

Property and Sovereignty, Information and Audience

Thomas W. Merrill*

*Morris Cohen's classic essay, *Property and Sovereignty*, correctly discerned that political sovereignty and private property are alternative forms of government. Where it failed was in suggesting that the choice between these modes of governance is a matter of dialing one up and the other down. The relationship between political sovereignty and property is complex, and varies depending on the audience of property we have in view. With respect to some audiences — strangers and transactors — those who favor a strong system of property will want to enlist a generous measure of assistance from the political sovereign. With respect to other audiences — neighbors and sharers — those who want a robust property system are more likely to want the powers of the political sovereign to be held in check. Cohen was thus right that the political order and private property are both forms of power over people. But the exact mix of these two regimes is anything but simple or unidimensional.*

INTRODUCTION

Morris Cohen, whose 1927 essay provides the inspiration for this Article, was correct in declaring that property is a form of sovereignty.¹ Both political sovereignty and property entail the exercise of power over persons. Private property confers such power by giving the owner the right to exclude others from a designated thing. Political sovereignty confers such power by giving the sovereign a monopoly on the legitimate use of coercive sanctions within the physical territory controlled by the sovereign — a kind of territorial right to exclude.

Cohen was wrong, however, in implying that there is a simple either/or relationship between political sovereignty and the sovereignty of property.

* Charles Evans Hughes Professor, Columbia Law School.

1 Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

Political sovereignty and property interact on many different dimensions. The political sovereign can enhance the power of property owners along some dimensions, and weaken their prerogatives along others. In this Article, I illustrate these complexities by considering four prominent audiences of property: strangers, transactors, neighbors, and sharers. Each audience presents a distinctive set of informational issues, and any property system must account for these issues in its design. The sovereign can assist in solving these informational issues — or can complicate the effort to solve these issues — in different ways depending on the audience. For example, in dealing with the audience of strangers, property owners need clear and easily understood signals about which things are claimed as property that can be communicated to a very large and indefinite class of persons. The legal system can assist in developing and enforcing these signals, or it can complicate the effort by making the signals murky or declining to backstop claims. In contrast, in dealing with the audience of sharers, property owners need to know who is entitled to share and whether there are limits on what kinds of sharing principles owners can adopt. The state can assist here by developing a variation on the law of contract, featuring mandatory and default rules to be used in structuring sharing relationships, or it can complicate the process of sharing by overriding decisions by affected parties about the appropriate terms of their relationship.

Given these design constraints, it is implausible to think that property systems can be modified by simply dialing up or dialing down the proportion of political sovereignty at work in the system. There is no one-to-one relationship between the general preferences within any society for state-power versus property-power and how these preferences translate into support for greater or lesser sovereign involvement with the system of property. Any property system will face informational constraints that significantly determine which property mechanisms are feasible with respect to any given audience.

To be sure, political preferences matter, but they do not systematically determine the kind or degree of government intervention designed to meet the informational needs of different audiences. To make this point, I offer two hypothetical individuals, Libertarian and Communitarian, each holding stereotypical preferences for public as opposed to private ordering across a range of issues. Libertarian prefers maximum freedom for property owners and minimal public intervention; Communitarian is skeptical of private property and sympathetic to public intervention. By attending to the four audiences of any property system, we find no simple relationship between the general preferences of Libertarian and Communitarian and whether they would support more or less political sovereign involvement in the property system in any given context. Libertarian will have stronger preferences for political sovereignty in dealing with the audiences of strangers and transactors, but

lesser political sovereign involvement with regard to neighbors and sharers. Communitarian will have different responses, having a weaker preference for political sovereignty in dealing with the audience of strangers and a different kind of sovereign intervention in dealing with transactors, but favoring greater political sovereign involvement in addressing neighbors and sharers. The general lesson is that sovereignty and property are not simple substitutes for each other, at least over the full range of issues that any system of property must address.

Part I summarizes Cohen's views about the parallel between private property and political sovereignty. Part II considers how the institution of property adopts different rules depending on the audience of property, and seeks to explain these differences in terms of the informational needs of the different audiences. Part III introduces the stereotypical characters Libertarian and Communitarian. One would expect, given the basic attitude of each toward private property and the state, that Libertarian would consistently endorse a more modest role for the state relative to Communitarian. But in fact, when we break down property in terms of its different audiences, we find that there is no simple relationship between political ideology and one's attitude regarding the appropriate balance between political sovereignty and the sovereignty of property. It all depends on which audience of property we have under consideration.

I. MORRIS COHEN ON PROPERTY AND SOVEREIGNTY

My topic is property and sovereignty, and so it is appropriate to begin with the foundational text for such an inquiry, namely, the eponymous essay by Morris Cohen. Cohen begins by observing that lawyers tend to view sovereignty and property as belonging to entirely different branches of the law. Sovereignty is a matter of public law; property is the concern of private law. To the contrary, Cohen argued, sovereignty and property are "inseparable."² By this, he meant that both involve the exercise of power over persons. Although Cohen said little about the nature of political sovereignty, he clearly thought it entails the exercise of power over individuals. Property, he said, also entails the exercise of power over individuals. This is because, as he put it, "the essence of private property is always the right to exclude others."³ Thus, owners of rural land can exclude others from hunting or gathering on their land; owners of industrial plants can exclude workers who do not agree to the wage they

2 *Id.* at 9.

3 *Id.* at 12.

propose to pay at the plant; merchants can dictate what sorts of goods and services consumers can acquire at their stores.

Cohen acknowledged that “the recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have.”⁴ The question he posed, therefore, is how far government — the exercise of power over persons — should take the form of political sovereignty and how far it should take the form of private property. In other words, the relevant question is what today we would call comparative institutional choice:

Certain things have to be done in a community and the question whether they should be left to private enterprise dominated by the profit motive, or to government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work.⁵

This, again, I find entirely unobjectionable.

Others will take issue with Cohen’s pronouncement that “the right to exclude others is the essence of property.”⁶ But here too I agree.⁷ Property entails a kind of sovereignty over things, of which the right to exclude others is the core or bedrock element. It is, of course, not an absolute sovereignty.⁸ Property ownership is subject to many qualifications in the form of regulations about the use of property designed to protect the interests of non-property owners; property can be taxed by the state; property can be taken by the state by eminent domain. But it would make no sense to call someone an owner of a thing if that person had no right to exclude others from the thing. We would say the thing in question is *res nullius* or part of the commons, not that it is something owned as property. Still, the main point is that one can

4 *Id.* at 14.

5 *Id.* at 27. Cohen thought the most important variable was “what sort of people are drawn into government service and what attitudes their organization develops in contrast with that of private business.” *Id.* This suggests he was thinking of questions such as whether utility services should be provided by government agencies or private corporations.

6 *Id.* at 21. The principal objection is that property is characterized by a plurality of features, of which the right to exclude is only one. *See, e.g.,* Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017 (2011).

7 *See* Thomas W. Merrill, *Property and the Right to Exclude II*, 3 *BRIGHAM-KANNER PROP. RTS. CONF. J.* 1, 2-8 (2014).

