

Property's Sovereignty

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This Article argues that ownership is a form of authority that is constitutionally basic in liberal societies. At the same time, I argue, neither the particular benefits nor burdens that accede to the position of ownership are. By distinguishing between a principle of sovereignty, which I argue constitutes the core authority of owners, and a principle of accession, which I argue regulates the distribution of benefits (and burdens) attached to the position, we can see how this is so. Taxation, regulation, expropriation, by means of which benefits are withheld or burdens imposed, are not then attacks on property that undermine the position of ownership itself. Attacks on the office of ownership as such would be, rather, acts by the state that deny the basic sovereign authority of owners to set the agenda that regulates private activity with respect to a thing, e.g., by subordinating owners to the private choices of others.

INTRODUCTION

Freedom is an organizing idea in many contemporary accounts of property. There are at least two ways to think about property as a freedom-based right. One way is to define property in terms of our personal freedom to advance our life-plans free from interference by others.¹ Property on this view is a

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1 See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). The same principle also animates classical liberal thinking about property rights, from John Locke to Milton Friedman. See also JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT* (1992).

position of negative freedom, a right against interference by others, that puts owners in the best position to capture whatever benefits may be had from a thing. On this view, property ensures that a thing is wholly available for the owner's purposes by excluding all others. There is a second freedom-based way to understand property not in terms of negative freedom but in terms of *sovereignty*: property gives owners the exclusive authority to set the agenda for things — an agenda to which others must defer.² This authority is a kind of sovereignty, for owners need not defer to any other private person in setting the agenda for things, but they may claim deference from all.³ The agenda-setting authority vested in the office of ownership is perpetual, exclusive, non-reviewable and, in its sphere, subordinate to none.⁴ Freedom is at the heart of ownership here too, but it is a relational freedom: owners relate to others through their decisions about things, and they do so as sovereigns, whose decisions command deference.

These two ways of thinking about property have important implications for property's status in our legal order. Freedom-based accounts of property generally suggest an important, even essential, place for property in the basic structure of society: property matters because freedom matters. But

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- 2 On the idea of ownership in law as a position of agenda-setting authority, see Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) [hereinafter Katz, *Exclusion*]; Larissa Katz, *The Regulatory Function of Property Rights*, 8 ECON. J. WATCH 236 (2011) [hereinafter Katz, *Regulatory*]. For related ideas about ownership and exclusivity, see generally the works of Henry Smith, Thomas Merrill, James Penner, and Arthur Ripstein — although I have tried to show how the position of owners is an office that is directly (and not just incidentally) concerned with decision-making about things. See also Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402 (2014); Chris Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418 (2013); Merrill, *supra* note 1.
 - 3 Ownership contrasts with other, lesser property rights. See J.W. HARRIS, *PROPERTY AND JUSTICE* (1996) (setting out the spectrum of property rights). With respect to perishable things or those designed for one-off uses (my clothes, food, Kleenex), we would probably get along just as well with a use-right or a right to consume the thing. Ownership reveals its full scope in the context of land or things that support more complex human activities.
 - 4 In contrast with a moral idea of sovereignty wrapped up with liberal ideas of the person. Morris Cohen is famous for linking the ideas of property and sovereignty. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). But as we will see, the legal realist movement simply brought to light the power of the individual to call on the state to back up the rights it recognizes (a proposition not limited to property rights). This reduces private authority to public authority and thus denies property any sovereignty of its own.

the challenge for freedom-based accounts of property is to make sense of the state's significant power to restrict the personal freedom of owners to advance their life-plans through ownership. I argue in this Article that the first way to think of property, as a right to exclude that leaves owners free to enjoy the benefits of property, cannot meet this challenge: it would treat even basic exercises of state power to tax, regulate and expropriate property as a *diminution* of property, even if a justified one.⁵ If the immunity of owners to these state powers is the measure of the deference our property rights command from the state, then we can see why there are very few legal and political philosophers left who think private property in itself commands *any* special deference from the state: few would deny owners' liability to taxation, regulation and expropriation.⁶ The sovereignty-based account of ownership that I advance here offers a new understanding of property to meet this challenge: it explains how each — owner and state — is sovereign in its sphere. Most of this Article is an argument in favor of this second conception of property.

But this Article also addresses a new puzzle of its own: if property is centrally about the sovereign authority of owners to make decisions about the agenda for their property, then what connection is there between ownership and the fruits or profits that owners are at liberty to derive from their property? I argue that there *is* an important connection between ownership and certain benefits or value derived from owning, but it is not an essential one. Instead, it is best accounted for by a separate principle of accession, with its own rationale.⁷ As we will see, this principle of accession accounts not only for the allocation of *value* to owners, but also for the allocation of certain costs

5 See, for instance, the Epstein-Waldron debate on property and the rule of law. Compare JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012), with RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011). If the point of property is to extend the sphere of choice to the external world, then state regulation that cuts back that expansion is a diminution of freedom, even if ultimately justified on grounds of public right. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM* (2009) (reconciling private and public right).

6 The Everyday Libertarian, who would deny the state's power to restrict property, is something of a straw man. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 12-39 (2002). More sophisticated libertarians like Epstein offer a utilitarian basis for restrictions on the state's regulatory power etc. See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 711 (1989).

7 Say X gets to decide certain questions and the decision yields certain benefits (fruits grow on the tree, profits made from investments, etc.). We allocate some of those benefits to owners for reasons of accession. Accession is a question

or burdens to owners, too. But by distinguishing between the principles of sovereignty and accession, we see how the state can take value from owners — through taxation, regulation and even expropriation — without attacking the core authority of owners. The *restriction* of the owner's choice-set and the benefits of owning, through regulation, taxation, or expropriation, is just another political choice.

Property, then, *is* a basic feature of our constitutional order, but not at all in the way that many property essentialists claim.⁸ The existence of this form of private authority is (I argue) a constitutional choice about the sources of basic authority in the political order: private ownership makes certain decisions the exclusive prerogative of a private office of ownership, just as other decisions are the prerogative of officials or their deputies exercising *public* authority (e.g., legislators, police officers, judges, bureaucrats).⁹ In property we have a distinct source of authority over private relations that is thus an aspect of our constitutional identity.¹⁰ I should say right away that I am not talking about a written constitution, but rather the rules in our political organization that establish and regulate authority.¹¹ To respect and promote property rights, from

about allocation of benefits, precisely the kind of question that is subject to the give and take of ordinary political conversations.

- 8 None of this means that property is a constitutional necessity for a liberal society: a liberal society committed to freedom may live up to that commitment without allowing for full-blooded ownership authority. *See infra* Section I.B. John Goldberg makes a somewhat related argument that tort law has a constitutional status without being constitutionally required of liberal societies. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524 (2005) (grounding a right to redress of private wrongs in an individual's rights to "structural due process" guaranteed in the U.S. Constitution).
- 9 *See* Malcolm Thorburn, *Reinventing the Night-Watchman State?*, 60 *U. TORONTO L.J.* 425 (2010) (on deputizing private citizens).
- 10 Constitutions have identities that may reflect not just pre-political or purely moral commitments but also the political organization itself. Thus, according to the (written) German constitution, Germany has an identity as a *federal* and social state and recognizes a right of citizens to defend that identity if there is no other means of protection available. The provision is entitled "Constitutional principles — Right of resistance" and reads as follows: "(1) The Federal Republic of Germany is a democratic and social federal state . . . ; (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available." *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* [GRUNDGESETZ] [GG] [BASIC LAW] May 23, 1949, BGBl. I, art. 20 (Ger.).
- 11 JOHN GARDNER, *LAW AS A LEAP OF FAITH* 143 (2012) ("The constitution of course contains those rules of the legal system that allocate ultimate (non-delegated

this viewpoint, means the vindication and perhaps even the defense of the constitutional choice to establish a source of authority over private relations that is separate from and irreducible to public authority.¹²

An attack on this core authority would come not from ordinary taxation, expropriation and regulation but from the uses of state power to undermine the “in charge” position that owners have. Where the state allows that the views of other private actors with respect to the agenda for a thing stand on an equal or superior footing to the owner’s, we might say that the idea of ownership itself is undermined.¹³ We gain better insight into proper state-owner relations by concentrating on this more substantial basis — a matter of constitutional identity — for the sovereign status of private property. While my account explains why ordinary state exercises of the power to regulate, tax or expropriate do not diminish property’s sovereignty, it also yields insight into the kind of state activity that might: the state-backed subordination of owners to the private choices of others with respect to a thing, for instance, *Kelo*-like takings that put private user A in charge of making decisions about private user B’s land.¹⁴

In Part I, I offer an account of the kind of private authority that owners have. Ownership, I say, is fundamentally constituted by owners’ authority over private relations with respect to their thing. This is what I have called their agenda-setting authority.¹⁵ This agenda-setting authority, exercised through

or if delegated then irrevocably delegated) authority.”). Scott Shapiro develops the idea of a “master plan” that structures impersonal planning authority. One advantage of Shapiro’s account is its perspective on the different sources of authority and the relationship among them: “acceptance of a plan involves more than just committing to do one’s part; one must also commit to allow others to do their parts as well.” SCOTT SHAPIRO, *LEGALITY* 183 (2011).

