
ARTICLE

GOVERNING THROUGH OWNERS: HOW AND WHY FORMAL PRIVATE PROPERTY RIGHTS ENHANCE STATE POWER

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INTRODUCTION

In recent years, many Western governments and organizations have pressed developing nations to build robust private property institutions and have made large sums available for such property-related projects.¹ One of the central justifications that policymakers and theorists provide for this strategy is that it will increase the economic power and freedom of individuals, thereby making them less vulnerable to the state.²

In this Article, I argue that in many cases, precisely the opposite is true: the formalization of private property rights actually makes owners *more* vulnerable to the state and *enhances* the state's governance powers over them.³ When property rights are formalized, the state gains the

¹ On the push to formalize property rights in developing states, see, for example, TERRY L. ANDERSON & LAURA E. HUGGINS, PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY 76-78 (2003), HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 158-63, 177-82 (June Abbott trans., 1989), JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 54-59, 73 (2002), and Douglass C. North, *The New Institutional Economics and Third World Development*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 17, 23 (John Harriess et al., eds. 1995). See also WORLD BANK, WORLD DEVELOPMENT REPORT 2005, at 79-84 (2004) ("The better protected [property] rights [are] . . . the greater the incentive to open new businesses, to invest more . . . and simply to work harder."); Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. 21, 23 (2001) (noting that development economists consider "well defined and alienable private property rights" essential to investment and growth); Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 WORLD BANK RES. OBSERVER 247, 257 (1999) (labeling the absence of permanent property rights "a limitation that may reduce investment incentives"); *Frequently Asked Questions*, HERITAGE FOUND., <http://www.heritage.org/index/faq> (last visited Apr. 15, 2012) (listing property rights as one of ten indicia of economic freedom).

² See, e.g., MARGARET LEVI, OF RULE AND REVENUE 18 (1988) ("[I]ncreasing economic power of the mass of the population has led to an increasing political power, which has culminated in the granting of universal suffrage . . ."); cf. JAMES M. BUCHANAN, PROPERTY AS A GUARANTOR OF LIBERTY 5-10 (1993) (contrasting the liberty-enhancing effects of private property with the tragedy of the commons); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 16 (reissued ed. 1982) ("[I]f economic power is kept in separate hands from political power, it can serve as a check and a counter to political power."); RICHARD PIPES, PROPERTY AND FREEDOM 4 (1999) ("[Property] promotes stability and constrains the power of government.").

³ I use "the state" to mean a territorially bounded, centrally controlled public authority backed by a monopoly on the legitimate use of force. See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

power to define the scope of those rights. This, in turn, provides the state with opportunities to impose significant burdens on owners. A system of formal private property rights serves as a mechanism through which the state can allocate responsibility to individuals on a mass scale for a wide variety of tasks, including some of the state's core governance functions.⁴ Because many of the state's core governance functions are territorially defined (such as maintaining peace and order within the territory, defending the territory from external threats, and providing infrastructure), this phenomenon appears most clearly in the case of private property rights in land.⁵ A network of landowners is a useful (and sometimes crucial) tool that lets a state govern locally in the farthest reaches of its territory, even when it lacks the capacity or will to use other more formal tools for governance, such as governing by bureaucracy or license. Thus, it is useful to think of the state's power to define property rights in a manner that includes obligations to carry out core state governance functions as itself a mode of governance. I call this *governing through owners*.

Governing through owners is an alternative to other more familiar modes of governance. Emerging or weak states that lack the capacity or political will to govern through bureaucracy or license may rely extensively on owners to carry out the state's core functions. But as states rely more and more on bureaucrats and licensees, only vestiges of this phenomenon may remain, serving as a reminder of the vulnerability of owners to the state.⁶

There are numerous examples in developed liberal democracies of governing through owners on a modest scale. For instance, snow laws require owners to shovel or clear snow from sidewalks that border

⁴ A closely related and yet distinct phenomenon is one in which states rely on owners' self-interest to fill in gaps in services that the state otherwise provides. See Malcolm Thorburn, *Reinventing the Night-Watchman State?*, 60 U. TORONTO L.J. 425, 428 (2010) (describing a mode of privatization in which states "may retreat from the business [of governance] altogether and leave individuals to buy what they need with their own resources").

⁵ See *infra* Section III.A.

⁶ The role of owners is much more complex in modern states with well-developed bureaucracies. Property taxes and special assessments—more common burdens on owners in modern states than direct responsibility for government function—represent a hybrid form of governance, combining elements of governing through owners and governing by bureaucracy or license. I reserve for another day a full analysis of when and why modern liberal democratic states govern through owners.

their property.⁷ But compliance does not entitle owners to greater rights to the sidewalk (they cannot, for instance, charge a toll or refuse passage) or to special benefits not available to the ordinary sidewalk-user. Sidewalk repair in New York City provides a similar, warmer-weather example of the state pressing owners into its service. The City's Administrative Code makes commercial property owners responsible for keeping the sidewalks in front of their properties in good repair.⁸ A recent amendment goes so far as to make owners liable for "slip and fall" injuries that occur on public sidewalks in front of their buildings and also requires them to purchase insurance to cover those damages.⁹

⁷ The public nature of these burdens is well-established. See *Willoughby v. City of New Haven*, 197 A. 85, 87 (Conn. 1937) ("Imposition . . . of a duty to clear walks of snow and ice . . . is not sufficient to render the individual, *instead of the city*, liable for injuries sustained by reason of snow."); see also *Taylor v. City of Yonkers*, 11 N.E. 642, 642-43 (N.Y. 1887) (declaring that the responsibility to ensure safe passageways ultimately rests with cities, even when legislation compels citizens to assist in the effort). On the role of owners as part of a public snow-removal plan, see *Garricks v. City of New York*, 801 N.E.2d 372, 375 (N.Y. 2003).

Snow laws mostly take the form of city ordinances or bylaws. See, e.g., D.C. CODE § 9-601 (2001); N.Y.C., N.Y., ADMIN. CODE § 16-123 (West, Westlaw through 2011 Local Law 29). In some jurisdictions, the common law also imposes obligations on owners. In New Jersey, for example, owners of commercial property have a common law duty to clear ice and snow from abutting walks. *Mirza v. Filmore Corp.*, 456 A.2d 518, 521 (N.J. 1983). With a few exceptions, courts have upheld the constitutionality of these ordinances. Illinois was one of the few states in which courts, at least initially, held snow-shoveling ordinances to be unconstitutional. *Gridley v. City of Bloomington*, 88 Ill. 554, 556 (1878), *overruled by* *City of Carbondale v. Brewster*, 398 N.E.2d 829 (Ill. 1979); *City of Chicago v. O'Brien*, 111 Ill. 532, 538 (1884), *overruled by* *Brewster*, 398 N.E.2d 829. *Brewster* overruled *Gridley*, holding that snow-shoveling ordinances were proper uses of police power. 398 N.E.2d at 832. Canadian cities also generally have bylaws in place requiring owners to shovel city walks. See, e.g., Calgary, Alta., Street By-law, No. 20M88, para. 67 (2011) (Can.), <http://www.calgary.ca/CA/city-clerks/Documents/Legislative-services/Bylaws/20m88-Street.pdf>; Halifax, N.S., By-law Respecting Streets, By-law No. S-300, para. 4, § 1 (1997) (Can.), <http://www.halifax.ca/legislation/bylaws/hrm/documents/By-LawS-300.pdf>; Regina, Sask., The Clean Property Bylaw, No. 9881, pt. 3, para. 6, § 1 (as amended) (1997) (Can.), http://www.regina.ca/opencms/export/sites/regina.ca/residents/bylaw/.media/pdf/Clean_Property_Bylaw_9881.pdf (Can.); Toronto, Ont., By-law No. 530-1999, § 2(1) (1999) (Can.), <http://www.toronto.ca/legdocs/bylaws/1999/law0530.pdf>.

⁸ N.Y.C., N.Y., ADMIN. CODE § 19-152(a); see also Jay Romano, *Sidewalk Liability Hits Home*, N.Y. TIMES, Oct. 5, 2003, at RE5.