8 Thomas W. Merrill, *The Property Strategy*, 160 *U. PA. L. REV.* 2062, 2067 (2012) (taking the position that the right to exclude means the exercise of *residual* managerial authority and accessory rights).

agree with Cohen that property is a form of sovereignty without buying into the notion that property is a form of absolute sovereignty — the “sole and despotic dominion” celebrated by Blackstone.⁹ This indeed was Cohen’s position: property is a form of sovereignty, but it is and always has been a constrained form of sovereignty. One can, of course, say the same about political sovereignty. It is common to say that liberal democratic states exercise political sovereignty, but this hardly suggests that they operate without any constraints. They must abide by the outcome of elections, respect individual rights, and so forth.

Although I agree with Cohen that property, like political sovereignty, always entails a type of power over other persons, I do not agree with what I consider to be at least an implication of Cohen’s essay, namely, that public and private sovereignty exist in a kind of zero-sum frame. Cohen seems to suggest that one can dial up public sovereignty and in so doing private sovereignty is dialed down. Or one can dial up private sovereignty and in so doing public sovereignty is dialed down. Whether a society flips the dial one way or the other is a matter of comparative institutional choice, guided ideally by sound empirical judgments about the relative strengths and weaknesses of the two forms of power in any given context. Thus, for example, Cohen suggests that minimum wage laws are either a matter of the sovereignty of the state or of the sovereignty of the employer, and that the state either should have the power to abolish forms of property without compensation (like slavery or distilleries), or should be required to compensate when it takes property.¹⁰

I argue, however, that Cohen’s account is misleading insofar as he posits a simple either/or choice between sovereign power and private property. Sometimes sovereign power magnifies the power of private property; sometimes it subtracts from that power. It all depends on which audience of property we have in view. To see that this is so, I will divide the institution of property into four distinct audiences: strangers, transactors, neighbors, and sharers. One could make a similar point about the contingent role of political sovereignty by speaking of diverse “institutions” of property.¹¹ I prefer, however, to think of property as a single institution that presents itself differently to different

9 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

10 Cohen, *supra* note 1, at 11 (minimum wage laws); *id.* at 23-26 (confiscations). To be fair, there are hints in Cohen’s essay that sometimes legal restrictions on property will strengthen property. *See, e.g., id.* at 21 (“To be really effective . . . the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property.”). But this is a distinctly secondary and underdeveloped theme.

11 *See* HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 3-55 (2011).

audiences that interact with it. The present division into four audiences is largely for illustrative purposes. One could conceivably come up with other audiences and could easily create subdivisions within the four audiences I consider.¹² In keeping with previous scholarship co-authored with Henry Smith,¹³ I regard information costs, and particularly the informational needs of the different audiences, as a key variable in determining the different aspect that property takes on in its interaction with each audience — and ultimately in determining the different functions of the state in enhancing or limiting the sovereign powers of the owner.

II. INFORMATION AND THE AUDIENCES OF PROPERTY

The primary contribution I wish to make concerns information. Any system of property rights requires the gathering and processing of information. This is costly, and someone must bear these costs. The candidates for bearing these costs are the persons claiming property rights, those who are subject to (that is, who must respect) such rights, and the government. In every known system that recognizes some degree of legally-protected property, the government will bear some portion of these costs, by providing for a system of police and courts that protect and enforce property rights. Where property is legally protected, the property system is implicitly regarded as a public good, worthy of public subsidy by taxpayers.¹⁴ But property systems also impose information costs on those who wish to claim rights under such a system, and on those who must respect rights established under such a system.

12 For example, one could add “government” as another plausible audience of property, insofar as government forbearance from upsetting expectations about property is an important variable in determining the general security of property rights. Since government plays a role in determining the proper response to dealing with each of the four audiences discussed, I have omitted any discussion of government forbearance as a cross-cutting concern, on the ground that it would unduly complicate the analysis.

13 *E.g.*, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) [hereinafter Merrill & Smith, *Property/Contract*]; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter Merrill & Smith, *Optimal*].

14 James E. Krier, *The Tragedy of the Commons Part II*, 15 HARV. J.L. & PUB. POL’Y 325 (1992).

Once we recognize that the information costs associated with establishing and maintaining any system of property can be distributed among different actors, some private, some governmental, we have the beginnings of a picture of the relationship between political sovereignty and private sovereignty that goes beyond the simple dial-up/dial-down model suggested by Cohen's essay. Property systems not only reduce or increase public power at the expense of private power, and vice versa. They also can reduce or increase the costs of a property system borne by the public or borne by private individuals.

I go further, and maintain that the information costs associated with any system of property will impose significant constraints on how public sovereignty structures rights to resources. The property system designed by the most enthusiastic libertarian will bear significant similarities to the one designed by the most fervent communitarian. The libertarian will not turn the dial all the way toward private sovereignty, at least if the libertarian wants to enjoy the benefits associated with private property.¹⁵ Likewise, the communitarian will not turn the dial all the way toward political sovereignty, at least not with respect to all or even most resources. As Cohen observed, "[n]ot the extremist communist would deny that in the interest of privacy certain personal belongings such as are typified by the toothbrush, must be under the dominion of the individual owner, to the absolute exclusion of everyone else."¹⁶

In order to explain why information costs constrain property systems in ways that cannot be captured by the dial-up/dial-down model advanced by Cohen, I suggest that we think of property as being addressed to different audiences. Each audience has distinct informational needs, based on the nature of its interaction with the property. This is not an entirely new perspective. Others have written about the audiences of property and the importance of effective communication with them.¹⁷ I offer what I think is a more systematic exposition.¹⁸

Specifically, I discuss four critical audiences which will be relevant in all modern societies without regard to where a specific society draws the line in general between public sovereignty and private property. These I call the

15 Cf. Sergio Dellavalle, *The Dialectics of Sovereignty and Property*, 18 THEORETICAL INQUIRIES L. 269 (2017).

16 Cohen, *supra* note 1, at 18.

17 See CAROL M. ROSE, PROPERTY AND PERSUASION (1994); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

18 The following builds on Thomas W. Merrill, *The Property Prism*, 8 ECON J. WATCH 247, 250-52 (2011).

audience of strangers, the audience of transactors, the audience of neighbors, and the audience of sharers. The informational needs of these audiences are affected by three variables which do not perfectly align. The variables are, first, the numbers of persons in the audience, second, the ease of identifying the persons in the audience, and third, the complexity of the information that the members of the audience are required to process in order to interact with property in the way they typically wish to interact.

With respect to the first variable, the number of persons in the audience, the audience of strangers sits at one end of the spectrum (most numerous) and the audience of sharers at the other end (least numerous). Similarly, with respect to identifying the members of the audience, the audience of strangers exists at one end (most difficult) and the audience of sharers at the other end (least difficult). Finally, with respect to complexity of information that the members must process, the audience of strangers sits at one end (most simple), and the audience of sharers at the other end (most complex). The audiences of transactors and neighbors fall in the middle on each of these dimensions, although not perfectly since in some circumstances transactors and neighbors may change places and in any event the package of information that is relevant differs significantly with each audience, making it debatable to say that there is a clear ordinal relationship in terms of the complexity of these packages of information. In any event, my claim is that the optimal informational strategy is significantly different with respect to each of these audiences.