12 I develop the idea that the distinctive role of owners in our constitutional order is to regulate private relations with respect to things. Relatedly, see Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061 (2010); Katz, *Regulatory*, *supra* note 2; and Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013).

13 This might also account for our intuitions about what is problematic about prohibitions on owners’ circumventing digital locks on operating systems in cars, tractors, etc. (forcing owners to defer to *manufacturers’* decisions about best uses of those vehicles).

14 See *Kelo v. New London*, 545 U.S. 469 (2005).

15 This stands in contrast to a narrow understanding of “private authority” as mere economic power (emerging from freedom of contract and the freedom to alienate property). A whole different set of normative concerns are raised when we think of private authority in the office of ownership than when we focus on

the office of ownership, is distinct from the benefits and burdens tacked on by the principle of accession. The ownership strategy puts agenda-setting authority in private hands. But questions about *whose* hands, and to what advantage, are another matter altogether.

In Part II, I show how and why private authority is distinct from and irreducible to public authority. I argue that the private/public distinction reflects distinct modes of legitimating authority in our constitutional order. Public authority exercised through public offices depends for its legitimacy on its univocality. It must be capable of standing as our *common* decision. Private authority, by contrast, makes no such claims of univocality. When the owner sets the agenda for his property, he makes no pretense of having come up with *our* decision. Rather, it is *his* decision that we are all bound to respect because of his position.¹⁶ We attribute authority to private actors just in virtue of their standing as owners. A genuine and validly made decision about what constitutes a worthwhile use of a thing claims legitimacy just in virtue of the decision-maker's "standing to say so" in relation to others.¹⁷ This private authority *is* absolute although not in the ordinary sense of that word (i.e., unrestricted rights to a thing and its proceeds¹⁸); rather, ownership authority is absolute in a much older and more illuminating sense: in its exercise, owners are *absolved* from the normative constraints that legitimize public decisions.¹⁹ Owners are free to act on their private judgment about what ought to be done with a thing.²⁰ Finally, I argue that the elimination of this private authority

economic power through markets. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (arguing that economic power is the counterweight to public (i.e., political) power); EVGENY B. PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM 41 (Barbara Einhorn trans., Transaction Publishers 2007) (1924).

16 *See* Scott Hershovitz, *The Authority of Law*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 65 (Andrei Marmor ed., 2012) (discussing requirements of respect and obedience in relation to the state's authority).

17 *See* Dorfman, *supra* note 2. For an account of what owners have standing to do, see Katz, *Exclusion*, *supra* note 2. For why ownership requires standing, see Katz, *supra* note 12 (discussing *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842), and problem of standing).

18 *See* David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009). *But see* EPSTEIN, *supra* note 5 (presenting a more sophisticated account, and acknowledging utilitarian grounds for these restrictions).

19 Daniel Lee argues that Bodin uses "absolute" in similar terms in relation to the state: the absolution of the sovereign from consideration of custom and other norms. *See* Daniel Lee, *Office Is a Thing Borrowed*, 41 POL. THEORY 409 (2013).

20 *Contra* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) (arguing that owners, and not just public institutions, must

represents not just one political choice among many; rather, the elimination of private authority to govern private relations with respect to things would represent a fundamental challenge to the constitutional identity of the political order we have. A legal order that establishes distinct and irreducible sources of authority with respect to people has a constitutional identity that is distinct from a legal order that acknowledges just one or the other kind of authority.

I. THE NATURE OF OWNERSHIP AUTHORITY

Owners occupy a position of being in charge of things, in relation to others. What is the nature of this “in charge of” position, what I call the office of ownership, and what kind or, as we will see, *kinds* of authority attach to it? In what follows, I argue that we can make sense of the office of ownership along two dimensions.²¹ First, there is what owners are charged to do for the rest of us, and this is to set the agenda for what can be done with particular things. Along this *first* dimension, ownership confers the authority to make decisions about things, according to a principle of sovereignty. Many property theorists have described the basic task of owners in terms of decision-making²²: owners make decisions about things that others are obligated to treat as final;²³ owners are the ones who set the agendas that determine what others may do with things;²⁴ and owners are the ones with the “standing to say so.”²⁵ As we will see, owners exercising agenda-setting authority do not exercise “choice” in some pre-political sense, i.e., a choice that is limited only by imagination

live up to the demands of “relational” justice in the exercise of their rights).

- 21 There is an important third dimension that concerns the appointment of successors to the office of ownership, e.g., the powers owners have to constitute a trust, to sell property, to gift it, to abandon and even destroy it. This dimension does not concern the core business of ownership; rather, it relates to administrative concerns with, for instance, avoiding vacancies in office and ensuring an orderly succession. *See generally* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010); Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).
- 22 *See* JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 39 (1988) (“The owner of a resource is simply the individual whose determination as to the use of the resource is taken as final . . .”); *see also* JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* 126 (1994) (distinguishing income and control rights); RIPSTEIN, *supra* note 5, at 95 (“Your basic right to your property is the right that you be the one who determines how it will be used.”).
- 23 WALDRON, *supra* note 22, at 39.
- 24 Katz, *Exclusion*, *supra* note 2.
- 25 Dorfman, *supra* note 2.

and the availability of raw ingredients. An owner's choice-set (e.g., whether in the end to set an agenda for land that entails industrial uses, residential uses or both) may be limited by regulation, nuisance law and other general prohibitions on conduct.²⁶ But within their legally constructed sphere, owners have the authority in relation to others to make decisions about use, a matter of private ordering.

Along the *second* dimension, owners are authorized to take certain benefits (e.g., entitlement to the fruits of the property) and are responsible for certain burdens (e.g., maintaining public walks) that I argue are tacked on to the office of ownership according to a *principle of accession*.²⁷ Here I am referring to the varieties of non-agenda-setting benefits and burdens that go along with ownership.²⁸ Owners are authorized to take whatever property yields, sometimes called the emoluments or the profits from the thing itself. Owners are also required to assume certain burdens, obligations that attach from time to time to the office of ownership, e.g., snow-shoveling, property taxes, and environmental cleanup. These accessory rights and responsibilities are *delegated* to owners according to a *principle of accession*, which allocates benefits and burdens to the office of ownership on the basis of a norm of proximity. These delegated powers may well have a crucial role to play in stabilizing a system of property: they shape the incentives owners have to be owners at all as well as the incentives that public officials have to maintain private property (in light of the wealth-maximizing effects of allocating profits to owners, but also in light of the enhanced capacity of the state to govern by attaching burdens of governance to the office of ownership²⁹).

26 We might understand these restrictions as guidelines within which choice is made; thus, criminal law has been characterized as a *choosing* system. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 44 (1968). Regulation is more than the backdrop for a choosing system: it concerns the relationship between two normative orders, public and private. These normative orders complement each other and interact with each other without necessarily supplanting each other.

27 Accession is both a doctrine (concerned with the irreversible attachment of one thing to another) and a principle. See, e.g., ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE (1986) (“[T]he right to all which one’s own property produces . . . and the right to that which is united to it by accessory, either naturally or artificially.”). I am concerned here with accession as a *principle* of distribution.