⁹ N.Y.C., N.Y., ADMIN. CODE §§ 7-210 & 7-211; see also *Hausser v. Giunta*, 669 N.E.2d 470, 471-72 (N.Y. 1996) (holding that a city may transfer liability for injuries caused by unsafe sidewalks from the city to the owner of the abutting property). Prior to 2003, owners were obligated to shovel snow, but courts treated this burden as the delegation of a public function that did not change the underlying responsibility of cities for

The account I advance here is an important corrective to the idea that formal private property straightforwardly increases private power and limits the power of the state.¹⁰ That idea rests, mistakenly, on a single point of comparison: private *versus* state ownership. Of course, private power is impaired when the state controls all material resources—in contrast to a situation in which individuals at least have some capacity for self-interested uses of things and the accumulation of personal wealth. However, there is another point of comparison, between formal private property, set out by the state and frequently coupled with responsibility,¹¹ and informal private property,¹² where both dependence on the state *and* the state’s power to attach obligations to

sidewalks. See *Garricks*, 801 N.E.2d at 375 (noting that an ordinance requiring landowners to remove snow from sidewalks “does not relieve the municipality of its” exposure to liability).

¹⁰ In an influential book, James C. Scott has argued that high modernist states simplify and standardize property rights primarily to gain a better appreciation of the wealth of their subjects. See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 36 (1998) (“The fiscal or administrative goal toward which all modern states aspire is to measure, codify, and simplify land tenure . . .”). My account shares some of the aims of Scott’s work in that it too attempts to illuminate some of the ways that states use and benefit from property systems. Unlike Scott, however, my concern is how states *lacking* the ability or political will to govern through purpose-built offices typical of high modernist, bureaucratic states use a network of owners to carry out their purposes.

¹¹ That private ownership often comes with duties is not a new claim. See, e.g., A.M. Honoré, *Ownership* (“[L]imitations on the use of things are . . . so obviously essential to the existence of an orderly community . . .”), in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 123 (A.G. Guest ed., 1961). On the normative foundations for the obligations of ownership in virtue ethics, see Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *CORNELL L. REV.* 745, 753-54 (2009), and Eduardo M. Peñalver, *Land Virtues*, 94 *CORNELL L. REV.* 821, 869-70 (2009). What *is* new is to view the burdens of ownership through the lens of state power and functioning, which reveals a mode of governance that contrasts with other forms of governance, such as governing by bureaucracy or license.

¹² While formal private property rights are those that the state recognizes, defines, and enforces, informal property rights depend on nonstate collective-action mechanisms for their definition and protection. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 131 (1991) (discussing private enforcement mechanisms); *infra* note 83 and accompanying text; see also Larissa Katz, *Red Tape and Gridlock*, 23 *CAN. J.L. & JURISPRUDENCE* 99, 104 (2010) (“[I]n most of the world, people control resources without recourse to the . . . state. In some cases . . . they turn to local collective action mechanisms . . .”); Carol M. Rose, *Privatization—The Road to Democracy?*, 50 *ST. LOUIS U. L.J.* 691, 703 (2006) (describing formal private property as “a creature of the state”). On the success of informal property regimes, see ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1991) and Carol M. Rose, *Property as the Keystone Right?*, 71 *NOTRE DAME L. REV.* 329, 334 (1996). *But see infra* note 84 and accompanying text.

property-holding are diminished or absent altogether. When seen in opposition to informal private property holding, formal private property may *increase* the extent to which owners are vulnerable to the state.¹³

The phenomenon of governing through owners suggests that the formalization of private property rights often enhances state power, but there is yet a further wrinkle: the usefulness of owners to the state does not always work to the disadvantage of owners. In some cases, it may also empower them vis-à-vis the state. The state's dependence on owners to carry out these governance functions throughout its territory may offset owners' vulnerability to the state. Of course, how much power owners hold by being in charge of state functions depends enormously on the details of the situation. When there are relatively few owners, or when owners are able to coordinate their efforts, the state might find that in order to govern effectively it has no alternative but to give in to some of their demands.

The balance of power between states and owners is thus much more complicated than the models that currently dominate property theory and international development suggest. These models insist that individual owners are least vulnerable to the power of the state where there is a clear and rigorously protected "private sphere" in which owners are free to set self-serving agendas for things and to accumulate personal wealth. But in some cases, at least, owners might be at their most powerful when the state extensively relies on them to carry out core governance functions. At its most harmonious, the state-owner relationship is one of *mutual* dependence, where the state depends on owners to carry out its core business throughout its territory just as much as owners depend on the state to protect their property rights.

This Article proceeds as follows. Parts I and II explain how and why owners are liable to be used as tools for state governance. My model of state-owner relations emerges from two important conceptual starting points: first, the nature of ownership as an office through which the state assigns burdens; and second, the conditions of a territorially defined state, namely, the establishment of basic governmental

¹³ Of concern here is how formal private property rights affect state power. On the personal and social benefits that secure formal ownership can confer, see MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 156-57, 281-82 (2000), JEAN-PHILLIPE PLATTEAU, *INSTITUTIONS, SOCIAL NORMS, AND ECONOMIC DEVELOPMENT* 134-51 (2000), and Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122 Q.J. ECON. 1561, 1591-93 (2007).

functions throughout its territory. Parts III and IV consider what governing through owners means for the balance of power between states and owners. Conventional wisdom is that individuals gain greater power and independence vis-à-vis the state through a clearly defined and protected private sphere. But this view does not account for the vulnerability of owners to the state and the phenomenon of governing through owners. Moreover, it obscures two crucial forms of protection against state predation: mutual dependence of owners and states when states rely on owners to govern and retreat from the state to an informal sphere.

I. OFFICES AND THE DISTRIBUTION OF RESPONSIBILITY

The core insight of this Article is that a system of formal property rights is a sometimes dangerously convenient mechanism for the state to offload some of the burdens of government onto the shoulders of individuals.¹⁴ Put another way, when the state formalizes property rights, it acquires a mechanism for pressing owners into its service at low marginal cost: it is able to convert an established system of property rights into a network of local offices. Governing through owners is an alternative to governing through bureaucracy or license. All are ways of distributing responsibility for state functions to large numbers of people.¹⁵ Government by bureaucracy or license can be more closely fitted with the jobs that need to get done—but these systems also require the state to set up a second set of offices (besides ownership). A system of formal private property rights enables the state to function beyond the effective reach of its centralized institutions and in the absence of willing licensees. By imposing governance obligations on owners, the

¹⁴ The question I address thus concerns not so much who benefits from state power or who controls the state but rather what kind of power the state has and what institutions affect it. See, e.g., Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research* (discussing the “capacities of states to implement their policies” (emphasis omitted)), in *BRINGING THE STATE BACK IN* 3, 15-18 (Peter B. Evans et al. eds., 1985).

¹⁵ All states act through people, whether they are officials under the control of the state, licensees, or other collaborators. One variable that informs whether the state relies on officials, as opposed to licensees or collaborators, is the availability of willing collaborators. See THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE* (1997) (noting that post-dark age states in continental Europe built up bureaucracies because they lacked trustworthy local collaborators); see also LEVI, *supra* note 2, at 10-11 (discussing the interactions among “rulers,” their agents, and their constituencies and describing the tendency of dictators to rely on officials).

state is able to do things locally that are basic to its claims of authority within a given territory: it can ensure that peace and order are maintained, that roads are built, and that frontiers are defended, all by coupling these obligations with the office of ownership.

In what follows, I present a model of state-owner relations that reveals what makes owners so attractive as a tool for governance and what makes them particularly vulnerable to being drafted in this way. In so doing, I present the balance of power between state and owners in a new light. Why are owners such appealing targets for mandatory collaboration with the state? One reason is the nature of ownership as an office that allows the state essentially to mass produce individual responsibility.¹⁶ A system of formal private property rights provides the framework for states to assign responsibilities to owners, an alternative to governing through bureaucracy or by license.