A. Strangers

I begin with the audience of strangers. By strangers, I mean persons whose objective with respect to any particular object of value is simply to avoid getting entangled with claims by others. Imagine, if you will, that you are walking through a parking lot in a shopping center filled with cars or you are standing at a luggage carousel in an airport waiting for your suitcase to arrive. By and large, your attitude toward these valued objects — other than your own — is one of casual indifference. You understand that the cars and suitcases you observe belong to someone else. Without thinking about it, you know that you are not supposed to vandalize one of the cars or grab someone else's suitcase. In other words, your objective is simply to avoid getting into any conflict over these objects. You are a stranger to these objects, as I use the term.

The informational problem faced by the audience of strangers is by far the most disbursed but also the most elementary. The number of people who must process the information is potentially very large. Think of all the people claiming suitcases at Kennedy Airport. The identities of the members of this

audience are completely indefinite. We do not know, in advance, who they are. Here we have the problem of communicating duties to the entire world in its most demanding form. At the same time, the information that must be communicated is very limited. In some contexts, as at the luggage carousel, it is simply “claimed by other” versus “belongs to me.” What is needed, in other words, is a device for communicating a relatively simple message to a very large and indefinite set of people.

What is that device? The best explanation is that it is respect for *possession* established by others.¹⁹ Possession is one of those interesting concepts that are difficult to define in the abstract but easy to apply. According to those who have given the matter the most sustained thought, including Oliver Wendell Holmes and Frederick Pollock, to be in possession of a thing is to establish control over it and communicate an intention to remain in control.²⁰ Conceptually, it is hard to specify in the abstract how much control is needed. Nevertheless, possession is a ubiquitous concept applied by people without dispute ninety-nine percent of the time. People nearly always concur in their judgments about possession in everyday life. Law professors have largely ignored this critical fact, perhaps due to their preoccupation with the small number of litigated cases involving some dispute over possession. Yet disputes between rival claims of possession, however interesting, represent but a tiny fraction of the applications of possession in everyday life. As Floyd Rudmin has noted, “it is remarkable how very few disputes and disruptions there actually are relative to the ubiquitousness of property norms and to the very high degree to which considerations of possession and ownership enter into our lives and regulate our behavior.”²¹

There are several reasons why possession offers the best explanation for how the information cost problem is overcome by the audience of strangers. First, possession operates very broadly as a means of organizing rights to resources. Possession often operates as a social norm, in contexts where the resource being allocated is not individually owned, such as claiming seats in a theater. The fact that possession operates independently of the law and emerges, more or less spontaneously, as a norm in a wide range of social contexts also

19 For further elaboration, see Thomas W. Merrill, *Possession and Ownership*, in *LAW AND ECONOMICS OF POSSESSION* 9 (Yun-chien Chang ed., 2015).

20 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, LECTURES V AND VI (1881); FREDERICK POLLACK & ROBERT SAMUEL WRIGHT, *AN ESSAY ON POSSESSION IN THE COMMON LAW* (1888) (Pollack wrote the portion of the book dealing with the theoretical significance of possession).

21 Floyd W. Rudmin, “*To Own Is to Be Perceived to Own*”: *A Social Cognitive Look at Ownership of Property*, 6 *J. SOC. BEHAV. & PERSONALITY* 85 (1991).

helps explain why perceptions of possession provide an effective foundation for overcoming the information costs of a system of rights to resources that operates with respect to the audience of strangers.

Second, perceptions of possession are based on simple visual cues about objects. A person sitting in a seat or a coat draped over the back of a seat is a sign of possession. This information can be obtained at a glance and is nearly always processed unconsciously. It is the quintessential example of what psychologist Daniel Kahneman calls thinking fast or “System 1” cognition.²² One need not be literate in order to discern the difference between objects that are possessed and those that are unclaimed. This is of considerable advantage in solving a problem that requires potentially all the world to exercise forbearance with respect to items claimed by others. All the world includes young children, persons of limited education or capacity to learn, and newcomers who may not speak the language or be familiar with the mores of the society. A system of resource allocation based on visual cues that are processed more-or-less automatically fits the bill. More so than a more complex system that requires that everyone understand what sorts of resources are typically owned as property and which ones are not.

Third, it is very likely that the capacity to identify objects as being possessed is part of universal human nature, in the sense that it has a genetic foundation.²³ No one has identified a “possession gene” or set of genetic alleles that allow individuals to recognize possession. But circumstantial evidence strongly suggests that something like a propensity to recognize possession is hardwired in all human beings. The available anthropological evidence suggests that recognition of possession operates in all known human societies.²⁴ Child development literature suggests that infants develop an understanding of possession, usually before they learn to speak, and well before they grasp the concept of ownership.²⁵ And animal researchers report that a wide range of animal species, especially primates, recognize claims of possession to objects like foodstuffs and simple tools.²⁶ If our primate ancestors understand the concept of possession, it almost certainly has a genetic component, and

22 DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

23 Thomas W. Merrill, *Possession as a Natural Right*, 9 N.Y.U. J.L. & LIBERTY 345 (2015).

24 For an overview, see Alan Barnard & James Woodburn, *Property, Power and Ideology in Hunter-Gathering Societies: An Introduction*, in 2 HUNTERS AND GATHERER: PROPERTY, POWER AND IDEOLOGY 23 (Tim Ingold et al. eds., 1988).

25 Lita Furby, *The Origins and Early Development of Possessive Behavior*, 2 POL. PSYCHOL. 30 (1980).

26 Sarah F. Brosnan, *Property in Nonhuman Primates*, 132 NEW DIRECTIONS CHILD & ADOLESCENT DEV. 9 (2011).

one that we as humans likely share. Of course, there is clearly a cultural dimension that affects what signals are recognized in different social settings as communicating claims of possession. The communicative acts that signify possession can differ from one culture or society to another, although it also appears that for the most part these signals are learned very easily, simply by observing how others behave.

Fourth, and relatedly, respect for possession established by others has a cross-cultural aspect that makes it possible for persons to carry their property with them across borders, in most cases without any interference or difficulty. Suppose you decide to take a trip around the world, flying from one country to another. You carry with you various belongings in a large suitcase. The countries you visit vary enormously in terms of their legal backgrounds, their degree of economic development, and their general respect for the rule of law. Nevertheless, there is a good chance you will return home with your suitcase and belongings intact. To be sure, if you wander off the beaten path it may be stolen. But at least within the tourist circuit consisting of airlines and airports, licensed taxis, and hotels catering to tourists, respect for suitcases possessed by others has become a universal norm. The most plausible explanation for this behavior is that people all around the world recognize and respect possession established by others, once they pick up on the visual cues that signify that something is possessed.