28 See Katz, *supra* note 12 (distinguishing between legitimate and illegitimate leverage).

29 Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012); Robert C. Ellickson,

What we gain by treating these dimensions of ownership separately is insight into the kinds of authority owners exercise and, perhaps even more importantly, the Janus-headed nature of ownership as *sovereign* in one sphere and *subject* in the other.

A. Sovereignty and Constitutional Ordering

Ownership claims special status as a sovereign right, if at all, in virtue of owners' authority to govern private relations with respect to that thing. It is the nature of this authority that I wish to consider, first in relation to other kinds of (delegated, i.e., non-sovereign) authority that owners themselves may have and, later, in relation to public authority.³⁰ Ownership, I will argue, has a place within a constitutional framework that assigns planning power to different actors, private and public, each with its own part to play within that constitutional order.

Let us say Robert owns land in Toronto. There are plenty of restrictions on what valuable aspects of that physical space Robert can claim as owner (e.g., minerals, airspace above a certain height, use of the land as a dump or factory).³¹ Robert's general obligations as a citizen of this country also restrict the scope of his decision-making authority, e.g., he cannot engage in illegal activities on his land, such as hunting out of season. Finally, Robert must pay property taxes, and must accept the state's right to expropriate (with or without compensation³²), to conscript his land in case of

The Affirmative Duties of Property Owners (Yale Law & Econ. Research Paper No. 499, 2014).

- 30 RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING THE INDIVIDUAL LIBERTY WITH THE COMMON GOOD* (1998); LIAM MURPHY & THOMAS NAGEL, *THE MYTHS OF OWNERSHIP: TAXES AND JUSTICE* (2002); Epstein, *supra* note 6. *But see* Hugh Breakey, *Who's Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified*, 33 *LAW & PHIL.* 573 (2014) (arguing that accepting a natural right to property does not foreclose the possibility of a welfare state).
- 31 *See, e.g.*, Planning Act, R.S.O. 1990, c. P.13, pts. V, VI (Can.) (municipal powers for zoning and restrictions on the subdivision of land).
- 32 U.S.-style compensation is not a constitutional basic across jurisdictions. In Canada, when the state passes laws that have the effect of taking property from the owner, the common law presumes an intention on the part of the state to compensate the owner unless the contrary is clearly stated. *See* *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101. In Israel, forty percent can be expropriated free of any duty to compensate. *See* YIFAT HOLZMAN-GAZIT, *LAND EXPROPRIATION IN ISRAEL: LAW, CULTURE AND SOCIETY* 20 (2007); Ronit Levine-Schnur

emergencies,³³ or to confiscate it, should someone else use it for criminal purposes.³⁴ Robert must also be careful that he remains in fact the owner: that some other private actor has not usurped the position through adverse possession or, if his land is in a land titles jurisdiction, that he does not lose title through administrative error or fraud.³⁵ Robert, we can see, is restricted in what he can achieve through his agenda-setting role, and depending on his preferences, in light of his life-plans, may be considerably restricted in the gains he can realize from ownership. His personal tenure as owner is protected but not guaranteed (subject to termination even if he has not done anything wrong, as in the civil forfeiture case, administrative error in a land titles system,³⁶ etc.).

What evidence is there of sovereign authority in this picture of restricted power? The state's power to regulate, tax and expropriate property does diminish the personal gains from ownership: an owner may be able to consume less or nothing at all if the state restricts uses, taxes profits or takes the thing out of her hands altogether. When the state restricts what owners can *do* with things, it hinders their ability to deploy their things to their own advantage in life. When the state taxes the income from property, the owner's profits from the thing are reduced. And when the state expropriates property, the present owner loses the use and enjoyment of the thing itself. On this view, private property rights are guaranteed only insofar as there is a check on the state's power to regulate, tax and take property from owners.³⁷

Restrictions on property may well diminish the advantages of ownership to *owners*. But this only settles the question of property's special status if we think that private property is fundamentally concerned with advancing the life-plans of owners (rather than putting owners in charge of private relations with respect to things). We stand to learn something fundamental about state-owner relations by focusing on the state's regulatory powers, etc. only if we think there is a conceptual connection between ownership and the benefits that

& Gideon Parchomovsky, *Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent Domain Exercises*, 45 J. LEGAL STUD. 437 (2016).

33 In Ontario, see Emergency Management and Civil Protection Act, R.S.O. 1990 c. E.9, § 7.0.2(4) (Can.).

34 In Ontario, see Civil Remedies Act, S.O. 2001, c. 28 (Can.).

35 See Land Titles Act, R.S.O. 1990, c. L-5, § 54-59.2 (Can.).

36 See Civil Remedies Act; Land Titles Act.

37 See Waldron's skepticism about property's transcendence in terms of property as a constraint on ordinary state power (i.e., property as a rule of law requirement). WALDRON, *supra* note 5.

accede to it.³⁸ Many liberals and libertarians assume that there is exactly this conceptual link between ownership and its benefits because they are already committed to the idea that ownership is an aspect of moral sovereignty.³⁹

The answer is simply this: Robert *qua* owner is sovereign in his (legally constructed) sphere. It is for Robert, and not for regulators, to set the agenda for *private activity* with respect to a thing, for the sake of others. Robert does not set the public agenda (concerned with the environment, health, public welfare, military defense, etc.) in relation to his land. *Public* officials are in charge of answering those questions unless they have *delegated* the authority to this private office of ownership.⁴⁰ Regulation, for all that it may undercut the *benefits* to the owner of owning, does not actually intrude on the jurisdiction of owners: regulation does not produce authoritative agendas for particular things.

If we think of a constitution as a master plan that assigns power to adopt plans for the group to different actors, we can see how regulators and owners each have their different parts to play.⁴¹ Imagine that we are in a city with very diligent regulators who have enacted onerous property standards and highly detailed zoning laws. Now imagine in that city that land is not worth as much as it once was and that many owners in the city have moved far away, leaving their property vacant with the intent to abandon it.⁴² We know that owners cannot always get out of the burdens that accede to ownership: they may be fined or removed from the position if they fail to discharge these incidental burdens, like shoveling snow and maintaining the property to a certain standard. But private ordering of the kind owners engage in, by

38 For some, this is the starting point for understanding the regressive nature of ownership and the state's role in constraining the evils that ownership necessarily introduces: for instance, Proudhon's famous line, "Property is theft," or Gracchus Babeuf's attack on property on the grounds that it allows a privileged few to *consume* in excess of what they need. See EDMUND WILSON, *TO THE FINLAND STATION* (1940) (discussing Babeuf's self-defense in his trial at Vendome). For others, this connection between property and consumption just follows from recognizing property as an aspect of our personal (moral) sovereignty. See Thomas Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009) (on the regressive nature of accession).

39 See generally Merrill, *supra* note 38.

40 As the state sometimes does when it governs through owners. Katz, *supra* note 29.

41 SHAPIRO, *supra* note 11.

42 The difficulty in law of abandoning land reflects the difficulty in evading the burdens assigned to the office of ownership (and the state's interest in guarding against vacancies). See Peñalver, *supra* note 21.

setting the agenda for the thing, with respect to others, is not something that can be achieved through public regulation. Owners may simply stop making decisions about what is to be done with a thing, stop directing others about the uses they might make of it and fail to appoint a successor who is willing to do all that. What we have in that case is a highly regulated but agenda-less thing. Regulators do not definitively *settle* private relations with respect to a particular thing.⁴³

Of course, in doing their part, regulators may sometimes overstep and take over the part that is meant to be left to owners. That might happen when regulators settle decisively what is to be done with Robert's thing by regulating all potential uses of the thing such that there is *no* open question about use left for him to decide: in that case, regulators may have eliminated the possibility of private relations with respect to that thing.⁴⁴ Public officials would undermine the possibility of private authority were they to give Robert's neighbors — or passers-by on the street — the final say-so about Robert's plans: in that case Robert would not be in charge of private ordering in relation to land; his neighbors would be.⁴⁵

Once Robert has figured out that he is in fact the person in office and once he has figured out what questions about use are open, Robert then is in a position to exercise ownership authority without deference to the opinions, wishes or even the needs of others. It is in the nature of this agenda-setting authority that we find property's sovereignty. The evidence of the sovereign nature of this authority is in the structure of the office of ownership and the kinds of duties it generates in the world at large: all others are obligated to defer to an owner's decision, without any possibility of appeal to any higher ruler with respect to that question. For the owner in fact to have exercised

43 Regulators may be hemmed in by rules limiting the state's capacity to act, e.g., requirements that takings be for public purposes only, etc. Because the office of ownership is impersonal, it does not matter *who* the owner is so long as the decisions produced by the office are authoritative.

