantial basis on which the people is constituted, and so not only determine what to do *in extremis*, but generate the very distinction between friend and enemy. In his early writings, Schmitt is reported to have supposed that Catholicism was the appropriate substantial basis for a proper political order; his later writing came to the conclusion that the substantial basis can take any content whatsoever.

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45 IMMANUEL KANT, *On the Common Saying: This May Be True in Theory but It Does Not Apply in Practice* (1793), in PRACTICAL PHILOSOPHY, *supra* note 25, at 273.

46 HOBBS, *supra* note 27, ch. 13.

47 CARL SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM (1950), *translated in* CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 157 (G.L. Ulmen trans., 2003) ("A simple question was raised with respect to the interminable legal disputes inherent in every claim to *justa causa*: who decides? . . . Only the sovereign could decide this question both within the state and between states."); SCHMITT, *supra* note 42, at 5.

The friend/enemy distinction has both an internal and an external aspect. Internally, the sovereign gets to identify an internal enemy; doing so comes down to choosing the substantial basis of the society. Externally, the sovereign chooses external enemies; doing so consists in identifying those who are by their nature a threat to society. But the two are not fully separable; the substantive basis is individuated by what it represents as a threat.

Schmitt's prose can come across as mildly hysterical (even by whatever standards are appropriate to paragraphs punctuated with frequent occurrences of the word "enemy"), filled with talk about a people struggling to preserve the very basis of its own continued existence. That all conflicts should be seen in these life-and-death terms seems surprising if communal life is identified in terms of something *other* than the private decision of the sovereign. If, however, it is a matter of the sovereign creating the community through the act of decision, any threat the sovereign deems to be existential is thereby an existential threat.

I have introduced the private model of sovereignty, suggesting that it would provide a point of contrast with the external aspect of what I have called the public conception of sovereignty, on which the sovereign is subject to the norm as against its subjects. The contrast between these two ways of thinking about sovereignty brings into focus the distinctive nature of the external aspect of the public conception of sovereignty. If a sovereign is charged with the public task of creating a rightful condition for the inhabitants of its territory, it cannot have private purposes, not even any private purposes that turn out to be shared by each and every one of its citizens (if there are any such purposes). Kant's widely misunderstood claim about a republican system of government being the basis of a lasting peace reflects exactly this thought: the point is not that voters are unlikely to be willing to foot the bill for war (or selectively unlikely to foot the bill for war against other democratic states<sup>48</sup>). Instead, if its public mandate is restricted to providing a rightful condition for its citizens, then a republican government will only go to war to protect its own rightful condition, or the rightful conditions of others with whom it is allied in a way that means that a threat to those others is a danger to it.

Conversely, understanding sovereignty in terms of a mandate explains why a violation of sovereignty would be wrongful. If the sovereign is charged with providing a rightful condition for the inhabitants of a region of the earth's surface, interference with the ability to do that is wrongful. So, just as there

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48 A prominent source is Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 13 PHIL. PUB. AFF. 205 (1983). A powerful critique can be found in Georg Cavallar, *Kantian Perspectives on Democratic Peace: Alternatives to Doyle*, 27 REV. INT'L STUD. 229 (2001).

is an internal norm for the exercise of sovereignty, so, too, there is an external norm that relates sovereigns to each other. For precisely the same reason, the public conception of sovereignty generates a norm relating to interactions of a sovereign with citizens of other nations. The sovereign must act in a way that is consistent with the freedom of those in its charge, that is, ordinarily, those on its territory. It has no such duties toward those who wish to enter its territory (provided that they are not in immediate peril).

This distinction between those on a nation's territory and those outside it is sometimes thought to be arbitrary: why do a person's interests become more important just because of where he or she is located? But the entire account has nothing to do with interests, and so the distinction does not apply to an imagined difference between the interests of one group of human beings and those of another; the sovereign is charged with providing a rightful condition on a particular region of the earth's surface. That requirement means that it must act on behalf of those so located.