The simplicity, universality, and normative force of possession explain why property systems adopt the right to exclude as the foundational norm for differentiating property from unowned resources.²⁷ A claim of possession is a claim of the right to exclude others. If you are sitting on a seat, you are signaling to others that you intend to exclude them from sitting in that seat. Here, the message derives from the elementary laws of physics: the presence of one object in a space precludes the presence of another object in the same space. But draping a coat over the back of the seat also entails communication of an intention to exclude others. Property entails taking this expression of intention, generally respected as a matter of social norms, and elevating it to a legal right. When property is recognized, exclusion is a right — the right to exclude. The point is that property systems, by adopting a core structure that synchronizes with the ubiquitous social norm of respect for possession, makes it feasible to communicate a general duty of noninterference with property — at least with regard to the audience of strangers.

27 Merrill, *supra* note 7, at 13-21.

B. Transactors

Let us then turn to a second audience of property — transactors. By transaction, I refer to any exchange of rights with respect to property, including gifts, sales, leases, bailments, licenses, or pledges of property as collateral for a loan. Transactors are persons who are considering entering into one of these transactions, whether or not an exchange is actually consummated.

This is, obviously, a very important audience of property. The ability to engage in exchange of things makes the world an infinitely richer and more attractive place than it would be without exchange of things. The ability to exchange things allows us to get rid of items that have become burdensome to us, and to acquire things that are more suited to our needs. And as any economist will tell you, echoing Adam Smith, free exchange allows things to be reallocated until they come into hands more capable of extracting value from them, thereby enhancing the efficiency and aggregate wealth of society.

In order to engage in exchange of things, however, we need to be able to acquire certain information about the things to be exchanged. One critical piece of information is that the transferor has the relevant rights needed to transfer the thing to the transferee. It would be highly inconvenient for A to acquire a thing from B, only to learn that C claims to have a superior right to the thing, or that D and E claim to have some kind of partial interest in the thing that has never been extinguished.²⁸ In other words, for transactions in things to take place, we need to determine that the transferor has “good title” to the thing in question. Good title means the would-be transferor has the capacity to transfer to the would-be transferee the right to control the thing as against all other persons in the relevant community. This requires an investigation of the chain of title. The fundamental axiom of title is *nemo dat quod non habet* — one cannot convey that which he does not hold. Thus, to establish good title, we need to have information about the chain of title or provenance of the object.

The informational demands on the audience of transactors are different in kind from those of the audience of strangers. The audience of transactors is not governed by a simple duty like do not interfere. Instead, the audience of transactors is interested in the history of the object — its provenance — in order to establish that the transferor has enough of the relevant rights vis-à-vis other persons who have historically interacted with the thing to make the transaction worthwhile to the transferee. The core objective of the audience of transactors is ensuring that they get what they have bargained for, and that

28 BENITO ARRUNADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE 15-41 (2012).

no third party will emerge claiming to have a superior right sometime after the exchange is complete.

The size of the audience of transactors is typically much smaller than that of the audience of strangers. Like the audience of strangers, the identities of those in the audience of potential transactors may be indefinite, in the sense that their identity is not known in advance, although it typically becomes known once their interest in transacting is revealed. In contrast, the information that is critical to the audience of transactors — the chain of title — is much more intensive than that of concern to the audience of strangers. Understanding the chain of title requires much more resource-specific and historical information than the basic norm that applies to strangers, and this information often must be interpreted by a trained legal advisor.²⁹

Obviously, we do not insist on an exhaustive examination of the chain of title before every exchange that takes place. We use a lot of proxies, such as the assumption that merchants engaged in the ordinary course of business have title to the wares they sell. And for exchanges of low-valued items with a relatively short expected life, like foodstuffs and clothing, we often take possession by the would-be seller to be a satisfactory proxy for title. But the more valuable the thing to be exchanged is, and the longer its expected life, something closer to an actual examination of the chain of title is likely to take place. This is especially true for things like real estate, airplanes, boats, and valuable artwork.³⁰

C. Neighbors

I turn now to a third audience of property, neighbors. The issue here is externalities, both positive and negative, that one item of property creates for other properties. The problem is most acute with respect to land, hence the reference to neighbors. Where land is concerned, virtually every parcel of land is affected, for good or ill, by the ways in which other nearby parcels of land are used. But many items of personal property, ranging from airplanes, to cars, to guns, to complicated derivative rights that can lead to financial panics, create externalities as well. The discussion should be understood to encompass all forms of externality associated with property, even if the labeling and my illustrations focus specifically on land.

The audience of neighbors presents information issues different from those associated with the audiences of strangers or transactors. The size of the

29 Merrill & Smith, *Optimal*, *supra* note 13, at 28.

30 See Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 302-04 (1984).

audience is smaller than the audience of strangers, and it is easier to identify the members of the audience in advance, at least in most cases, than it is with respect to the audience of transactors. The informational demands are also much more various and complex. In a manner analogous to transactors, the informational needs of neighbors are likely to vary depending on the scale of the externality.³¹ For example, a landowner contemplating engaging in an activity like building a factory must determine (1) which neighbors are likely to be affected by the activity; (2) whether the effect is likely to be positive or negative; (3) whether the magnitude of the effect is likely to be sufficiently serious to trigger some response from the affected neighbors; (4) what form the response is likely to take; and (5) whether the response will adversely affect the landowner to such a degree as to call into question whether to engage in the activity.

Because of the enormous variation in the perception and response to externalities, it is likely that the primary mechanism for regulating behavior in this context will be social norms. As in the case of respecting possession established by others, there is in all likelihood an innate predisposition here. But it is a different predisposition — a desire to earn the respect or esteem of one's group or clan. The behavior that will elicit such a response has a much larger cultural component than the signs of possession which appear to be easily learned by observation. Norms of neighborly behavior vary quite widely based on local cultural understandings, and consequently will differ significantly from one time and place to another. To cite just one example, in the eighteenth and nineteenth centuries it was considered appropriate behavior in American cities to discharge privies into open sewers running along streets, keep pigs and chickens that would forage for garbage in the neighborhood, utilize horses for transportation that left their droppings everywhere, and burn wood or coal in fireplaces that would emit uncontrolled soot onto surrounding property.³² None of this would be considered appropriate today.

Because of the great diversity and mutability of norms of neighborly behavior, informal mechanisms of social control dominate here. Those who conform to the relevant norms are rewarded with approval. Those who violate these norms are greeted with glares of disapproval. These informal modes of social control are responsible for keeping lawns mowed, houses painted, mufflers replaced on cars, and dogs on leashes.

As populations grow and social mobility increases, it will be necessary to supplement social norms as a mode of control with some type of legal regulation

31 See Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1325 (1993) (distinguishing “small,” “medium,” and “large” events affecting land).