44 Regulators who deprive the owner of *any* decision about the thing *take* it, in which case private ownership is not eliminated but merely transferred to a new owner. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). What it is to take over ownership of any particular thing is to *settle* the question of what should be done with it. If there are no decisions left to be made, then the regulators have taken over that function.

45 Now of course, it is in the nature of most public decision-making bodies in a democratic state to consult people (e.g., our neighbors in an application to change land-use) in making the public decisions reserved to them. But this reflects constraints on public not private authority and what public decisions require in order to claim to represent our united will.

her sovereign authority, she must have made a decision that in fact is within her sphere. For instance, I cannot decide that my neighbor is prohibited from enjoying the view of my garden, although such a decision would concern the benefits available to others from my thing. The decision itself must be *genuine*, and so not a sham, e.g., gratifying spite under the cover of making an ownership decision; the decision must also be *valid*, conforming at the very least with whatever procedures mark a decision as authoritative in our system of law, e.g., publicity requirements, writing requirements, formal requirements of livery and seisen, requirements of transfer of possession, registration requirements, etc. Ownership decisions command deference from others⁴⁶ and the nature of ownership as the kind of position that generates these authoritative decisions is reflected in its structure: the office of ownership may be shared or fragmented among rights-holders, but the internal structure of the office of ownership and the recognition of any additional rights in that thing must be consistent with the owner's supreme authority in that sphere.

B. Legal Sovereignty and Moral Sovereignty: A Principle of “No-Merger”

The office of ownership conveys responsibility, on my view, broadly to coordinate our activities with respect to things and to establish a social plan for how that thing is to be used. The kind of authority owners have to carry out their task is, however, *private*: an owner may determine for herself and without review how to prioritize among permitted uses of resources.

The capacity of owners to advance their private interests *through* ownership is behind what I think is one of the most important mistakes in liberal theory about property's sovereignty: this is the view that we claim property rights, and the power owners have to make decisions about things, as aspects of our capacity as moral agents to direct our own lives. Property's sovereignty from this perspective is just an aspect of *moral* sovereignty, the freedom a person has to author her own life, choosing how and why to exercise her personal powers.⁴⁷ Moral sovereignty explains many of the law's core commitments,

46 An owner's authority thus directly commands deference: it is a position of authority that makes moral claims to deference from the rest of us. An owner's authority, like the authority of regulators and other public officials, is ultimately backed by state coercion, but it is not constituted by the power to call on the state to coerce others, as Morris Cohen and others would have it.

47 On planning and moral life, see GARDNER, *supra* note 11, and BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* (2005). On capacity to choose how to use our powers, see RIPSTEIN, *supra* note 5; and PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). There are lots of expected benefits and privileges around which we make

such as our rights to bodily integrity (i.e., rights to our person), and freedom of religion, conscience, expression, etc. We could not author our own lives if our powers to make and follow through on our life-plans were subject to the choices of others: if, for instance, others could conscript our powers to advance their plans or if others could force us to use or forbear from using our powers for reasons that are not ours.

In this Section I clarify what I think is an important distinction between the authority of owners and the liberty of persons (protected by their basic rights to bodily security, etc.). The imperative for private ownership is not the moral idea of sovereignty that finds legal expression in our rights to bodily integrity. A society could take freedom as a basic value without organizing itself around private property, as many others have noticed.⁴⁸ Such a society could get by with rights to consume (food, art supplies) or to use resources (tools, living space) for certain purposes, in order to avoid a society of poverty and material dependence and to allow the means for human flourishing. Through ownership, we introduce more than just the means of securing important interests (or, as some would have it, basic freedom): we introduce *responsibility* in the form of authority over private activity with respect to a thing. What private ownership introduces is a legal idea of sovereignty, which operates autonomously from the rest of officialdom.

It is not hard to see how ownership and the powers an owner has to make plans for things become associated with claims to moral sovereignty: moral sovereignty requires the protection not just of our life-plans, but of our *capacity* to use the powers we do have to make and follow through on those plans for ourselves. Because ownership involves making plans for things in ways that may improve the life of the owner, it is a small step to conclude that ownership is an aspect of the powers we have and that it is protected from interference by others for reasons of moral sovereignty. Because our ownership of things ultimately figures in our life-plans, it seems inevitable that we treat our power to set the agenda for things like our power to use our bodies, shape our own thoughts or consume something we possess: powers that constitute us as free moral agents and that claim special protection in virtue of our moral sovereignty.

our life plans — including the privilege of remaining in personal relationships with others. These powers merge into a field of powers with respect to which we are entitled to take a certain attitude. They include relatively stable powers, like our rights to our person, and relatively unstable and uncertain powers, like our right to receive benefits from others or the state.

48 *E.g.*, Gerald Gaus et al., *Liberalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed.), <https://plato.stanford.edu/entries/liberalism> (last revised Dec. 22, 2014); HARRIS, *supra* note 3 (setting out the property spectrum).

I don't think this conclusion is warranted, though, either to make sense of the self-seeking nature of property or in order to recognize a principle of sovereignty at work in the idea of ownership. In what follows, I want to distinguish two kinds of sovereignty, the legal sovereignty of the office of ownership from the moral sovereignty of the person. The powers of owners, I argue, are protected by an idea of legal sovereignty that grounds the special status of property in the constitutional order. What distinguishes the powers of ownership from the powers that constitute a sphere of moral agency is that they belong to an (impersonal) office of ownership. Of course, ordinary people hold the office of ownership, just like ordinary people hold the position of judge, or police officer, etc. And, as we will see, owners are charged with exercising their own judgment about what is to be done with a thing, without review, allowing owners to align their decisions about things with their decisions for life. But the powers of an owner are attached to the office of ownership and do not merge with the "all-purpose" power a person has to direct her own life. I call this a principle of "no-merger" that I think is crucial to understanding why the authority that owners have is not secured by a principle of *moral* sovereignty. Property is not just another instance of being your own master; while it is a position *for* those who are their own masters, the position itself concerns an aspect of our social plan.

Let me start with a small doctrinal point that I think points to something much larger and more important about the nature of ownership powers and the separateness of the office from the person. Say Robert owns Blackacre and has a right of way over Greenacre that allows access to Blackacre from the public road. This is an easement. We can think of an easement as carving out a specific power or use-right from one property-holding (the servient tenement) and attaching it to another property-holding (the dominant tenement.) Robert, as the owner of Blackacre, has a right of way over Greenacre, which supplements the powers he otherwise enjoys as owner of Blackacre. Imagine now that Robert, while still the owner of Blackacre, buys a parcel of land behind Blackacre, Pinkacre. Pinkacre does not have access to the same public road that Blackacre has but no matter, thinks Robert: I will just drive my car across Greenacre to Blackacre and carry on to Pinkacre, where I will park it. Can Robert do this? In common law, the answer is no: although Robert is not increasing the burden on Greenacre by using the easement to access Pinkacre, he exceeds his jurisdiction anyway if he uses his easement other than for purposes related to Blackacre.⁴⁹

49 *Alvis v. Harrison*, [1991] 62 P. & C.R. 10 (H.L.) (Eng.); *Das v. Linden Mews*, [2002] EWCA Civ. 590 (Eng.).

Now it is well understood that easements are not at common law allowed to be “in gross” or just rights for the benefit of people; clearly, the right must be for the benefit of an identified piece of land in order to be a valid easement. So an existence-condition of an easement over Greenacre is the identification of some parcel of land that is benefited. A person is *competent* to claim an easement only in virtue of his ownership of land that is benefited. But what is less obvious is that the requirement of a dominant tenement is not just an existence-condition of an easement (which we might account for as a capping principle, limiting the extent to which any parcel of land may be burdened by requiring that there be some benefited parcel). Rather, the power that Robert has relates just to the thing to which it attaches, the dominant tenement Blackacre. Put another way, the power that Robert has with respect to Greenacre, the easement, is not an “all-purpose” power but rather an incident of Robert’s agenda-setting authority for Blackacre.