#### **IV. COLLAPSING THE DISTINCTION IN THE OTHER DIRECTION: PROPERTY AS STEWARDSHIP**

I now want to look briefly at what I contend is the opposite mistake: supposing that property has an internal norm akin to the norm that I have claimed governs sovereignty. This idea has a distinguished history: Aquinas argues that the rationale for property is that an asset tends to deteriorate unless some specific person is in charge of it.<sup>49</sup> Rawls makes essentially the same argument. In Rawls's case, he begins with a paraphrase of Aquinas's argument about property, and then extends it to a state's territory, writing: "as I see it, the point of the institution of property is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, the asset tends to deteriorate."<sup>50</sup> In Aquinas, the point of the argument is to show that private property can be legitimate, despite the fact that it is not, on his view, mandatory, as a religious community could organize itself without property, with only rights of usufruct.

More recently, Finnis has developed Aquinas's view:

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49 ST. THOMAS AQUINAS, *Summa Theologiae II-IIae 66 articulus 2*: [*Whether It Is Lawful for Anyone to Possess Something as His Own*], in AQUINAS POLITICAL WRITINGS 207 (R.W. Dyson ed., 2002).

50 JOHN RAWLS, THE LAW OF PEOPLES: WITH THE IDEA OF PUBLIC REASON REVISITED 39 (1999).

Appropriation of resources to the ownership (or lesser property rights) of particular individuals or groups is appropriate and even necessary, for three reasons: where something is held in common, or by many people, it tends to be neglected, and the work involved in managing it tends to be shirked; its management tends to be relatively confused, misdirected and inefficient; and the whole situation tends to provoke discord, quarreling and resentment.<sup>51</sup>

Finnis makes it clear that this account treats private property as a sort of delegated power, and that property is finally in the service of an understanding of the earth's resources and even the products of human effort as ultimately held in common. This type of argument can be understood as the sort of two-level, no crossover account I noted above. So understood, it shares the fortunes, such as they are, of such accounts, but generates no internal norm; it simply offers a philosophical account of why property has no internal norm by appeal to factors to which the naïve norm of property does not attend.

The other, more prominent, way of thinking about the justification in terms of the usefulness of usable things is as an internal norm; there is something that you, as owner, are supposed to do with your property, that is, preserve it and see to it that it is available for future use. On this understanding, it may well be that institutional or informational considerations are brought forward in order to explain why the duties incumbent on an owner are not always enforced. My own view is that, given the arcana of property law, the rules about the system of estates, and easements and licenses, talk about low information costs and administrative convenience seems out of place. But more than that, the idea that the regulative principle for property is to be found in some idea of stewardship introduces a regulative principle that is diametrically opposed to the practice that it is supposed to regulate. Owners get to decide what they do with their property; they have the right to exclude, and even to destroy what they own. It seems strange to say that their entitlement to do so is in the service of preserving the asset, or that we don't have enough information to determine in particular cases whether destroying or abandoning an asset is the best way to preserve it. Such easily recognizable cases seem to call

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51 JOHN FINNIS, AQUINAS 190 (1998); see also ST. THOMAS AQUINAS, *Summa Theologiae II-IIae 66 articulus 2: Whether It Is Lawful for Anyone to Possess Something As His Own*, in AQUINAS POLITICAL WRITINGS, *supra* note 49, at 207. For contemporary statements of related positions, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 285-86 (1980); David Lametti, *The Objects of Virtue*, in PROPERTY AND COMMUNITY 1 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2009); and William N.R. Lucy & Catherine Mitchell, *Replacing Private Property: The Case for Stewardship*, 55 CAMBRIDGE L.J. 566 (1996).



for a different form instead. Put differently, there is fundamental tension between a norm that says on its face that no person is in charge of another person's property and a regulative principle for that norm that says that the world as a whole, or the objects in it, are really in charge of the people who are entrusted with them.<sup>52</sup>