32 See, e.g., DONALD L. MILLER, *CITY OF THE CENTURY* 123 (1996).

of externalities. At least this is true with respect to land, where there are many different possible uses of land, which complement or conflict in complex ways. It is also true of intangible rights like financial assets, which can give rise to panics and “runs” that pose devastating consequences for entire economies.³³ Given the great diversity and mutability of neighborhood norms, this poses a problem, because law, by its nature, tends toward prescriptive rules of conduct of a uniform and permanent nature. Thus, when law enters the picture it has had to develop strategies for coping with information very different from the simple exclusion rights that govern in the audience of strangers. The common law of nuisance reflects one such strategy. In its classical English incarnation, with the locality rule and the live-and-let live maxim, nuisance operated as a kind of legal enforcement of neighborhood norms.³⁴ Today, real covenants and zoning ordinances have largely supplanted nuisance law. They very much retain their localized flavor, adopting “governance rules” for the use of property that reflect and enforce local values.³⁵ Other externalities — widespread air and water pollution, unsafe motor vehicles, undercapitalized banks — require much more elaborate regulatory responses.

D. Sharers

The final audience I refer to is the audience of sharers. Resources are often most valuable when they are divided up or shared.³⁶ The sharing can be among relatives or friends, as when roommates share an apartment or a family shares a home. Or the sharing can be within a multi-unit complex, as when many apartments share common spaces and facilities in an apartment building or many shops share common spaces and facilities in a shopping center. The sharing may be in a business firm or other type of organization, as when workers share access to a photocopier, a computer network, or the use of a vehicle. Or the sharing can take the form of pooled investments in a firm or investment vehicle, as when many persons own shares of stock in a firm or purchase shares in a mutual fund. As these examples suggest, sharing of property is extremely common, and highly important to the functioning of our society.

33 See, e.g., GARY B. GORTON, *SLAPPED BY THE INVISIBLE HAND* 13-59 (2010).

34 Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

35 Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

36 Daniel Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

The information cost problem among the audience of sharers is roughly the opposite of the one we encounter in the audience of strangers. With strangers, the size of the audience is large and indefinite, but the content of the message is simple — do not interfere. With the audience of sharers, the relevant audience will often be very small or at the very least the identity of the relevant members will be easy to determine. But the message to be communicated may be highly variable or quite complex. In general, where the number of sharers is small and the property they share is important in their daily lives, coordination is likely to develop through a process of implicit gift-exchange, giving rise to relationship-specific norms.³⁷

Take, for example, an apartment with one kitchen shared by three roommates. The roommates may develop a unique understanding — explicitly or implicitly — about who gets to cook on what days or at what hours, who gets to use which shelves in the refrigerator, who cleans up and how often, and so forth. The understanding is likely to be unique to the three roommates, and is likely to evolve over time as conflicts arise and get redressed. The roommates are likely to have a good understanding of the arrangement, or at least to know the points of agreement and disagreement. But their particular understanding will not be the same as that of any other set of roommates, nor will it be of interest to any other set of roommates or anyone else for that matter. One could make similar points about the workers in an office with respect to the sharing of a photocopy machine, or the partners in a private equity firm with respect to the sharing of capital and profits.

The basic mechanism for communicating the rights and obligations among the audience of sharers is consent. This is the opposite of the strategy adopted for the audience of strangers. For strangers, we rely upon a general ascriptive duty of noninterference with respect to the thing that applies to all persons without regard to their consent. In jurisprudential terms, this is a right *in rem*.³⁸ For sharers, we rely upon the consent of the relevant sharers to a particular division or use of the thing. Jurisprudentially speaking, this is a right *in personam*.³⁹ This refers to rights and obligations particularized to identified individuals. The rights and duties created by contract or by judicial judgment are central examples of *in personam* obligations.

Many, perhaps most, of the rights and obligations among sharers, although based on consent, are not embodied in any formal document or written contract.

37 ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 103-06 (2008).

38 Merrill & Smith, *Property/Contract*, *supra* note 13, at 789-809 (and sources cited therein).

39 *Id.*

As in the case of the social norm of respect for possession that prevails among strangers, and the neighborhood norms that prevail in particular localities, most of the rights and obligations that prevail among sharers are based on norms. In this context, the norms are relationship norms.⁴⁰ If we return to our three roommates sharing a kitchen, it is likely that they will reach an agreement about the use of the kitchen which will be respected by each (one hopes) as a matter of mutual consent. The agreement will be reflected in a set of relationship norms that evolve over time as they interact, encounter conflicts, and seek to resolve those conflicts.

I do not mean to imply that formal contracting never plays a role in allocating rights and obligations among sharers of property. Landlord-tenant law, trust law, and corporate law are all examples of sharing regimes that can be said to rely in significant part on formal agreements that are legally enforceable. In each case, the sharing within these regimes will incorporate a significant measure of relational norms, which on a day-to-day basis may be more important in determining the rights and obligations of the parties than the formal contractual provisions. In landlord-tenant law, for example, the formal allocation of rights and obligations in the lease or in binding provisions of landlord-tenant law like the implied warranty of habitability are most likely to be invoked in the event of a dispute. As long as the parties are getting along, questions about the landlord's maintenance duties and the tenant's conduct are likely to be governed by relational norms.

The basic point is that the audience of sharers faces a very different informational problem than the audiences of strangers, neighbors or transactors. With respect to strangers, the problem is to communicate a simple message to a large and indeterminate audience. With respect to sharers, the size of the audience is small or at least determinate, but the content of the message is likely to be complex and idiosyncratic. The solution is to switch from *in rem* duties that apply to the world at large to *in personam* duties based on individual consent. In both contexts, norms play a large role — social norms in the case of strangers, relational norms in the case of sharers.

III. SOVEREIGNTY AND THE AUDIENCES OF PROPERTY

What does this typology of audiences of property tell us about the relationship between sovereignty and property? It suggests a far more nuanced picture

40 As such, the relationship among sharers can often be conceptualized as a form of relational contract. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

than the simplistic turning of the dial back and forth in the direction of more public sovereignty and less property sovereignty, or vice versa. With respect to some audiences, there is likely to be broad agreement about the appropriate level of public oversight, or if there is disagreement, it will be on the basis of factors other than a general preference for, or aversion to, public as opposed to private power. With respect to other audiences, ideological preferences for or against public control will loom larger. Overall, the identity of the relevant audience plays a role at least as important as political ideology in determining where the dial is set between Cohen's two types of sovereignty.

To see that this is true, I propose to introduce two stereotypical characters who have opposed ideological views about the relative merits of public and private ordering. I have drawn these stereotypes based on contemporary disputes in property theory. Today, in contrast to the time when Cohen wrote, few if any property theorists advocate the abolition of private property or state ownership of the means of production. Today's disputes generally presume the continued existence of a liberal democratic society in which private property is a secure feature. Controversy has narrowed to a debate about how much autonomy we should allow the owners of property as opposed to non-owners or persons more generally in different contexts. Should property owners generally be regarded as autonomous sovereigns, subject to limited constraints? Or should the use and disposition of property be governed by a balancing of interests in which the claims of the owner are weighed against the interests of other members of society, either case-by-case or context-by-context?

The first of my two stereotypical characters I call *Libertarian*. Libertarian is strongly committed to the autonomy of owners of private property and believes that property owners should have broad discretion to manage and control their property as they see fit.⁴¹ Libertarian is also very suspicious of the state. The state, he believes, is run by politicians who have little knowledge of how the world works and are prone to making decisions that gratify their own preferences or cater to powerful interest groups that keep them in office. In contrast, private property owners will survive and flourish only if they convince others to part with some of their property through a process of voluntary exchange. The competitive marketplace that results will tend to produce a mixture of goods and services that do more to promote the general welfare than could ever be achieved if production decisions were directed by politicians.