If we grasp why Robert cannot use his easement to advance plans he has for Pinkacre (and beyond Pinkacre, his life generally), we might also loosen our grip on the idea that property is an all-purpose right, an aspect of our moral sovereignty as persons. The sovereign authority of owners fundamentally concerns plans for the thing and only incidentally allows certain advantages to owners in advancing their plans for life.

Property powers, attached as they are to discrete offices of ownership, do not form a consolidated whole in quite the same way as our personal powers might. So we speak about my real estate “portfolio” or my collection of paintings, as though I were an owner of a mass of things that generates all-purpose power for me. But in fact, I am an owner many times over with respect to each thing that has a legally cognizable, separate existence. Property in law is organized around discrete offices of ownership, each enabling the owner to make plans for the thing associated with that office.⁵⁰

Robert’s all-purpose powers, by contrast, are not attached to any particular holding of Robert’s nor is Robert forced to proceed piecemeal in his plans for

50 Zoning laws will allow voluntary merger in limited circumstances. There are some statutes that allow for the involuntary mergers of neighboring parcels of land, but these statutory provisions are controversial precisely because they stand as against a common law approach that resists merger even in this context. There is a common law doctrine of merger that unifies greater and lesser property rights *in the same piece of property* when these rights are held by the same person, as the rationale for the separate existence of rights no longer obtains in such a case. Hence, for example, easements require the dominant and servient tenements to be owned by different people. *Re Ellenborough Park*, [1955] All E.R. 667 (C.A.). That bears no relation to the normative principle of no-merger that I advance here, in the context of legal and moral sovereignty.

life when it comes to deciding how to think, act, etc.: there is a unity to our life plans because there is unity to each of us, as persons, moral agents.⁵¹ For our personal powers and moral faculties do form one consolidated sphere of moral autonomy: my moral faculties, my aesthetic sensibilities, my physical powers (my cardiovascular and muscular strength, etc.) are just part of me and the powers I claim to direct when I claim moral personhood. These claims of moral personhood may well extend to things in my possession or things that I am at liberty to consume — profits I have realized — so long as that liberty endures. But it does not extend to the powers we have to settle questions about use, for others, attached to the separate office of owners. That authority owners have is not all-purpose or part of our more general all-purpose means, but specific to the resolution of the question owners are meant to solve: what is to be done with a thing? What that means is the owner's authority to answer that question may well be an important sovereign authority, but its sovereignty does not come from the same place as the sovereignty people claim in their person. This is a structural feature of ownership that is easily lost because of the indirect benefits that flow from an owner's ability to make decisions with respect to a particular thing that produce benefits for the owner's life or for her ability to manage a separate and unrelated thing that she also happens to own. For instance, I may in virtue of my decision-making authority over Blackacre be able to generate all kinds of advantages for Whiteacre, which I also own, that I could not achieve just through exercising my property rights with respect to Whiteacre. We may have reason to want to be owners of a particular thing because of the advantages this yields for our management of our lives generally or even our management of other things in the world that belong to us. But it is also plain that these advantages are incidental and not core to the nature of the authority we have as owners of a particular thing: we would be no more or less owners of a thing if the rest of our lives, or property portfolio, happened to be such that these advantages were not forthcoming.

This puts important distance between my account of ownership and the authority it claims and Arthur Ripstein's account of the moral principle of sovereignty that he thinks constitutes our claims to noninterference in the exercise of our property rights.⁵² According to Ripstein's Kantian view of property, we have a general claim to non-domination in relation to any of our "own" powers. On this view, there is a kind of merger then between the powers of ownership and the powers of personhood in the formation of a

51 On the centrality of projects to personhood, see GARDNER, *supra* note 11; WILLIAMS, *supra* note 47; and BERNARD WILLIAMS, *Persons, Character and Morality*, in MORAL LUCK 1, 12 (1981).

52 See generally RIPSTEIN, *supra* note 5.

sphere of personal sovereignty, on moral grounds, within which we are free to exercise our powers as we see fit, without interference from others. A person is free just insofar as she and no one else determines how to exercise the powers that we consider *hers*. What we do when we protect property is preserve a personal sovereignty.

Now for Ripstein and other Kantians, just what our powers consist in is a contingent and variable matter. One day I might have a full cupboard as I set out to make supper. The next day I might find myself running out of food and unable to make a simple pasta sauce. The crucial point for the Kantian is not that the principle of sovereignty protects any particular set of capacities, but that the powers we do have, either in our person or as owners, command deference in virtue of their relation to our larger moral claims of freedom: what it is to recognize a person as free is to recognize that she is sovereign in the exercise of whatever powers she happens to have. Put somewhat simply, our capacity to make plans for things is normatively significant only insofar as it is an aspect of our capacity to make plans for life more generally. Our status as free and rational agents explains why we can make our property decisions free from interference, just as in other context it explains why we get to make our own choices about our bodies.

The principle of sovereignty that I advance here does not rely on the same moral foundations, which I think is a good thing: folding private property into our moral claims of sovereignty as people presupposes some pre-political account of the right to call the shots for others (more than just a right to possess) that is difficult to sustain, even for Kantians.⁵³ It also is difficult from a conceptual point of view: surely if our ownership authority rested on *moral ideas of the sovereignty of the person*, we would see a much closer association between the authority of the office and the interests of the individual who holds it. The idea of property in law points in a different direction: the office of ownership is impersonal and commands authority and deference from others in virtue of the decisions that emanate from it (genuine and valid ones only, of course). This also explains why a trustee's decision about the thing, from which she cannot profit and which cannot then be seen as an aspect of her power to set and pursue her own plans for life, is nonetheless an *ownership* decision.

What distinguishes my account from a Kantian liberal account is its emphasis on the task assigned to owners: owners are responsible for setting the agenda that governs private relations with respect to that thing. Indeed, it matters very little from the perspective of property law itself, who among

53 Louis-Philippe Hodgson, *Kantian Property Rights and the State*, 15 *KANTIAN REV.* 57 (2010); Larissa Katz, *Ownership and Social Solidarity: A Kantian Alternative*, 17 *LEGAL THEORY* 119 (2011). *But see* RIPSTEIN, *supra* note 5.

us has the mandate to act as owner. As Samuel Pufendorf put it: "It is indeed of little concern to the state whether a piece of land is cared for by Gaius or Seius, provided it does not lie without a caretaker."⁵⁴ The idea of property, on my account, does not emerge out of the idea of belonging or the attachment of a person to a thing. It is ownership itself that forges the link between a person and a thing, by marking out that thing as subject to the officeholder's authority.

This account of ownership bears a resemblance to other, much older stewardship models of ownership, according to which owners are charged with caring for things for the sake of others. My account of property's sovereignty — and ultimately its non-reviewability — helps to distinguish it from stewardship models of property. Stewardship models of ownership, which share my focus on the management of resources, are justly criticized for ignoring the profit and consumption potential of ownership.⁵⁵ My account of ownership is not a standard stewardship model (or indeed a stewardship model at all) because it is concerned with managing private relations with respect to things (rather than just things themselves) and because it rules out the possibility of review that is inherent in the idea of stewardship. Finally, my account allows that we cannot make sense of our experience of ownership — and much of the law of property — if we ignore the fact that owners are free generally to advance their own private interests through the agendas they set for the thing (the very essence of corruption in other contexts). Ownership is not best understood as a stewardship role, and to see the full scope of ownership's sovereignty, we need to understand how and why ownership is in principle non-reviewable.

C. Non-reviewability of Sovereign Ownership Decisions

Some positions are in principle reviewable whether or not we have the institutions in place to conduct that review in any particular case. This is true of judges and trustees. That is because of the nature of that kind of authority: it implies reviewability because the very claim of authority rests on its capacity to withstand review on the standards that it generates itself.⁵⁶ For Example, the possibility of review is inherent in the very exercise of fiduciary authority.