A. Features of an Office

The position of owner invites responsibility for state functions, such as building infrastructure, defending frontiers, and even adjudicating disputes and maintaining peace and order. The reason for this lies primarily in the nature of ownership as an office that shares (or even anticipates) features of purpose-built offices that convey specialized roles in more developed systems of governance.¹⁷

By looking carefully at the concept of offices and the large-scale systematicity it enables, we set the groundwork for understanding how and why states offload the burdens of government onto owners. Offices allow a special kind of planning to take place: through a network of

¹⁶ States face special challenges in holding individuals responsible. As a historical matter, collective responsibility seems to have been the starting point for Western political authorities, even after the concept of individual responsibility existed in the Church and the family. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 185-86* (1983) (distinguishing between “offense[s] against society,” historically the subject of secular enforcement, and individual sins, which the Church punished); FINBARR MCAULEY & J. PAUL MCCUTCHEON, *CRIMINAL LIABILITY 11* (2000) (noting the Church’s interest in individual, as opposed to social, responsibility); cf. ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY, AND SOCIAL TRANSITION 111* (1979) (discussing the legal relationships between individual property owners, their land, and their families in twelfth-century England).

¹⁷ This concept of offices contrasts with the Weberian idea of patrimonial offices, which are inheritable, personal, and legitimately for profit. See 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 1028-32* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978).

offices, the state can allocate responsibilities prospectively, systematically, and at mass scale.¹⁸ Offices convey authority and responsibility to perform a specific role in a larger system or practice. A *network* of offices, very importantly, forms a blueprint for distributing responsibility. Individuals then slot themselves into this network as officeholders.

At the outset, there is a distinction between “mere roles” individuals might assume, on the one hand, and “offices,” on the other hand, to which roles and responsibilities attach. Offices set out roles for their holders, but not all roles are embedded within offices. Three features of offices help distinguish them from (mere) roles people might assume or assign one another: offices are positions of authority that are (1) rational parts of a system or practice, (2) separable from their holder,¹⁹ and, (3) stable or enduring in nature. While roles may come and go with the people who perform them, offices remain even when unfilled.²⁰

A network of offices represents a rational distribution of authority and responsibility in the following sense. Offices are defined (or rationalized) in terms of their place within some system or practice—for example, a social, political, or religious practice. Even when offices are vacant, they represent a fixed way of divvying up authority and responsibility in keeping with that system or practice. Of course, we can assign mere roles to people to advance a specific, well-worked-out plan, but that role may nonetheless fall short of an “office” simply because it is not defined in terms of an ongoing system or practice. Imagine you are planning a camping trip with a group of friends (to take

¹⁸ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 212 (rev. ed. 1973) (discussing prospective versus retrospective responsibility or responsibility that arises as events unfold); John Gardner, *Hart and Feinberg on Responsibility* (discussing the distinctions and interactions between responsibility and liability), in THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 121, 133-34 (Matthew H. Kramer et al. eds., 2008).

¹⁹ On the impersonal and stable nature of offices generally, see SCOTT J. SHAPIRO, LEGALITY 75 (2011).

²⁰ I have elsewhere made the claim that ownership is an office precisely because it is designed to endure even as holders of the position come and go. See Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 78 (2010) (“[T]he law’s most pressing concern is not *who* is owner but rather that the office of owner is filled.”); see also H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 208 (1982) (describing Bentham’s view of conveyance, namely that “[t]he old owner . . . appoints the transferee to the ‘office’ of owner of the property”). For a conceptual analysis of ownership affirming the nature of ownership as an office, see Christopher Essert, *The Office of Ownership* 33-34 (Mar. 2012) (unpublished manuscript) (on file with author).

an example from H.L.A. Hart).²¹ It may be that the plan requires some people to assume positions of authority. For instance, someone may need to be in charge of the route or setting up camp at night. Naturally, we might agree in advance who will do each job. Johnny, in this example, might be in charge of setting up camp. When we have a very detailed idea of what our plan requires of Johnny, we might speak of Johnny as having a role to play. But it would be quite improper to speak of Johnny as occupying an office because there is no ongoing practice or system of which that role is a part.

The second crucial feature of offices is their impersonal quality. An office is necessarily separable from the person who holds it. Offices convey a set of rights, duties, powers, and privileges to whoever happens to occupy the position. I call this the “impersonality thesis.”²² An important implication of the impersonality thesis is that an office can endure as office-holders come and go even when there is no one in the position. If an office falls vacant, the office still functions as a placeholder in that system. For example, judges have a position in a system of justice defined by their authority and responsibility to adjudicate the cases that come before them.²³ If some of those judgeships are vacant (such as in the U.S. context, when there are delays in confirmations), the judgeships do not disappear nor do the contours of the system of justice change. The offices remain, placeholders in that system, until they are filled.

The impersonality of offices is another basis on which some roles can be distinguished from offices. Some roles depend in a normatively significant way on the personal identity of their holder. Consider family roles. Not just anyone can be a child’s mother: it is a role (concerned with loving, nurturing, and raising a child) that is bound up with a specific person. It would be possible to set up a legal office of

²¹ See HART, *supra* note 18, at 212.

²² The separability of offices generally from the office-holder is also a well-known feature of ownership. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 112 (1997) (“What distinguishes a property right is not just that they are only contingently ours, but that they might just as well be someone else’s.”); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 306 (2008) (distinguishing between the office-holder and the office itself); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1782 & n.213, 1792 & n.251 (2004) (citing Penner for the idea that property rights and obligations are impersonal and separable from any particular owner).

²³ On the public nature of offices, and for the view that “an office is any position in which the political community as a whole takes an interest, choosing the person who holds it or regulating the procedures by which he is chosen,” see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 129 (1983).

guardian, of course, to which many of the responsibilities of a parent could be attached. But a mother's role is inseparable from her personal identity. It is thus possible to speak of a mother's role in the rearing of a child but not of the office of motherhood.

Stability is a third feature of offices. An office is a stable position of authority, not an ad hoc role. Imagine that a ship is going down at sea and the captain and crew are immediately swept overboard. A very forceful and charismatic soul suddenly and unexpectedly takes charge of directing passengers to lifeboats as the ship is sinking. He proves to be very effective at shepherding his fellow passengers safely onto the lifeboats. He assumes command and is accorded deference by the others because of his obvious ability to handle the situation. Our hero performs a function *spontaneously* as events unfold, but he does not have a stable position in an ongoing system or practice. He is not the captain or a member of the crew, who we might say hold offices in some established maritime system. Nor is he even like the passenger in the exit row on an airplane, who has a clearly defined role agreed upon ex ante that takes hold in the event of emergency. The ad hoc nature of our hero's role means it completely lacks the stability associated with offices. As soon as the emergency is over, the role disappears. It is not just that it is vacated by our hero; it does not even notionally occupy a place in an existing system or practice.

The chief strength of a network of offices is that it enables states to allocate responsibility systematically and on a mass scale even as the people who hold those offices come and go. Of course there is a very important weakness inherent in attaching burdens to offices too: the actual work attached to an office gets done only if there is someone *in* the office. Offices that are voluntary must come with significant incentives to enter office and significant obstacles to leaving office if they are to serve as effective governance tools.²⁴ I later consider this weakness in the context of ownership but first I elaborate on one of the crucial advantages of a system of offices: how it enables states to allocate responsibility prospectively and on a mass scale.

B. Mass Producing Responsibility

When the state governs through owners, it grafts state functions onto a system of formal private property rights. Assume for a moment

²⁴ As we will see, *infra* Part IV, most systems of property undertake to make the position of owner as sticky as possible to limit the possibility of exit.

that the state has the general authority to obligate its subjects to engage in some activity, such as to shovel public sidewalks. How is its authority enhanced when it is able to attach that obligation to a legal office, like ownership? Why is it so much more effective to couple state burdens with private rights, rather than impose standalone obligations? I argue that governing through owners enables states to mass produce prospective responsibility while picking out with some precision who is obligated to do what.