41 The most prominent exponents of these views are probably Robert Nozick and Richard Epstein. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-72 (1977); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

The contrasting stereotype I call *Communitarian*. Communitarian does not deny the importance of private property, but believes that it must be supplemented by public ownership of key resources and that private owners must be constrained in their pursuit of their individual interests in order to take into account the interests of others.⁴² Communitarian has a much more sanguine view of government, and believes that government agents are generally well informed and primarily motivated to advance the general welfare of society. Because they serve for fixed salaries, government agents have little motivation to treat people unfairly or to make decisions based on self-interest. In contrast, Communitarian believes that the private sector, which is dominated by the profit motive, is likely to reach self-interested decisions that favor the rich and powerful but shortchange the poor and the powerless.

One can encapsulate the difference between Libertarian and Communitarian in terms of preferred default rules for resolving disagreements about the use of property. Libertarian adopts a default rule that allows owners to take action regarding the use of their property for any or no reason at all. Communitarian, in contrast, prefers a default rule that requires property owners to justify their actions in terms of some acceptable public reason. Thus, Libertarian believes that property owners should be able to exclude trespassers, revoke licenses, terminate concurrent tenancies, evict defaulting tenants and mortgagors, abandon or destroy property, decline purchase offers, and disinherit relatives, for any or no reason at all. Communitarian believes that property owners should be called upon to justify their actions in these and other matters by giving some socially-acceptable reason for their actions. For example, a landlord who has reserved the right to approve the assignment of leases should be required to cite a “commercially reasonable objection” before declining to give approval.⁴³

These competing default rules highlight that the underlying disagreement in property theory parallels that between those who believe in the superiority of private ordering and those who believe in the superiority of public ordering. Those who argue for private ordering believe that social welfare is more likely to be advanced by voluntary sorting of individuals and resources through family networks and contractual exchange. Those who argue for public ordering are drawn to a model of common deliberation about the proper allocation and use of resources, which requires some kind of collective oversight in which public

42 For important works that I regard as communitarian, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* (1997); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF PROPERTY: TAXES AND JUSTICE* (2002); and JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000).

43 *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837 (Cal. 1985).

reasons are given and defended as the basis for decisions. If this is correct, then my stereotypical distinction between Libertarian and Communitarian tracks the same fault-line that Cohen posited in distinguishing between private and public power over persons through different modes of sovereignty, translated to a new era when the range of disagreement is narrower but still very real.

We are now in a position to consider how these two characters, Libertarian and Communitarian, are likely to respond to the characteristic issues presented by the different audiences of property: strangers, transactors, neighbors and sharers.

A. Strangers

With respect to the audience of strangers, the nature of the informational problem suggests that any property regime is going to rely heavily on respect for possession in regulating conflicts between those with valuable things and the many strangers who are exposed to those things. Certainly this will be true at the level of social norms. It is also likely to be true at the level of law.

Without regard to the nature of the regime, there will be a concern with protecting possession from depredations by strangers. All human societies recognize individual possessory rights to things like tools, clothing, and grooming instruments. This is true of all known hunter-gatherer societies.⁴⁴ And Marxist or other anti-property political regimes have never succeeded in stamping out property in such personal items. North Korea, which is probably the most extreme anti-property regime in the world today, evidently allows individual ownership of television sets and bicycles.⁴⁵ There are obvious information cost explanations for this. The monitoring costs of collective allocation of low-valued personal consumption items would be far too great relative to any conceivable benefits. Even close-knit communal societies like kibbutzim reveal a consistent pattern away from collective sharing toward individual assignment of resources over time.⁴⁶ And even if a regime goes in for state ownership of heavy industry, railroads, airlines, banks, and mines, it will surely want to protect this public property from vandalism and theft, that is, from depredations by strangers.

When we turn to modern liberal democratic states, the contrasting views of Libertarian and Communitarian are less stark. Even if social norms operate to protect individual holdings from interference by strangers, Libertarian will

44 Barnard & Woodburn, *supra* note 24.

45 BARBARA DEMICK, NOTHING TO ENVY: ORDINARY LIVES IN NORTH KOREA 14, 33, 77 (2009).

46 Ellickson, *supra* note 31, at 1347-48.

want strong and secure property rights. The best public policy to achieve this goal is to backstop social norms with criminal protections of property and robust civil tort actions against those who interfere with property.

Communitarian is likely to have a more qualified or ambivalent attitude toward protecting property against depredations by strangers. To be sure, there is significant disdain for protecting property against strangers in the context of intellectual property. Here, a robust school of thought has emerged arguing that private exclusion rights are unnecessary and even counter-productive in stimulating innovation. These scholars argue for a principle of open access to intellectual goods, claiming this would facilitate the growth of cooperative communities and achieve more innovation more justly distributed than does the regime of intellectual property.⁴⁷ These views have inevitably cycled back and influenced attitudes among communitarians toward conventional property. A recent book by scholars sympathetic to the critique of intellectual property celebrates the role of squatters, sit-in demonstrators, and other “property outlaws” in calling into question the justice of existing property regimes and promoting “redistributive values.”⁴⁸

Thus, although few if any communitarians have gone so far as to advocate the abolition of private property, it is plausible to assume that Communitarian will be less eager to devote sovereign political resource to protecting property against strangers, relative to Libertarian. Communitarian is likely to regard crimes against private property as of less concern than crimes against persons.⁴⁹ On this basis, one might predict that Communitarian will endorse relatively moderate penalties for crimes like vandalism and theft directed against private property, at least where there is no direct threat against persons. And Communitarian is probably more likely to confine protection of private property to self-help where the injury to property is seen as purely economic.⁵⁰

In one respect, Communitarian will want to see an expanded role of the political sovereign in mediating disputes between owners and strangers. Communitarians generally celebrate the decision of the New Jersey Supreme Court in *State v. Shack*,⁵¹ which effectively transformed the law of trespass

47 See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); LERRY LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

48 EDUARDO MOISES PENALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 18 (2010).

49 Traditional criminal law scholars often take the same position. See WAYNE R. LAFAVE, *CRIMINAL LAW* 919-20 (4th ed. 2003).

50 See *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (restricting owners of private “intranet” systems to self help in seeking to block unwanted emails, and citing prominent communitarian intellectual property scholars in support).

51 *State v. Shack*, 277 A.2d 369 (N.J. 1971).

from a rule (no entry without permission) to a standard (balance the interests of the intruder and the owner in determining whether entry is permitted). Standards entail ex post inquiries which generally require greater judicial resources than rules. Still, it is doubtful that a generalization of the position adopted in *State v. Shack* would increase the level of state involvement in protecting property rights against strangers. The expense and uncertainty of applying such a standard would discourage property owners from turning to the courts for protection against strangers, and would probably result in a substitution away from courts to self-help (more fences). So one would have more elaborate cases, but fewer of them. On balance, the effect on the involvement of the sovereign would be uncertain.