54 SAMUEL VON PUFENDORF, ON THE LAW OF NATURE AND NATIONS bk. IV, ch. XII ("On Usucapion"), at 651 (1729).

55 Scholars like Greg Alexander, Eduardo Peñalver, and David Lametti have developed modern-day stewardship models of property (influenced by Aquinas). See, e.g., David Lametti, *The Objects of Virtue*, in PROPERTY AND COMMUNITY 1, 22-34 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); Eduardo Peñalver & Greg Alexander, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2008).

56 This idea is at work in *Edwards v. Sims*, 24 S.W.2d 619 (Ky. C.A., 1929). There,

Other positions are reviewable because they are merely delegated authority that is subject to scrutiny by those higher up the chain of command: this means we can identify some superstructure, some “sleeping sovereign” that might at any time be awoken to ensure its delegates are acting properly.⁵⁷ Property has neither of these two features: it is not in principle reviewable nor reviewable in virtue of its place in a hierarchy.

Indeed I would go further and say that an owner’s core agenda-setting decisions are *in principle* not reviewable because they claim nothing but authority to set the agenda or the “standing to say so.”⁵⁸ Ownership decisions are true to form *and* claim deference from the rest of us even if they claim no other virtue (e.g., the *correct* answer to some coordination problem, the most efficient, or the most just).⁵⁹ In this, ownership is different from other kinds of authority exercised for the sake of others that are in principle reviewable on that basis — whether or not there are in fact institutions ready to do the job.⁶⁰

An owner’s decision about the thing need not aspire to any particular virtue; she can adopt moral horizons that are entirely her own (and shared by no other). Indeed, as I have argued elsewhere, this is a conscious design principle of ownership: faced with competing visions about what ought to be done with a thing, one strategy is to authorize someone to make the decision for the sake of us all.⁶¹ This is, of course, a highly individualized form of authority to make decisions for others (as are indeed other positions of private authority, like a trusteeship): in establishing ownership as a source of authority, we rely on individual rational agency rather than collective decision-making procedures to sort out resource management. What is distinct about ownership as a position of authority — and what distinguishes it from other private and public authority, held for the sake of others — is that we do not require owners to pursue any particular good precisely because of *how* ownership is meant to solve the problem of moral disagreement about resource use. If we were to require owners to advance some shared understanding of what ought to be done with that thing, we would require at least in principle some

the interlocutory decision by Justice Sims was not *appealable* but it was treated as inherently reviewable by a court of equity. H.L.A. Hart recognized that judicial decisions are inherently reviewable even if we have not put in place the institutional apparatus for appeal. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

57 Richard Tuck, *The Sleeping Sovereign*, John Robert Seeley Lecture, Harvard Univ., Cambridge, Ma. (May 2012).

58 Dorfman, *supra* note 2.

59 Katz, *Exclusion*, *supra* note 2; *cf.* Dorfman, *supra* note 2 (on responsibility of owners for ensuring justice in the terms of interaction).

60 HART, *supra* note 56.

61 Katz, *supra* note 12, at 1472.

additional decision-making procedure for arriving at that shared understanding generating *ex ante* instructions for owners or *ex post*, allowing us to evaluate owners' decisions for correctness. Ownership is *itself* a solution to the problem of conflicting ideas about use, but only insofar as owners are left to exercise their own judgment in setting the agenda for the thing. The ownership strategy is for *owners* to decide privately what is to be done. It does not then rely on a shadow public strategy for getting good answers to conflicts about uses of things. A crucial feature of ownership as a governance strategy is that owner's authority does not rest on any moral claim about correctness, but just the standing to decide.

Contrast this kind of authority with that of the courts, which, on John Gardner's view, makes justice a priority. He writes: "any adjudicative system whether or not it is administering a system of rules ought to be just above all."⁶² Judicial decisions claim to put justice first and are thus in principle reviewable on grounds of *injustice* — even in the absence of an appellate court.⁶³ It is the nature of such authority, the claims to virtue that it must make, that makes it in principle reviewable. Judges have exclusive and autonomous authority to adjudicate the dispute before them, but their authority is not supreme: whatever the institutional arrangements that in fact are in place, the decision itself is in principle subject to review by some higher authority. This is not just a feature of the publicness of courts. *Private* authority for the sake of others may also be in principle reviewable. Private fiduciary relationships, guardian-ward, trustee-beneficiary, and financial advisor-client relationships, all require that the fiduciary's decision claim certain virtues. Trustees' decisions, for instance, must be without conflict or profit (they must display the virtue of loyalty⁶⁴), and are inherently reviewable on that basis (through an action of passing accounts). With respect to a decision that fails to live up to the virtue of loyalty it claims, the trustee has no right to deference and is subject always to the authority of the courts to set matters right. The possibility of review follows from the recognition that there are virtues that the decider must aim for but may to greater or lesser degree fail to exhibit.⁶⁵

62 GARDNER, *supra* note 11, at 259.

63 *Id.* at 256-57 (on courts of equity and courts of law).

64 *But see* J.E. Penner, *Is Loyalty a Virtue, and Even if It Is, Does It Really Help Explain Fiduciary Liability?*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 159 (Andrew S. Gold & Paul B. Miller eds., 2014); Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra*, at 261.

65 Stephen Darwall, *Authority and Second Personal Reasons for Acting*, in *REASONS FOR ACTION* 134 (David Sobel & Steven Wall eds., 2009).

Finally, let me consider whether ownership decisions might be subject to reviewability on grounds of *internal* consistency: might we not require an internally consistent rationality of owners without betraying the sovereign nature of the authority? We might well say that owners are absolved from aiming at some moral virtue or public reason, but still insist that in making private decisions, owners display a coherent moral viewpoint over time and stay true then to their own private reasons. It is hard to see any commitment to coherence across decisions in the nature of ownership authority: owners clearly don't bind themselves or their successors just by the decisions they have made. There are prudential reasons to develop a coherent agenda and there are prudential reasons also to complete the plans begun by a predecessor such as sunk costs. There are in addition reasons of detrimental reliance by others that may limit an owner's ability to change course. That has more to do with bilateral, personal relations, e.g., what you may have led that person to believe to her detriment, than demands of rationality in relation to that decision-making procedure.

The office of ownership is impersonal and yet allows the moral opinions of whoever happens to hold office to prevail. Even if we could demand consistency of any single owner during her tenure, we could not maintain the nature of ownership as a decision-making procedure absolved from considering conflicting opinions and at the same time hold a new owner bound by the prior one. We see this to guard the integrity of that decision-making procedure at work in the rule against perpetuities, which removes conditions on ownership that coerce conformity with prior viewpoints by prolonged threats of forfeiture. Nothing is more likely to produce conformity to a single moral viewpoint than a perpetual condition reflecting the will of a past owner.

A decision to be in principle reviewable must make certain moral claims that allow evaluation. Ownership is not in principle reviewable; it is in principle *not* reviewable on grounds other than jurisdiction because ownership decisions rest just on a claim of standing: that is *my* decision to make and no one else's. A person either has or lacks standing (and so either is or is not exercising that jurisdiction in making the decision in question). There can be no question of *degree* in the context of claims of standing: one cannot have a little bit or a lot of standing in the same way that one might be accorded no, little or much discretion in making decisions that are reviewable, e.g., in determining what is just, prudent, or deciding what is in the best interest of someone else. Now of course we have already seen that an owner's authority is legally constructed: some uses of a thing are off the table. But this does not diminish owners' authority to regulate private relations with respect to

a thing, as we have seen, but just changes the context within which owners make those decisions.⁶⁶

D. Delegated Authority and Accession

In relation to these accession-based benefits and burdens, owners function merely as privileged subjects or empowered servants of public authority. That is important in the end for the point I am trying to make through this Article: we will see that in relation to these accessory benefits and burdens, owners are always subject to public authority, a “sleeping sovereign” who might awaken to rein in their capacity to profit or who might oversee or even take over their exercise of delegated authority.⁶⁷

Consider the burdens that attach to Robert’s position as owner of Blackacre. Let’s say that Robert owns a large commercial property in downtown Toronto. A city bylaw says that Robert is liable to clear the public sidewalk adjacent to his property of any encumbrances.⁶⁸ Robert’s property is a very high-end shopping mall and many although not all passersby are customers. Robert’s property is also very close to a subway stop and many people bike down and park their bicycles on the sidewalk, locking them to signposts. Now Robert’s responsibility is to clear the sidewalk of encumbrances that impede free passageway generally (and not just access to his property). This is clearly a public function: it is meant to protect the use of the sidewalk as a sidewalk and falls to the owner of Blackacre (Robert at the moment) just in virtue of the proximity of that property. The owner of Blackacre is in a sense “best placed” to discharge the obligation, on some kind of a cost-benefit analysis.⁶⁹ The state in placing this burden on the nearest owner is “governing through owners,” a phenomenon I have discussed elsewhere.⁷⁰

The question for me now is to consider the kind of authority Robert has with respect to this kind of burden, an accession to the position of ownership. He clearly has the responsibility to remove encumbrances and must have some authority to discharge that responsibility, but is this the same kind of authority that he has to govern private relations with respect to Blackacre? Say

66 Analogously, a sovereign with a shrinking territory has the same authority to resolve any and all questions of a certain type that come up, and make plans on a smaller scale.