It will, no doubt, be objected that I have overlooked the possibility that there are simply a plurality of different norms, serving a variety of different interests: the owner's interest in autonomy, the interests of others in having valuable things preserved, and the social interest in things going to their most highly valued use. This sort of easy pluralism is difficult to refute; given enough different competing interests, any result can be accommodated, and so, none in particular can. My aim is not to show that such pluralism is impossible, only that it is unnecessary. Of course, you can say that there is a norm and a counter norm about everything, and that the entire world is a compromise. You can then go on to attach your preferred weights to norm and counter-norm, and so recommend a specific compromise. The moral and intellectual cost of doing so is, however, unacceptably high, because it does away with the category of a wrong, the category of a violation, the very thing that the concepts of property and sovereignty proposed to identify.

## V. CONCLUSION: SOVEREIGN LIMITS ON PROPERTY AND PROPERTY LIMITS ON SOVEREIGNTY

I have argued that despite significant parallels, property and sovereignty are different concepts and do little to illuminate each other. Or rather, insofar as the parallels are illuminating, they generate more heat than light unless the contrasts are also held firmly in view. Attempts to assimilate one to the other lead to intellectual and moral confusion.

I want to conclude by noting the ways in which the concepts of property and sovereignty so individuated interact: property is a restriction on the ways in which private persons may treat each other. As such, it is not a restriction on what the state may do. The familiar libertarian charge that taxation or regulation is inconsistent with property rights that are morally prior and superior to any claims by the state cannot even be stated in the terms I am proposing here. Enforceable property rights are only possible in a legal order, in which there is someone entitled to specify, apply, and enforce norms on behalf of

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52 Unless that norm enters into the sort of two-level account discussed in *supra* text accompanying note 10, in which case the rationale requires that it never be consulted directly.

everyone present on its territory. But that is just to say that enforcement of private property claims can only take place against the background of public sovereignty. For the same reason, purchase of vast tracts of land in another country does not give the purchaser any moral or legal claim to export its home country's legal system to the purchased land. Subject to the law of the sovereign state in which the land is acquired, land, as property, can be alienated. But the sale of land does not alienate sovereignty. Just as territory is not a state's property, so, too, property in a distant land does not become the state's territory. Participation in a legal order is mandatory, and ownership of large amounts of property does not entitle the owner to negotiate special terms or exemptions from mandatory ones.

It is sometimes said that the naïve conception of property is outdated, and that the urgent issues faced by the contemporary world require a different understanding. On this view, the human species has reached a point at which people should use what they have for the benefit of all, or at least constrain themselves to take account of the long-term global effects of familiar patterns of land and resource use. Problems of climate change have also led to insistence on rethinking the nature of sovereignty. I do not think that either concept needs to be abandoned or rethought. It is incumbent on sovereigns to preserve the natural conditions of the continued existence of their societies, and so, in the service of that mandatory purpose, to constrain and coordinate the ways in which land is used and other resources depleted within their political societies, to restrict deforestation or impose carbon taxes, and so on. But these are fundamentally public matters, not because private owners should take no moral interest in them, but rather because any solution to them is essentially public and global, not a matter of the state reminding particular individual citizens and owners about the specific things that they were already under an obligation to do in their capacity as owners of land or other property. In a world of states, states may compel their citizens to restrict the ways in which they use what they have — compel them to participate in mandatory schemes of cooperation — but this is in the service of fundamentally public purposes.

This conceptual connection between the naïve norm of property and the existence of a public legal order does not turn property into a power delegated by the sovereign. The state is entitled to tax and regulate property in the service of its mandatory public purposes. In so doing it will inevitably and appropriately affect who has what, but those effects do not suggest, let alone establish, that the claims private persons have against each other are powers delegated by the state. The distinction between property and sovereignty is just the distinction between private purposes, which are essentially discretionary, and public purposes, which are always mandatory.