Assume that it is sometimes in a state's interest to hold individuals prospectively responsible to do or not to do something. If the state wants to have someone take on a role, it needs some mechanism for singling him or her out so that the job actually gets done. Of course, a state might instead obligate groups of people collectively to perform some function. Or it might hold certain people responsible retrospectively in response to the occurrence of some undesirable event (using some formula, such as the lowest cost avoider, to figure out on whom best to pin responsibility, *ex post facto*). But these strategies, although they avoid the problem of identifying who is responsible *ex ante*, limit the state's ability to effectively distribute the burdens of governing.²⁵ Individual *and* prospective responsibility requires that the law identify the individual obligee with precision, so that she knows not only what is to be done but also that she is the one responsible for doing it *ex ante*. Though normally viewed as a requirement of justice,²⁶ it is also a practical requirement necessary for the effectiveness of law.

How, then, might the state identify the responsible actor? One possibility is for the state to allocate responsibility by picking out the specific individual by name, as is done in private contexts where our plans require us to assign roles and responsibilities. This suggestion is feasible, perhaps, in the personal social context. Assuming a person does not have an extremely active and volatile social life, her circle of friends is likely small and stable enough that she and her friends might assign roles and responsibilities for personal activities, such as dinner parties, camping trips, or playdates, simply by naming the person in

²⁵ Indeed, my model would suggest that states will rely more on collective responsibility in the absence of a system of formal private property rights. See, e.g., Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1, 43-44 (1980) (noting that, in "the absence of effective government," collective responsibility is the only way to enforce societal norms).

²⁶ See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) ("[T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him . . .").

charge.²⁷ This strategy, however, would be too costly for the state to adopt. Assigning roles by name imposes information and operational costs that increase with the scale of the plans.²⁸ Offices and office-holding provide a tool for governance that enables the state to distribute roles and responsibilities systematically and on a mass scale. Coupling state functions with legal positions such as ownership allows the state to hold specific individuals prospectively responsible *without* identifying each by name.²⁹ To fully understand the value of prospective individual responsibility that is nevertheless impersonal and mediated through offices, consider the following scenarios.

Scenario A: A fire breaks out in a packed theater that has no assigned seats. A rule posted at the front door announces that, as a condition of entry, *everyone* is responsible for putting out fires. At the first smell of smoke, mayhem breaks out as everyone tries to put out the fire simultaneously without anyone to coordinate their efforts. The manager (rightly) concludes that a house rule that obligates *everyone* to put out the fire does not assign roles or responsibility effectively.

Scenario B: The next evening, there are new house rules. Now, as a condition of entry, everyone must accept the manager's authority to allocate responsibility to pay for any damage caused by a fire to the person whom he determines was "best placed" to prevent or to limit the damage. That night a fire breaks out again. Some members of the audience get into an argument over who should be liable, while others slip away, figuring that they are unlikely to be considered "best placed" to put the fire out and anyway can afford to pay if they are. No one in the end undertakes to extinguish it.

²⁷ See *supra* Section I.A.

²⁸ See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1330 (1993) ("[T]ransaction costs tend to increase with the number of individuals involved."). With technological advances, state-citizen relations are becoming more intimate and, some scholars would say, inappropriately so. See Malcolm Thorburn, *Identification, Surveillance and Profiling: On the Use and Abuse of Citizen Data* (discussing how states use technology and personal data to manage their subjects), in SEEKING SECURITY: PRE-EMPTYING THE COMMISSION OF CRIMINAL HARMS 15, 27-28 (G.R. Sullivan & Ian Dennis eds., forthcoming 2012).

²⁹ Cf. Jane Caplan, "This or That Particular Person": *Protocols of Identification in Nineteenth-Century Europe* (discussing, in the context of various European countries' restrictions on personal names, the way in which standardization and categorization permit greater and cheaper state oversight), in DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 49 (Jane Caplan & John Torpey eds., 2001).

Scenario C: Now imagine that the theater comes under new management. The house draws up a seating chart and assigns seats at the point of sale. The new rule is that a person is responsible for extinguishing any fire that starts under her seat. Thus, if a fire breaks out under seat J3, the occupant of J3, whoever she happens to be, is obligated to put it out. In order to allocate the burden of fire control prospectively to a clearly ascertainable person, the manager need only ensure that *someone* occupies J3. This rule, that the occupant of J3 is responsible for putting out fires under J3, assigns roles, *ex ante*, to specific individuals and identifies those individuals with precision, but it does so without naming them.

When might the state need to look behind the office to the identity of the officeholder? The state may require that a name be attached to the position for enforcement purposes.³⁰ The kinds of concerns that drive the state's enforcement mechanisms—such as its interest at the point of enforcement to identify and engage with actual, named individuals—are quite different from the concerns that drive the state's governance strategies. A state relies primarily on the exercise of its authority to carry out its ends. An effective state, like an effective parent, resorts to coercion only rarely.³¹ Coercion is a backstop, not a primary tool for governance.³² For the purposes of governance, a state effectively assigns roles and responsibilities by providing people with just enough information to know what is required of them. At least initially, a state need not interest itself in the identity of the obligee. That information becomes relevant only later if the obligee fails to

³⁰ Indeed, undue concern with the problem of identification is often a symptom of the mistaken view that the main business of the state is the enforcement of commands. Thus Jeremy Bentham found the common law practice of not regulating or registering citizens' identity particularly problematic. See JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW* (1843) ("The greater number of offences would not be committed, if the delinquents did not hope to remain unknown."), *reprinted in* 1 *THE WORKS OF JEREMY BENTHAM* 557, 557 (John Bowring ed., 1962). For a discussion of common law and civilian practices of surveillance and identification, see Thorburn, *supra* note 28, at 23-25.

³¹ See LESLIE GREEN, *THE AUTHORITY OF THE STATE* 71 (1988) ("As a psychological or sociological thesis about the sources of compliance, the view that the state is essentially a coercive order is unsupported by the evidence.").

³² The importance of coercion is to "assure the law-abiding that the recalcitrant will not take them for suckers." *Legal Obligation and Authority*, *STAN. ENCYCLOPEDIA PHIL.* (Dec. 29, 2003), <http://plato.stanford.edu/entries/legal-obligation>. *But cf.* YORAM BARZEL, *A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE* 17 (2002) ("Power, especially in the context of the state, is usually viewed as the ability to inflict physical harm.").

perform, at which point linking offices to named individuals reduces enforcement costs.³³

But when it comes to the office of ownership, the problem of personal identification is less acute, even at the point of enforcement. That is because the state has the option of crafting remedies that operate in rem. The forfeiture of the thing itself, temporarily or permanently, or even the threat of forfeiture, enforces the obligations of the office no matter who holds it.³⁴

II. THE USE OF PRIVATE RIGHTS TO CONVEY STATE BURDENS: SOME ADVANTAGES

I now consider more closely why ownership is a kind of office and what these reasons reveal about its suitability as a mechanism for governance. Ownership has many of the characteristics of an office—it is an impersonal and stable position of authority that can be rationalized as part of an ongoing system for allocating decisional control with respect to things. But it is not purpose-built for the allocation of state burdens. How and why, then, do states govern through owners?

A. *Commandeering a Preexisting System of Rights*

Ownership is a position of authority, designed for other purposes, but which states can commandeer to achieve the purposes of government. When a state governs through owners, the state couples a system of governance with a system of property rights instead of creating new offices dedicated to the performance of state functions.³⁵ Owners

³³ For an example of identification requirements for land registration, see SUSANA LASTARRIA-CORNHIEL & GRENVILLE BARNES, LAND TENURE CTR., FORMALIZING INFORMALITY: THE PRAEDIAL REGISTRATION SYSTEM IN PERU 26, 28, 32 (1999). The identification of owners may have other purposes related to the enforcement of private contracts. On the accountability of owners to others through registration, see HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 54-56 (2000). For a critique of this account, see Kevin E. Davis, *The Rules of Capitalism*, 22 THIRD WORLD Q. 675 (2001) (reviewing DE SOTO, *supra*).

³⁴ English law has long included forfeiture laws. In feudal law, escheat for felonies gave the Crown possession of land for a year and a day. See A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 19-20 (1961). And of course liens are, in effect, threats of the loss of possession or ownership in the event of nonperformance. See Kevin E. Davis, *The Effects of Forfeiture on Third Parties*, 48 MCGILL L.J. 183, 194 (2003) (providing examples of when, under Canadian law, true owners may have to bear the burden of forfeiture even when not complicit in crime).