67 Richard Tuck develops this idea in his Seeley Lectures. *See* Tuck, *supra* note 57; *see also* Lee, *supra* note 19.

68 Roughly modeled after City of Toronto, Municipal Code, § 743-41 (2014) (Can.).

69 *See* Ellickson, *supra* note 29.

70 Katz, *supra* note 29.

Robert decides that these bicycles interfere with his priorities for the public walk — leisurely window shopping by customers carrying big bags. Robert determines that it is not good enough that passersby, if they go single-file, watch their step and move slowly, will in the end get past the bicycles to a wider stretch of sidewalk down the road. Can Robert remove the bicycles? Does Robert have the authority to exercise his own judgment in this way without regard to the interests and opinions of others? When something like this happened in Toronto, citizens were outraged that the property owner had the authority at all to make decisions about a public space and questioned whether the owner could exercise it in a less than public spirited way (the decision, to remove the bicycles, advanced the owner's private interest as the owner of the adjacent mall without regard to the interests of commuters).

On my account, where Robert has authority to make certain decisions about public goods tacked onto the office of ownership, his decision is not an exercise of his sovereign authority to regulate private relations with respect to his thing. It is a delegated authority that is different in kind from his agenda-setting authority with respect to his land. In principle, if Robert makes the "wrong" decision from the standpoint of public reason, the public has the right to recover that authority and to offer its own solution to the question of what constitutes an encumbrance. This "in principle" right to review and to recover delegated authority exists whether or not there are particular institutions with review powers already in place. Delegates are in principle liable to supervision, review, and the resumption of their powers by the delegator. Owners, in relation to the state, may be given greater or lesser degrees of discretion in coming up with their answers to the burdens that accede to ownership. This kind of ownership decision, however, is not final just in virtue of the owner's standing (as agenda-setting decisions are). The authoritative nature of such decisions depends on their content and conformity to public reason. Sometimes but not always governments make explicit that these decisions are made by owners as service-providers, subject then to the supervision of the state. For example, in New York City, when private owners were responsible for building piers out into the East River, the city settled on the minimum specifications of those piers. In many cities today, where owners are required by municipal bylaw to shovel public sidewalks, cities are quite careful to specify how much time owners have to complete the job and just how clear sidewalks have to be as a result. The decisions that owners make about how to perform these delegated tasks are the decisions not of a sovereign but of a subject, subordinated to the state and its original authority to determine those questions.

An owner has a similarly delegated authority to profit, enjoyed as a subject, not a sovereign, in much the same way that she discharges the delegated

burdens of ownership as a subject, not a sovereign. She may enjoy many privileges from the current regulatory regime that allow her to make uses of her property in ways that significantly advance her life-plans. Just as an owner may be best placed to perform some service for the state, such as shoveling adjacent walks, so too it may be that the owner of a thing is best placed to take the yield of that thing: allocating profits on a principle of accession to the proximate thing may set up the right incentives and may tend to avoid conflict, e.g., where the thing is within one person's control but the right to the profits is allocated to another. The principle of accession, however sound a basis for distributing benefits and burdens, works independently of the principle of sovereignty.

II. PRIVATE VS. PUBLIC AUTHORITY

What distinguishes the private authority of owners from the public authority of officialdom? When Morris Cohen treated the subject of property's sovereignty many years ago, he meant to show that one reduced to the other: property claimed sovereignty precisely for the reason that it is just another expression of public authority.⁷¹ For Cohen, it is the state's power to coerce. My claim about property's sovereignty is quite a departure from this view: in ownership, we have a distinct source of authority that is not at all reducible to public authority, as mutually supportive as these may be. This view of property as a distinct source of authority will turn out to ground the claim I develop later that private property forms an ineliminable aspect of our constitutional identity.

In virtue of what, then, is this form of private authority distinct from and irreducible to public authority? Private authority, we have seen, is a distinctive strategy for governing, one that relies on *private* judgment. One way to sharpen what is distinctive about private authority is to look more closely at the sense in which private authority is constituted as an absolute position of authority. What it means for ownership authority to be absolute is not that owners have boundless authority: ownership is a bounded sovereignty, a recognizable jurisdiction within which owners have sovereign authority. By absolute, I mean that owners are *absolved* from considerations of public reason and the interests of others. Owners are free to exercise private reason in setting the agenda for things.

By contrast, all conceptions of public authority — certainly Fullerian, Kantian or Razian accounts — have a conception of *public justification*. Public norms must be “public” and intelligible in terms of public reason. So we see

71 Cohen, *supra* note 4.

that a norm that requires each of us simply to do as God requires would not pass muster as a public norm no matter how benevolent and conducive to the good, because religion lacks this quality of public reason. For Kantians, public authority is true to its own nature only where it is possible for each of us to join the union with our dignity intact⁷² (i.e., the system of law does not lead us into material dependency nor subordinate any one of us to the private will of others⁷³). On Razian accounts, public justification does not concern the conditions that make it possible to form a united will, but rather serves to legitimate an otherwise alien authority (the state) whose requirements must be rationally intelligible to us in order to register as authoritative at all. Ordinarily, for public authority to be justified, it must help us conform to what reason already requires of us.⁷⁴ Public norms are reason-giving to others.

Private authority does not aim for publicness in the same way, either as an expression of our united will — the decision of an owner is *his*, made for others and binding on them, but not *theirs for their own sake* — or as an aid to moral reasoning: ownership decisions do not normally help us to conform to reasons we already have precisely for the reason that the strategy of ownership is to allow for decision-making in the face of moral disagreement about how things should be used.⁷⁵ There are some legal theorists, such as Avihay Dorfman, Hanoach Dagan and Joseph Singer, who think that the decision the owner arrives at must reflect democratic principles and rule of law considerations directly. Insofar as others are bound by owners' decisions, Dorfman and Dagan have argued, they are entitled to demand that owners construct substantively just norms that reflect the people they actually are.⁷⁶ This, I think, misses the point of the ownership strategy and also the distinctive space it occupies in the constitutional order. Ownership is a strategy that relies on standing alone to claim respect from others. We don't expect of non-owners that they will generally have independent moral reasons for conforming

72 RIPSTEIN, *supra* note 5.

73 In contrast to a Rousseauian idea of the General Will which is unqualified by any idea of the private: what it means to be truly general is that there is no private left outside of that generality.

74 Normal Justification Thesis. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

75 While ownership does have a coordination function, it is not the kind of coordination-oriented decision, like traffic rules, about which people are unlikely to have strong preexisting moral views. People do have strong ideas about what is to be done with things. While the decision owners make works a bit like a traffic light, what is different about it is that the subject-matter is something about which we do likely have independent moral opinions.

76 Hanoach Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 *THEORETICAL INQUIRIES L.* 391 (2017).

to an owner's agenda. Nor is it in the nature of private property to require owners to join public officialdom, by requiring that they generate norms that aim for justice first. Private property is the kind of institution whereby we get determinative answers to questions about the uses of things by allowing owners to assert their *private* reasons — the very essence of corruption in the context of public authority, no matter how benevolent.⁷⁷ Core ownership decisions — those concerned with agenda-setting — do not command respect from others because they are just or conform to moral reasons we already have or represent our united will. They command respect because they emanate from the office of ownership.