The bottom line is this: Libertarian and Communitarian will both support the use of sovereign power to backstop property rights insofar as the audience of strangers is concerned. If there is any divergence in their prescriptions, however, it will manifest itself in terms of Communitarian supporting less sovereign intervention, and Libertarian more — the exact opposite of what the simple Cohen model would suggest. The informational needs of the audience of strangers are few and simple, and are primarily communicated through social norms. But those signals will be strengthened if the state offers effective criminal and civil remedies against strangers who violate property rights. Libertarian is likely to be an enthusiastic proponent of this form of sovereign intervention, since this type of state power reinforces the autonomy of private property rights.

B. Transactors

When we turn to the audience of transactors, we see a similar pattern. Both Libertarian and Communitarian will want to allow resources to be transferred from one person or entity to another. But Libertarian is likely to place a higher value on freedom of alienation of property, since this is critical in establishing an allocation of resources grounded in individual consent. Libertarian is likely to insist that owners can dispose of property however they choose, provided there is no fraud or duress in the exchange. Communitarian is unlikely to deny that transactions are important both to individuals in developing their life plans and to society in promoting an efficient distribution of resources. But Communitarian will be more wary of assuming that every exchange is to the mutual advantage of the parties, and will worry about unequal bargaining power, contracts of adhesion, and the presumption that every person always acts in their best interest. These conflicting perspectives are likely to yield different prescriptions about the type of public sovereign intervention appropriate in regulating relations between owners and transactors. On balance, it is unclear

whether Communitarian will end up advocating a more sovereign engagement than Libertarian.

Libertarian, of course, will place a high value on facilitating transactions among private property owners. In order to achieve this objective, Libertarian will want to endorse a relatively high level of commitment of sovereign authority to creating a legal infrastructure that will support a robust regime of such transactions. Four public interventions, in particular, are likely to appeal to Libertarian as a way of promoting a vigorous market in property rights.

First and most obviously, the state needs to invest in developing an effective law of contracts, and in a system of adjudication that applies this law in an impartial and relatively predictable manner. Almost certainly, this means developing and sustaining an independent judiciary, and supporting it with consistent appropriations of taxpayer dollars.

Second, the state must invest in developing a menu of property forms, and limiting parties to holding property in one of these recognized forms. This, the so-called *numerus clausus* principle, represents a significant public constraint on the transactional freedom of individual property owners.⁵² The purpose of such a restriction is to reduce the information that other transactors must gather and process in order to engage in any exchange of property rights. In particular, the forms tell transactors *who it is* they must transact with. Allowing individuals to deviate from the standard menu of forms would create an informational externality for other transactors in the relevant market. This is because everyone in the market would have to make sure they were getting only the form they want, and not some curious novelty or variation on an existing form.

Third, the state must invest in developing a set of rules for interpreting the relevant rights that have been created using the recognized forms of property. The aspiration behind these rules is to make it possible to determine the content of any conveyance of property by seeking the opinion of a legal advisor. The trained advisor can examine the document of conveyance, determine what interests have been created, determine whether any gaps are left that require the creation of implied interests as a matter of law, and eliminate any interests that violate prohibitory rules like that against restraints on alienation. Armed with this information, the advisor can inform the interested parties about their rights — without having recourse to litigation. Of course, this objective has never been fully realized. Any system of rules of any complexity is going to generate disputes about interpretation and application of the rules. But it is striking how little reported litigation there is about the interpretation of

52 Merrill & Smith, *Optimal*, *supra* note 13.

the interests created by voluntary conveyances of property (as opposed to executory contracts allocating risk).

Fourth, the state must invest in creating registries of rights designed to assist transactors in determining the provenance of objects or the chain of title. Recording acts, which entail a relatively more modest commitment of sovereign resources, allow parties to file whatever information they choose, leaving it up to subsequent transactors to figure out what this information means in terms of the chain of title. Registries of rights are a more statist solution. Here a government official, called a registrar of rights or something similar, gathers the information about the chain of title submitted by the parties and makes an official determination of the state of the title, which is thereafter deemed to be binding on subsequent transactors.⁵³ Ironically, registries of rights, the more statist solution, provide greater security of rights. They are favored by most advanced capitalist systems (but not the United States, which uses predominately recording acts).

In combination, the law of contracts, independent judiciaries, the *numerus clausus* principle, the formal rules of construction, and the creation of registries of rights have significantly reduced the information costs of exchanging property rights. This, of course, is what any good Libertarian would want, but it entails turning the dial of power in the direction of a significant degree of public sovereignty.

In Cohen's time, when the alternative to the sovereignty of private property was socialism, there was a sharp contrast between the degree of state intervention to promote transfers of property in capitalist and socialist regimes. Extreme anti-property regimes, like communist countries, are unlikely to devote many resources to enforcing and interpreting contracts, clarifying the legal dimensions of property rights, or developing effective registries of rights. Even in social-democratic regimes, where a large portion of productive resources are owned by the state, many transactions will take place between state-owned enterprises, and will be governed by relatively informal bureaucratic processes. In Coasean terms, transfers take place "within the firm" rather than "in the market."⁵⁴ This, too, tends to reduce the investment of sovereign resources in solving the informal needs of the audience of transactors.

Today, the contrast between Libertarian and Communitarian is less stark. To be sure, Communitarian is likely to put a lower value on the desirability of facilitating transfers among private property owners, if only because Communitarian has less faith in the market as a device for allocating resources. This is likely to manifest itself in various ways. Whereas Libertarian will

53 See ARRUNADA, *supra* note 28, at 131-67.

54 R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

prefer a law of contract that features rules developed *ex ante*, Communitarian will favor a law of contract sprinkled with standards like good faith and unconscionability, applied *ex post*. This is because Libertarian regards contract law as a means of facilitating transfers of property, whereas Communitarian will tend to see contract law as a device for promoting fairness and distributional equity between the parties.⁵⁵ As a result, Communitarian's version of contract may increase the costs of transacting. Similarly, Communitarian is likely to resist the *numerus clausus* principle as unduly essentialistic or formalistic. Communitarian may prefer a more open-ended bundle of rights model of property, or may argue that the forms of property perform important functions other than facilitating transactions.⁵⁶ All this makes it unclear whether it is Libertarian or Communitarian who will advocate for more state involvement with transactors.

In the end, both Libertarian and Communitarian will embrace a significant role for the state in facilitating transfers of property. But there is little reason to think that Libertarian will prefer a more minimalist state than Communitarian insofar as the audience of transactors is concerned. The state intervention endorsed by Libertarian will be unambiguously directed toward satisfying the informational needs presented by the audience of transactors; the state regime sponsored by Communitarian will have more diverse objectives, and in this sense may complicate the process of dealing with transactors. All one can say with confidence is that they will advocate for a different type of involvement.