³⁵ Unlike offices purpose-built for government work, the system of rewards that attaches to ownership is not directly keyed to the performance of public roles and

may have powers that complement the tasks the state assigns them; for example, owners charged with preserving some habitat for an endangered species may depend on their exclusionary powers to do so. But in other contexts, the powers attendant to ownership—for instance, rights of noninterference, privileges of use, and the powers to give, sell or share access with others—may be of little help in carrying out the tasks of governance.³⁶ For instance, owners may be obligated to carry out tasks outside the physical boundaries of their property, such as building or maintaining public roads adjacent to their land. In these (and other) cases, their obligations stem from their positions as owners but are not fully supported by the rights, powers, and privileges that come with ownership.

Unlike offices that are tailor-made to form a part of a system of governance (namely, bureaucratic offices), ownership remains a dual-purpose position. The position of owner is forced to accommodate both personal uses, enabling owners to set self-serving agendas for things, and political uses, enabling states to hold individuals responsible for government functions. In the context of a system of governance, ownership is perhaps better understood as a *proto-office*, to distinguish it from a specialized office dedicated to the performance of state functions.

Ownership, it may be thought, is ill-suited as a tool for governance precisely because it is not purpose-built to convey governmental responsibilities. But while this is true to some extent, there are also many advantages, from the state's perspective, to governing through owners. There are significant costs to organizing a functioning bureaucracy. It takes time, expertise, and funds. In addition, there are many problems, such as corruption, that bedevil the efficient functioning of bureaucratic governments. Bureaucracies cannot be built overnight.³⁷ Thus, another advantage of governing through a network of owners is precisely that a system of private property rights has a separate and independent rationale—the creation of a private sphere for its holder. Rather than creating a second system of authority dedicated to

responsibilities. Owners do not collect a salary or fee for performing their responsibilities. Rather, their reward is their tenure or the occupation of the position itself and its particular rights, privileges, and powers.

³⁶ By contrast, governing by license authorizes private individuals to exercise limited and precisely defined state authority. See MICHAEL J. BRADDICK, *STATE FORMATION IN EARLY MODERN ENGLAND* 40-42, 88 (2000).

³⁷ Cf. MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* (2008) (discussing persisting uncertainty in determining what institutions best foster a developing society).

advancing the aims of government, the state simply repurposes an existing system of rights.

A significant downside to governing through ownership, however, is that it entails relying on voluntary posts for the fulfilment of core state functions. Unlike other, more general legal positions, such as citizenship, ownership is voluntarily assumed. While many systems of property rights work hard to limit exit from the position of owner, very few systems obligate individuals to take up the position.³⁸ And we can relinquish the position of owner by transferring or releasing our rights to someone else or, to the extent that abandonment is legally possible, by leaving the thing ownerless.³⁹ Thus, the voluntariness of ownership may present a problem for states that set the price of ownership too high: governing through owners is only possible where there are actually owners in place to do the work of the state.

But it is important not to overstate the problem that the voluntariness of ownership presents—at least in the absence of an informal sector. If the state is able to prevent the movement of the *objects* of property into the informal sector, the exit of *people* from the formal sector is unlikely too. Where there is no viable informal sector (more on this below), the voluntariness of ownership only inhibits states to the extent that owners are willing to exercise their option to be propertyless. That is, people might choose not to be owners. But where that choice means giving up entirely on a private sphere, the scope for exit is limited considerably.

B. Vulnerability and State Leverage

Because owners are dependent on the state to enforce the private benefits of ownership, they are vulnerable to the state's ability to draft them into its service.⁴⁰ This reality is not a normative claim about the legitimacy of the state's power to define the burdens of ownership.⁴¹

³⁸ We are not born owners. It is a status that requires some kind of acceptance.

³⁹ See Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 200-02 (2010) (discussing the traditional limitations on abandonment).

⁴⁰ The state's role in protecting property rights is what makes these rights "formal." See *supra* note 12.

⁴¹ The state's power to coerce, which owners invoke in demanding the protection of their rights, cannot legitimately be applied in support of rights that the state does not define. The state's power—and duty—to define what it enforces rests on the basic idea that the state acts legitimately only when it acts without bias and according to rules knowable *ex ante*. If it were otherwise, then the state would be no more than a hired gun, doing the bidding of private individuals who sought to dominate others by setting

Rather, it is a descriptive claim about the leverage a state has over owners when it serves as their protector. Without competition from other collective-action mechanisms for the authorization and enforcement of property rights, the state is able to act like a monopolist: it can raise the price of ownership by attaching more burdens to the position of ownership without losing “customers.”

The state’s power over owners may take different forms, but, in any form, owners depend on the state for their property rights and so are vulnerable to the state’s demands. States may rely on “super-owner” status to define the burdens of ownership.⁴² In its capacity as “super-owner,” a state delegates ownership authority in the form of a grant, to which it then attaches terms and conditions, just as a private property owner might. This is the most straightforward way for a state to leverage a system of property rights to create a system of governance, and it was a common strategy for emerging states⁴³ in feudal societies.⁴⁴ This phenomenon appeared most clearly in the practice of “dependent” land holding in feudal systems, in which land was held by private individuals, instead of the King, in exchange for (mainly) military service.⁴⁵ A modern day version is seen in the exactions municipalities claim from developers in exchange for what we might think of as “more”

the terms under which they would be required to act. But I do not aim to develop this normative claim here: this Article is primarily a conceptual and descriptive enterprise.

⁴² I am making this claim descriptively. For a normative account of this concept, see, for example, ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 239 (2009). In English common law, the doctrine of tenure implies that everyone’s property is ultimately held for the Crown. See CHARLES HAPRUM ET AL., *THE LAW OF REAL PROPERTY* 22 (7th ed. 2008) (“[A]ll land in England is owned by the Crown.”). But see SIMPSON, *supra* note 34, at 44 (calling the notion that the Crown “owns” the land “very modern”).

⁴³ Common lawyers typically insist that the common law does not have the idea of a state. But whatever the legal status of the “Crown” in English law, I am referring here to the state as a political entity. See WEBER, *supra* note 3, at 77-78 (“[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”).

⁴⁴ This practice is not solely feudal, however. See HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870*, at 44-59 (1983) (discussing New York City’s development of its waterfront using the “Planning by Granting” method, by which the City sought to build up those areas through the distribution of development rights).

⁴⁵ SIMPSON, *supra* note 34, at 3. On the nature of the feudal relationship generally, see S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW 178-80* (1969), THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW 506-20* (5th ed. 1956), and FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW 4* (2d ed. 1968).

property rights—an enlarged sphere of private authority. The direct and simple form of leverage that a state has as super-owner implies certain limits on the power of the state vis-à-vis owners: the state, like any owner, must have something to give away—something that can be the subject matter of a grant.⁴⁶ The power to impose terms runs out at the point the state has nothing more to offer.⁴⁷

The leverage the state has over owners thus comes from its power to define the rights it enforces. But the state is not restricted to taking the form of a super-owner setting the terms and conditions of a grant. The burdens of ownership in modern states are typically the products of a state's police powers, the general authority to govern in the public interest.⁴⁸ For instance, as previously noted, many municipalities in the United States and Canada have enacted laws that make owners responsible for shovelling sidewalks and building and repairing roads.⁴⁹ Thus, governing through owners, though perhaps most extensively used by feudal states, exists in the modern bureaucratic state as well.

In this section, I have argued that a network of owners serves a dual purpose: it is an institution designed to allocate self-serving, agenda-setting authority to individuals, but it is also a mechanism for distributing state responsibility systematically and on a large scale throughout the state's territory. Such a network simultaneously empowers private owners and lets the state govern through them. Owners' dependence on the state for the enforcement of their private rights renders them vulnerable to state demands. I next consider the special advantages to the state of governing through *owners* rather than through any other position of private authority.

⁴⁶ Cf. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 303-08 (3d ed. 2005) (arguing that zoning does not reflect actual land use plans but is often much more restrictive so that cities can hand out additional property rights to owners in exchange for further exactions).