Deference defines the relationship between owners and non-owners, but only with respect to private activities relating to that thing. Owners do not give instructions to others generally, who can from reasons entirely of their own steer clear of the owner's thing. Owners are not charged with planning our whole lives for us: only that aspect of our private relations that concerns the particular thing they have charge of. Private property concerns not just jurisdiction to answer certain questions, but the jurisdiction to decide how a particular thing is used. It is the particularity of the thing that gives property authority its shape.⁷⁸ And so it is that a system of private property introduces a network of public goods that allow those unwilling to submit to private power to sidestep entirely the sphere within which owners are sovereign.⁷⁹

Private ownership, I have argued, is a political strategy⁸⁰ for solving the problem of conflicting ideas about resource-use in society: it establishes a position of *legal* sovereignty, allowing for exclusive, non-reviewable decision-

77 For instance, former Toronto Mayor Rob Ford faced accusations of corruption for using his position to raise money in support of his private charity, The Rob Ford Football Foundation.

78 Many doctrines suggest the importance of the thing itself, as the locus of the private ordering owners have charge of: (1) *In rem* rights do not survive the *destruction of the thing*; (2) *No substitutions*: rights are not transferred from thing to thing. Bailments, for instance, require the return of the thing itself or else the original owner cannot be claiming his original right to the thing in making a claim against the purported bailee, but must be claiming some other contractual right. *See Mercer v. Craven Grain Storage Ltd.* [1994] C.L.C. 328 (H.L.) (But what about the law of tracing, which allows property claims to follow mere tracing of value?)

79 *See RIPSTEIN, supra* note 5, at 232 (giving roads as an example of public accommodations built into a system of private property).

80 There are many reasons why a society might favor this strategy — efficiency, development of civic virtue and other aspects of the person, limited government (fewer decisions reserved for (public) officialdom). We might say the same about federalism. My aim here is to show how and in what sense ownership

making authority to govern private relations with respect to things. Private ownership is the recognition of an entirely distinct and basic (i.e., not derived from any other) source of authority in our legal order. Like federalism, it is a particular political strategy, rather than a requirement of the rule of law or a reflection of pre-political rights. But also like federalism, it is basic in the sense that it contemplates an irreducibly distinct source of legal authority. In the case of federalism, each level of government is sovereign in its sphere — neither's authority is traceable to the other; in the case of private ownership, public and private authorities are conceptually distinct sources of authority, neither reducible nor traceable to the other. What it means to have private property is to will the organization of power in which private and public offices exercise authority for the sake of others. What distinguishes private and public offices, on my account, is what we require for the justification of each.

The distinction between private and public authority is thus a constitutional distinction: these are separate modes of justifying authority that establish the range of legitimate authoritative decisions in the legal order.⁸¹ This account of property's place in the constitutional order is rooted in a kind of political realism⁸²: the basic modes we have of justifying authority in society are constitutional fundamentals. Justifying ownership is not just a matter of piggybacking on a general justification for public authority (as the realists thought it was in thinking of ownership as an instance of (justified?) state coercion).⁸³ In fact, justifying ownership is necessarily a distinct strategy holding down one part of our constitutional order and defining the distinctive shape that our legal order has. There may be multiple sources of authority in our constitution, as we see in federalism (where regional governments have the authority to make certain decisions and the federal government, to make others). Owners are set up as a distinct source of authority to resolve other

might stake out a place for private actors in the constitutional order, as a basic element of that order.

81 For the liberal who draws this distinction on person/state grounds, this is also a constitutional decision. My account is impersonal: the kind of authority rather than the holder is what makes some kinds of authority private.

82 See WILLIAMS, *supra* note 47, at 12:

I want a broader view of the content of politics, not confined to interests, together with a more realistic view of the powers, opportunities, and limitations of political actors, where all the considerations that bear on political action — both ideals and, for example, political survival — can come to one focus of decision (which is not to deny that in a modern state they often do not). The ethic that relates to this is what Weber called *Verantwortungsethik*, the ethic of responsibility.

83 Cohen, *supra* note 4.

questions about things. Of course, we can well imagine a legitimate legal order, committed to the freedom of the person, that does not think it is acceptable under any circumstances for a person to elevate her moral judgment about the right course of action over the opinions of anyone else. Private property is not a constitutional *necessity*.⁸⁴ But in a legal order that *has* introduced this mode of justifying authority, ownership is a constitutional basic. Constitutional ordering consists in the setting out of distinct and irreducible forms of authority in society, the basic framework within which other constitutional matters are then worked out.⁸⁵ The very idea of a constitution implies a commitment to the social plan it sets out, and where that includes the office of ownership, then it implies a commitment to preserving private authority in that form, too.⁸⁶

What then might constitute a diminution in the office of ownership that would amount to a fundamental constitutional change? Certainly not expropriation or confiscation: if the state expropriates something or even if it forces the transfer of property to someone else, the thing remains private property in the hands of its new owner. Nor does a restriction on the range of uses that an owner might make of a thing: the office of ownership authorizes its holder to choose from among permissible uses. Owners are sovereign in their own sphere, but this does not mean that they must be sovereign overall. Neither does a ban on owning certain categories of resources (e.g., gold and silver): a ban like this merely narrows the range of things that can serve as objects of private property, leaving the position of owner intact.⁸⁷ And taxation, a personal liability to pay taxes, likewise has nothing to do with the office

84 Dagan & Dorfman, *supra* note 76, at 410.

85 For the liberal this is the basic decision, but liberals mean something different by this distinction: the recognition of the separation but mutual dependence of private and public right.

86 I do not offer a theory of legitimate constitutional change here. But it seems to me that constitutional change cannot legitimately be achieved by one source of authority (e.g., public) overwhelming the other (the private), nor by negotiation (for an impersonal authority cannot negotiate the terms of its existence), nor by any other internal amendment short of revolution.

87 I know of no societies that, once having introduced private ownership, allow it with respect to all resources. Private ownership is meant to be a strategy that deals with a certain kind of problem. We might not think that it is appropriate to all resources any more than adjudication is appropriate to all conflicts. Rather, private ownership is only appropriate for those resources that require that form of management (just as adjudication is only appropriate for those cases that cannot be resolved out of court). See J.E. Penner, *The Concept of Property and the Concept of Slavery*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 242 (Jean Allain ed., 2012).

itself, but merely places burdens on the owner. Regulation leaves intact the office of ownership, an impersonal position that authorizes its holder to make certain decisions about things, sometimes to great advantage and sometimes not. What would count as the elimination of private property, I argue, is the elimination of property's private aspect, such that ownership no longer entails the authority to make exclusive and non-reviewable decisions about things. That would represent a fundamental shift in constitutional argumentation, the way we think power and its use can be justified in society, in effect, a *new* constitution. This cannot happen by mere amendment, but results rather from the *abolition* of the old order.⁸⁸

CONCLUSION

Ownership, it turns out, involves sovereignty of a kind: a carve-out of authority within the constitutional order for private actors to make decisions with respect to things. Property's sovereignty is not the sovereignty we claim with respect to our own persons. Nor is it the sovereignty that a state claims with respect to its territory, the instantiation of the state itself in time and space. Property's sovereignty refers to the irreducible, non-derivative authority owners have to set the agendas that regulate private activity with respect to things. This points to what is constitutionally basic about property: the authority owners have to make that kind of decision. It also allows us to see more clearly how a principle of sovereignty does not account for the particularized benefits nor does it offer grounds to repel particularized burdens of ownership. A distinct principle of accession accounts for the allocation of both benefits and burdens to the office of ownership.

88 Constitutional amendment, including radical constitutional amendment, happens all the time, but then we might do better to recognize these changes as tantamount to revolution. One example would be the Thirteenth Amendment. It is questionable, though, whether this was just an amendment or in fact the introduction of a new order. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); see also JOHN FINNIS, *Revolutions and Continuity of Law*, in 4 *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 407 (2011). Take, for instance, the *Magna Carta*, which changed society from one organized around a model of authority in which the King is in absolute control, to one organized around private and public authority, in which each is sovereign in her sphere.