C. Neighbors

With respect to the audience of neighbors, the equation is admittedly different. The primary mechanism for regulating externalities is social norms. Many people are anxious to earn the esteem of their neighbors, and most will want at the very least to remain on good terms with neighbors. This naturally leads them to adhere to local norms of neighborly behavior. As society becomes more complex, people become more geographically mobile, and technology develops uses of property capable of projecting external effects over great distances, neighborhood norms will increasingly become inadequate to control the socially desired level of external effects.

With growing mobility and technology, some form of legal regulation will almost certainly emerge to supplement neighborhood norms as a method of

55 Cf. Hanoeh Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) (advocating a liberal private law dedicated to promoting "respectful interaction" between individuals).

56 E.g., DAGAN, *supra* note 11, at 31-35.

controlling externalities. Here, Libertarian and Communitarian will diverge in their prescriptions, and will do so along the lines implicitly assumed by Cohen. Communitarian, having greater faith in public sovereignty, will enthusiastically embrace local land use controls, environmental laws, product safety laws, labor laws, and financial regulations. Libertarian, who prefers private ordering, may be willing to go along with nuisance law, insofar as it tracks norms of neighborly behavior, and with the use of real covenants, which are voluntarily assumed by all affected property owners. But Libertarian will be unhappy with more intrusive forms of governmental regulation, viewing them as heavy-handed intrusions upon owner autonomy often motivated by favoritism toward one type of enterprise at the expense of others.

The divergent response of Libertarian and Communitarian toward government regulation of externalities is exacerbated by the fact that they are likely to have different perceptions about the existence of and need for regulation of external effects. Communitarians tend to see externalities everywhere; Libertarians are apt to think that external effects are exaggerated or can be avoided with appropriate contractual arrangements, or that they will disappear over time with new market responses or technological innovations. Consider in this regard the response to the risks associated with climate change. Climate change is the ultimate externality, with every animal on the planet exhaling carbon dioxide and contributing to a phenomenon affecting everyone else. Communitarian is likely to view the prospect of rising temperatures with alarm, and to advocate for an immediate regulatory response in the form of emissions controls on greenhouse gases and mandates for renewable resources. Libertarian is apt to be skeptical about claims that global warming is occurring or that it warrants an urgent response, and will be more inclined to suggest that the problem may be self-correcting, perhaps with the development of new technologies for generating energy or disposing of greenhouse gases.

In any event, with respect to the audience of neighbors (broadly conceived), we see that Communitarian will want to turn the sovereignty dial in the direction of more state involvement, while Libertarian will want to keep the dial more closely aligned to the sovereignty of property. This is probably the closest approximation to the relationship Cohen had in mind in characterizing the tradeoff between political and owner sovereignty. As he wrote: "The state . . . must interfere in order that individual rights should become effective and not degenerate into public nuisances. To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless."⁵⁷

57 Cohen, *supra* note 1, at 21.

D. Sharers

Our last audience, the audience of sharers, also sees an alignment of preferences for public versus private sovereignty that corresponds to the stereotypical assumptions about the values of Libertarian and Communitarian. The principle that underlies sharing is consent. Whether it is roommates sharing a kitchen, a family sharing a home, landlord and tenant sharing an apartment complex, partners sharing a business, or investors sharing the returns of a mutual fund, the division of interests in property among sharers is grounded in mutual consent. The divergent perceptions of Libertarian and Communitarian in this context derive from their different perceptions about the genuineness and legitimacy of such consent.

Communitarian will be quick to cite reasons why consent to a particular sharing arrangement should be questioned. One party may have more options than the other, or may be a more skilled negotiator, or may have better information about the consequences of entering into a sharing relationship. One party may behave opportunistically to exploit the vulnerabilities of the other. One party may have a higher social standing which translates into greater bargaining power. For any or all of these reasons, Communitarian is likely to believe that legal reforms — the exercise of political sovereignty — can serve as an appropriate corrective to the many reasons why consent to a sharing arrangement may be misguided or illegitimate.⁵⁸

Libertarian, who has more faith in individuals than governments, will be inclined to believe that consent is genuine and mutual. Not always. Libertarian will not deny that sometimes a sharing arrangement has been procured by force or fraud, and will endorse government action to allow redress in these circumstances. Libertarian may also acknowledge that changed circumstances may require special protection for one of the parties to a relationship grounded in consent, such as protection for spouses in the event of divorce or for minority shareholders in the event of a transfer of corporate control.

But on a wide variety of measures, Libertarian and Communitarian will disagree about the appropriate balance between political and private sovereignty in responding to the audience of sharers. Consider the dissolution of common ownership, such as a tenancy in common or joint tenancy. Libertarian will likely endorse a right of automatic partition, for any or no reason. This will result in a division of the property, either in kind or by judicial sale, and it

58 On the other hand, some communitarians may fear over-intervention by the state, insofar as it may interfere with relationships among community members, which are assumed to be based on altruism, care, and sharing. See, e.g., John Eekelaar, *Self Restraint: Social Norms, Individualism and the Family*, 13 THEORETICAL INQUIRIES L. 75 (2002).

preserves the autonomy of the parties to decide whether to continue in a sharing arrangement or to withdraw their consent. Communitarian may be intrigued by the possibility of requiring some kind of for-cause limitation on dissolution of common ownership, in order to ensure that the parties are adequately informed of the consequences of splitting up and one party is not browbeating the other.⁵⁹ Landlord-tenant law will also be a rich area of disagreement, with Communitarian endorsing implied warranties of habitability and rent control and Libertarian insisting that market forces provide the best protection for the tenant, unless the market has been distorted by too many regulatory interventions in the past.

E. In Sum

The point of this imaginary construction of views is to argue that there is no simple relationship between political ideology and one's views about the relative merits of political sovereignty and property rights. It all depends on which audience one has in contemplation. With respect to the regulation of externalities and exercises of consent to sharing relationships, those who generally refer public to private ordering will want to turn the dial in the direction of political sovereignty, and those who prefer private to public will have the opposite response. But with respect to protection of property against violations by strangers and encouraging transfers of property, the response will likely either be the opposite or at least unclear: those who prefer private to public ordering will dial up a significant measure of public sovereignty, and those who prefer public to private may prefer less. Cohen was right that the political order and private property are both forms of power over people. But the exact mix of these two regimes is anything but simple or unidimensional.

CONCLUSION

Morris Cohen's famous essay correctly teaches that political sovereignty and private property are alternative forms of government. It is also correct in positing that the relevant question is comparative: which system of government works best to promote social welfare in any given context? His essay is misleading, however, insofar as it suggests that the choice between these modes of governance is a matter of dialing one up and the other down. The

59 See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549 (2001).

relationship between political sovereignty and private property is complex, and varies depending on the audience of property we have in view.

I have argued here that different audiences of property have different informational needs. Those informational needs, in turn, will suggest a different role for political sovereignty in order to help satisfy those informational needs. This means that those who support a robust system of private property and those who support a more communitarian approach to property are likely to have different reactions to sovereign intervention, depending on which audience we have in view. With respect to some audiences (strangers and transactors), those who favor a strong system of property will want to enlist a generous measure of assistance from the political sovereign. With respect to other audiences (neighbors and sharers), those who want a robust property system are more likely to want the powers of the political sovereign to be held in check.