⁴⁷ Again, in the context of exactions, the limited nature of this form of leverage means that cities have a hard time getting developers to perform long-term functions, such as the upkeep and maintenance of transit-related infrastructure.

⁴⁸ See generally MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005) (providing a history of the police power in the United States); Thorburn, *supra* note 4, at 431 (adopting Blackstone's definition of the "public police" as "the due regulation and domestic order of the kingdom" (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* *162)).

⁴⁹ See *Ryan v. City of Schenectady*, 154 N.Y.S. 890, 892 (Sup. Ct. 1915) (likening the requirement to remove snow to "a police regulation"); *supra* notes 7-9 and accompanying text.

III. WHY OWNERS? LOCATION, LOCATION, LOCATION

Thus far, I have shown why it is sometimes to the state's advantage to couple obligations with legal positions like ownership rather than simply imposing standalone obligations on the population at large or naming individual obligees. But why is *ownership* in particular such a useful category? Put another way, there are general advantages to be had from bundling obligations with legal positions generally, yet we do not routinely see state functions coupled to other legal positions. Not everyone licensed to practice medicine in the state of New York, for instance, must form road-repair crews as a condition of the license.

What is it in the nature of property rights, then, that leads states to govern through owners rather than through doctors? The answer is clearest in the context of property rights in land. While all forms of property rights enforced by the state give the state some leverage to impose burdens,⁵⁰ property rights in land have a special feature that enhances their use as a tool for governance: they are defined in terms of their location within the state's territory. When this special feature of property rights is considered in conjunction with what I will argue is the territorial nature of core state functions—building infrastructure, maintaining peace and order, and defending borders—the reason states find it attractive to govern through *owners* becomes clearer. This connection between private property rights and a particular space in a state's territory is what makes governing through owners so effective.

A. *The Territorial Nature of Core State Functions*

The territorial dimension of property rights is so important for governance purposes because states are themselves defined territorially. The territorial component of land ownership makes it a particularly effective medium for transmitting territory-related burdens at the core of the state's business—namely, infrastructure, defense, peace, and good order. After all, a state is just the political authority that regulates and coordinates the activity of people within its claimed territory.⁵¹

⁵⁰ We thus see governance through holders of other forms of property rights, like patents, whose holders bear the burden of fulfilling some of the burdens of modern progressive states relating to innovation and education. While I am grateful to Hanoch Dagan and Bob Ellickson for pressing me on this point, I leave full consideration of governing through this and other forms of property to another day, if only because it introduces new controversies over the scope of the state's responsibility and mandate to govern.

⁵¹ See GREEN, *supra* note 31, at 71-72 (stressing the centrality of authority to the idea of the state).

Its most basic purpose is to establish itself as the supreme political authority capable of maintaining order within its boundaries.⁵²

Indeed, a country is stateless if those claiming political authority are unable, in fact, to establish a civil society—i.e. the basic order that enables people to carry on with their lives.⁵³ The most basic things that states need to do to establish a civil society include securing the state against external and internal threats to peace and order and providing the infrastructure to enable the movement of people (and their goods) within a territory.⁵⁴ Justice and human flourishing might require much more than this, such as the regulation of markets, safeguards against poverty, universal education, support for the arts, etc.⁵⁵ But my claim here is just that the provision of *at least* these three kinds of goods—(1) secure frontiers, (2) peace and order within state boundaries, and (3) basic infrastructure that allows people and goods to penetrate into the farthest reaches of its territory—is constitutive of even the most basic claims of political authority with respect to a given territory. Seen this way, the provision of this most basic order throughout its territory is a survival condition of a state.⁵⁶ Core aspects of state business thus inevitably have a territorial component.

⁵² See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) (“The object of the rule of law is to substitute for violence peaceful ways of settling disputes.”).

⁵³ What civil society fully requires is, of course, a subject of normative, moral, and political inquiry, and I do not attempt to answer that here.

⁵⁴ Even libertarians sign on to at least this basic conception of the state’s role. See, e.g., Richard A. Epstein, *Living Dangerously: A Defense of Mortal Peril*, 1998 U. ILL. L. REV. 909, 911 (acknowledging “standard public goods” such as “law enforcement, public roads, and defense”). For a discussion of the normative underpinnings of the state’s job to provide roads and defense in Kant’s political philosophy, see RIPSTEIN, *supra* note 43, at 238, and Larissa Katz, *Ownership and Social Solidarity*, 17 LEGAL THEORY 119, 124 (2011). For an economic conception of infrastructure as a public good, see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

⁵⁵ Since the middle ages, states have considered it their duty to regulate markets. Cf. HARTOG, *supra* note 44, at 33-43 (analogizing the “early American city” to the “medieval English borough,” in that the “city government . . . ha[d] no proper sphere beyond the regulation of economic activity”). The modern state has assumed a much expanded mandate.

⁵⁶ For views on the autonomy of the state to pursue ends independent of any particular set of private interests, see LEVI, *supra* note 2, at 186-88; Peter B. Evans et al., *On the Road Toward a More Adequate Understanding of the State*, in BRINGING THE STATE BACK IN, *supra* note 14, at 347, 350-54, and Dietrich Rueschemeyer & Peter B. Evans, *The State and Economic Transformation: Toward an Analysis of the Conditions Underlying Effective Intervention*, in BRINGING THE STATE BACK IN, *supra*, at 44, 63-68. For an additional view

A country is “stateless,” or is stateless in part, where it is unable to carry out its basic functions. A state may survive in part even as it fails elsewhere. An otherwise strong state may exhibit pockets of weakness in anywhere from its frontiers to its “core” territory. Governing through owners enhances state capabilities by enabling the state to function beyond the reach of its central institutions. It ensures that there is someone in place to perform state roles and responsibilities such as road-building, frontier defense, and the management of local disputes, each of which must be performed locally. As the state defines its core aims differently, to include health, education, and welfare—functions less territorially defined—the comparative advantage of governing through owners as against other modes of governance, such as through bureaucracy or license, will decrease.

B. *Distributing Burdens to Local Offices*

The territorial dimension of land has certain crucial advantages that facilitate the effective distribution of government burdens to owners. Recall the theater analogy and, specifically, the advantages associated with drawing up a seating chart for a theater and assigning specific seats to purchasers of tickets.⁵⁷ This practice lets a theater manager articulate obligations in general terms while picking out specific obligees. In the example, everyone is responsible for putting out fires under her own seat. The discussion above drew attention primarily to how assigned seating conveys information about *who* is obliged to do what. But note also how this practice gives content to the obligation itself. The sale of a ticket to seat J3 qualifies a general obligation to put out fires in terms of space and time; it thus not only tells us who should take care of a fire but also tells us *which* fires ought to concern that person—those, and only those, located under J3. What results is a system of fire control for the entire theater. Assuming a full house, there is someone to put out a fire no matter where it starts.

Similar advantages arise where roles and responsibilities graft onto a system of private property. This is clearest with property rights in *land*, where the position of owner is defined in relation to a particular slice of the state’s territory. The owner in charge of a particular place can be assigned jobs in that particular place.

on how the government relies for its power on the economic pursuits of the governed, see GIANFRANCO POGGI, FORMS OF POWER 144-45 (2001).

⁵⁷ See *supra* Section I.B.

Cities, for example, link the burden of clearing snow to ownership for precisely this reason. Assume that public sidewalks abut mostly private property.⁵⁸ Coupling snow-removal duties with private ownership immediately provides the city with an army of snow shovelers, who are in place before any snow even falls. As one court noted:

The assistance to the city which is obtained under ordinances making it the duty of abutters to remove snow and ice from the sidewalks adjoining their property relieves, to that extent, the burdens of labor and expense which it otherwise would necessarily, in discharge of its municipal duties, be subjected to⁵⁹

In another case, the New York Court of Appeals noted frankly that, while cities were responsible for enabling pedestrian passage, “[i]t is not expected, and cannot be required, that the corporation shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens.”⁶⁰ A system of property rights in land thus helps states to govern *locally* by attaching jobs that need to be done locally, such as road construction or border defense, to ownership of land.⁶¹

⁵⁸ Of course, there are sidewalks in front of public property too. The comprehensive nature of a snow-removal plan that relies on owners is a function of the extent to which sidewalks in a city abut private land.

⁵⁹ *Willoughby v. City of New Haven*, 97 A. 85, 88 (Conn. 1937); *see also* *Fields v. City of Leavenworth*, 58 P.2d 1065, 1068 (Kan. 1936) (“The ice was removed much more promptly by the tenant than the city possibly could have removed it from every sidewalk . . . under the conditions which then obtained.”).

⁶⁰ *Taylor v. City of Yonkers*, 11 N.E. 642, 642 (N.Y. 1887).

⁶¹ While governing through owners is generally done on a modest scale in modern states, states still impose burdens on owners relating to core state functions, such as maintaining infrastructure, *see supra* notes 7-9, or maintaining peace and order, such as the obligations of mall owners in some jurisdictions to provide policing services to prevent third-party assaults, *see, e.g.*, *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1338-40 (Kan. 1993) (considering the liability of mall owners for failing to prevent criminal assaults by third parties). There are other examples of states using owners to assist in government projects. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9625 (2006) (holding owners responsible for cleaning up pollutants whether or not they caused the problem). Private owners are also drafted to further the purposes of the federal government in the Endangered Species Act: they are required not to use their land in a way that harms, harasses, or kills endangered or threatened species as defined under the Act. 16 U.S.C. § 1538(a)(1)(B).

IV. STATE-OWNER RELATIONS: A NEW MODEL

What do formal private property rights mean for our relationship with the state? The answer for many policymakers is, simply, greater freedom from state interference.⁶² Formal private property rights guarantee a space for individuals to make self-serving decisions apart from the public sphere in which the state operates. The struggle for power between owners and the state is thus analyzed primarily in terms of control over resources: when resources are in *private* hands, there is a diminution of public power, and vice versa. This logic has led some policymakers to overemphasize certain risks the state poses to owners. For example, the primary concern for many policymakers in international development has been to determine how to keep resources in the private sphere and out of state hands and, more generally, how to convince nervous investors that a state's commitment to protecting private property rights is genuine.⁶³

This conventional view of state-owner relations—shared by theorists and policymakers across the political spectrum—fails us in two ways. First, it prevents a clear view of the range of governance strategies available to a state. Governing through owners—not as familiar as governing through license or bureaucracy—is an important and distinct mode of governance that does not fit with the logic of liberalism (classical and egalitarian alike). Instead, from the viewpoint of classical liberalism, state demands on owners register purely as infringements on a “private” sphere.⁶⁴ Prominent libertarian theorists like Richard Epstein and politicians like Senator Orrin Hatch argue that the state acts improperly, even predatorily, when it places a disproportionate

⁶² See *supra* note 2 and accompanying text.

⁶³ See, e.g., KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES* 94 (2010) (“[H]ost countries are more likely to attract technology intensive foreign direct investment if they have developed legal systems that protect property rights”); LOUIS T. WELLS & RAFIQ AHMED, *MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY* 295 (2007) (discussing the impact of property rights on international trade). On the propensity of states to prey on the wealth of subjects and its effect on economic development, see, for example, STEPHEN HABER ET AL., *THE POLITICS OF PROPERTY RIGHTS: POLITICAL INSTABILITY, CREDIBLE COMMITMENTS, AND ECONOMIC GROWTH IN MEXICO, 1876–1929*, at 19 (2003), DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 59 (1990), and WORLD BANK, *WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS* 99 (2002).

⁶⁴ See FRIEDMAN, *supra* note 2, at 5-6 (noting that “classical liberalism” valued, above all, individual freedom from state authority).

share of social burdens on citizens who own property.⁶⁵ In their view, states looking to outsource core state burdens should respect the integrity of the private sphere by bargaining for the services of private actors and then governing by license.

From the viewpoint of egalitarian liberalism, holding owners responsible for core state functions is problematic because it pushes private actors into “public” roles, without the oversight or public law constraints that apply when government employees do the job. Many egalitarian liberals think that certain functions are for the state alone to discharge, which they interpret to require governing by bureaucracy.⁶⁶ Each of these divergent viewpoints, however, overlooks the fit between ownership and governance. Rather than recognizing governing through owners as a distinct governance strategy, they merely explain its various manifestations as piecemeal deviations from these other more familiar modes of governance.

Second, the conventional view that formal private property represents a transfer of power from state to individual weakens our understanding of how the balance of power between state and owners might be managed. Policymakers have pressed consistently in the direction of an ever-expanded private sphere in order to offset the power of the state.⁶⁷ But freedom from state domination might just as well lie in one of two other directions: (1) in mutual dependence, where the state depends on owners to perform core functions just as owners depend on the state to protect their rights; or (2) in independence, through exit

⁶⁵ See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161-62 (1985) (criticizing an understanding of eminent domain that includes an overly broad conception of “public use”); NANCIE G. MARZULLA, *The Property Rights Movement: How It Began and Where It is Headed* (labeling environmental regulation of property rights an “intrusion into ordinary life”), in LAND RIGHTS: THE 1990S’ PROPERTY RIGHTS REBELLION 1, 5 (Bruce Yandle ed., 1995); Orrin G. Hatch, *Foreword to* NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION, at ix, ix (1997) (asserting that property rights are “under attack from the regulatory state”).

⁶⁶ GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 4-5 (Jody Freeman & Martha Minow eds., 2009) (listing several hazards of investing state power in private parties); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 121 (2007) (“[C]ertain government functions may be so fundamental as not to be transferable to private hands under any circumstances.”). Kantians also resist the privatization of core state functions on noninstrumental grounds. See Thorburn, *supra* note 4, at 441-42 (arguing that privatization of state functions would undermine the purpose of the state).

⁶⁷ See *supra* note 2.

from the formal sphere where the state guarantees our property rights—to an informal sector in which third-party collective-action mechanisms perform that service. My model of state-owner relations exposes how states incorporate owners into a system of governance and also reveals the vulnerability of owners isolated in a formal, state-defined private sphere.

A. *Mutual Dependence*

Let us take a particularly dramatic state function, the securing of territorial boundaries. Western history is full of examples of states using owners to defend frontiers.⁶⁸ Romans granted land on the frontiers of their empire to former legionaries, who then served as the first line of defense against barbarian hordes.⁶⁹ William the Conqueror granted land in England to his knights in return for military service.⁷⁰ The Habsburgs created a defensive screen against the threat of a Turkish invasion by putting military settlers, the Grenzer, in place on the borderlands in Croatia.⁷¹ More recently, in colonial America, the trustees of Georgia—themselves owners charged with governance functions—handed out property rights, locked in fee tail, to settlers from England as a means of creating a buffer against Native American

⁶⁸ I will put aside for now a related phenomenon: states that control property rights on frontiers not only frequently extract positive services from owners, such as military service, but also the very fact of state control over property on the frontiers has, in some contexts, preempted the associations (*gesellschaften*) that might otherwise create informal rights and thus acquire a kind of political authority that threatens the state's own.

⁶⁹ See, e.g., Gabriele Wesch-Klein, *Recruits and Veterans* (relating that veterans were sometimes settled "in areas that had belonged to the Roman Empire for only a short while" because "war-hardened veterans could make a real contribution to the defense of their new homes in an emergency."), in *A COMPANION TO THE ROMAN ARMY* 435, 444 (Paul Erdkamp ed., 2007).

⁷⁰ Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 *REAL PROP. PROB. & TR. J.* 507, 540 (2003).

⁷¹ Gunther E. Rothenberg, *The Origins of the Austrian Military Frontier in Croatia and the Alleged Treaty of 22 December 1522*, 38 *SLAVONIC & E. EUR. REV.* 493, 493 (1960); see also GUNTHER E. ROTHENBERG, *THE MILITARY BORDER IN CROATIA 1740–1881: A STUDY OF AN IMPERIAL INSTITUTION* 6-70 (1966) (discussing the role of settlers that served as "[m]ilitary colonists" in various empires and focusing on the role of the Grenzer in the Habsburg Empire); John Childs, Debate, *A Short History of the Military Use of Land in Peacetime*, 4 *WAR HIST.* 81, 83-84 (1997) ("[T]he Grenzer[] were settled in this region and, in return for land, performed military service . . .").

attack on the frontiers.⁷² Naturally, a human line of defense required a certain density of population. Too few owners in place would render the state vulnerable to an attack. The trustees of Georgia ensured that they would have enough owners in place on the frontiers by granting land subject to entailment. Since land in fee tail could not be freely sold off, there could be no changes to lot size or to the number of owners required to do the job.⁷³

Owners who performed crucial state functions also acquired a countervailing power because states depended on them to stay. In some contexts, military settlers exploited this relationship of mutual dependence to claim a share in government power more generally. The Grenzer, for instance, owed military service to the Habsburgs, but were able to lay claim as a result to general governance powers in the borderlands.⁷⁴ A relationship of mutual dependence emerged and lasted for centuries.⁷⁵

On both sides of the state-owner relationship, however, there are incentives to escape dependence. Sometimes the owners find ways to take the benefits of ownership but leave the burdens behind, such as by exploiting external circumstances that make states vulnerable to the demands of owners. Settlers on the Georgia frontier, for instance, pressed successfully for the abolition of entail and thus retained the full economic benefits of ownership with none of the restrictions that tied them and their families to the land.⁷⁶

At other times, it is the state that escapes dependence on owners and reclaims power for itself by relying on other governance strategies while simultaneously stripping owners of responsibility for core state functions. When states remove public functions from the office of ownership, they also strip the governance power that owners enjoyed within a relationship of mutual dependence. In late feudal England, the emerging state ceased to rely on manorial landlords to provide core state functions. For example, royal courts began to take over the

⁷² Claire Priest, *Understanding the End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period* 38 (Feb. 2010) (unpublished manuscript) (on file with author).

⁷³ *Id.*

⁷⁴ See ROTHENBERG, *supra* note 71, at 8 (noting the “substantial privileges” afforded the Grenzer for their service).

⁷⁵ *Id.*

⁷⁶ See Priest, *supra* note 72, at 38-40 (recounting the Georgia settlers’ campaign to eliminate entail that resulted in a provision in the Georgia Constitution to that effect).

jurisdiction previously reserved to manorial courts.⁷⁷ By the late twelfth century, the Crown had begun to assert the power to define and protect property rights generally.⁷⁸ By the thirteenth century, the Crown had moved from merely enforcing property rights defined by manorial law to claiming sole authority to enforce and define *all* property rights and so to create new forms of tenure.⁷⁹ The manorial lords, though still themselves vulnerable to the Crown's authority to define their rights and the incidents of tenure, were ultimately stripped of their power and responsibility to resolve local property disputes, an important role in a system of governance.⁸⁰ Thus over time, the mutual dependence of owners and states was dislodged as owners became vulnerable to a state that did not in turn depend on them.

As a state turns to employees and mercenaries to govern, it ceases to depend on owners to carry out its core business. Mutual dependence of state and owners, by contrast, serves as a simple form of constraint on the arbitrary or predatory exercise of power by the state over owners.

⁷⁷ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 226 (2002). For discussions of the role of manorial courts, see MILSOM, *supra* note 45 at 11, 88-89, FRANK STENTON, THE FIRST CENTURY OF ENGLISH FEUDALISM 1066-1166, at 55-56 (1961), and Paul R. Hyams, *Warranty and Good Lordship in Twelfth Century England*, 5 LAW & HIST. REV. 437, 447-50 (1987).

⁷⁸ The Crown began to take over the definition and enforcement of property rights with Henry II's Constitution of Clarendon in 1164. It was then that Glanvill introduced the idea of centralized legal authority: "[N]o man need answer in any court for his freehold land unless commanded to do so by the King's writ." SIMPSON, *supra* note 34, at 24. Protection against disseisin in royal courts further eroded manorial jurisdictions. See BERMAN, *supra* note 16, at 456 (calling the protection "one of Henry II's great devices for wresting jurisdiction" from the feudal courts); see also John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 LAW & HIST. REV. 197, 200 (1992) ("As the need for seigniorial jurisdiction faded in the late fourteenth and fifteenth centuries, the quality of justice dispensed in manor courts also declined."). On what this meant for the concept of ownership in English law, see Woodbridge v. Bardolf, (1194), reprinted in 1 ROTULI CURIAE REGIS: ROLLS AND RECORDS OF THE COURT HELD BEFORE THE KING'S JUSTICIARS OR JUSTICES 48 (Francis Palgrave ed., 1835), translated in S.A. REILLY, OUR LEGAL HERITAGE: KING AETHELBERT, 596, TO KING GEORGE III, 1776, at 121 (2012); and BERMAN, *supra* note 16, at 446-49.

⁷⁹ See *Quia Emptores Terrarum*, 1290, 18 Edw., ch. 1 (removing restrictions on land transfer to provide tenants with more freedom to alienate their land).

⁸⁰ As the Crown took over the protection and definition of property rights, everyone in effect became tenants *in capite*. See BAKER, *supra* note 77, at 237 ("[B]y the thirteenth century the tenant was in reality the owner of the land.").

B. *Exit to the Informal Sector*

Access to nonstate sources for the protection of property rights in the informal sector allows owners to remain independent from the state altogether. The choice owners face then is not between holding property and remaining property-less but rather between holding property protected by the state and holding it under some other collective-action mechanism.⁸¹ If the state is successful, there is no parallel world in which some nonstate authority provides the functional equivalent of formal private property rights.

Of course, not all states will be entirely successful in this regard. Not all can maintain a monopoly on the supply of property rights throughout their territory. Dissident groups, customary or tribal authorities, or other collective-action mechanisms that crudely approximate civil society in areas beyond the reach of the state may serve as other sources of authority in pockets of the state's territory.⁸² In such circumstances there may well be a viable informal sector that roughly replicates the types of entitlements that owners expect the state to supply.⁸³ It is important to note, however, that what is often called the "informal sphere" is rarely a neat parallel world in which rival political or social institutions establish the functional equivalents of formal property rights. Instead, those rights are often significantly degraded,⁸⁴ depending on first- or second-party enforcers and brute force rather

⁸¹ This introduces a new form of vulnerability as nonstate collective-action mechanisms acquire leverage over owners. Any practical understanding of the extent and nature of this vulnerability—and whether it is in fact preferable to vulnerability to the state—turns on context-specific factors, including the kind of authority the collective-action mechanism claims over people and territory and the incentives it has to exercise that power.

⁸² Informal collective-action mechanisms include customary tribal authorities, voluntary associations, and even organized criminal organization that in some places effectively rule over mini-territories within a state's territory. See, e.g., David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 *ECOLOGICAL Q.* 3, 7-11 (2005) (summarizing the creation and application of the ad hoc property codes that developed among miners at the time of the Gold Rush); Mattathias Schwartz, *A Massacre in Jamaica*, *NEW YORKER*, Dec. 12, 2011, at 62, 64-65 ("Many of Jamaica's low-income communities are still led by dons, whose organizations act like miniature states: allocating benefits, defending borders, and extracting taxes.").

⁸³ See ELLICKSON, *supra* note 12, at 139-40 (arguing that property arrangements are possible—even common—in the absence of state-backed rights).

⁸⁴ See, e.g., Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 *U. CHI. L. REV.* 1237, 1267 (2005) (describing informal property rights as possessory rights with limited exchange value as defined by the particular informal network).

than law. The risk of state domination may nevertheless push some owners to abandon the formal sector in favor of even a degraded form of possession in the informal sphere.⁸⁵ This explains the otherwise puzzling situation in which there are few takers for formal property rights as resource users look instead to self-help or to organized crime to acquire and hold on to their possessions.⁸⁶ The possibility of exit to the informal sphere alleviates dependence on the state and undermines the state's power to set the "price" for formal property rights. The dependence of owners on the state is thus a function of the state's monopoly on the supply of property rights within its territory.⁸⁷

CONCLUSION

This Article concerns the political uses of private property rights. While property's economic uses have often been addressed,⁸⁸ few scholars have considered the political uses of a system of property

⁸⁵ I have argued elsewhere that this explains phenomena like the persistence of informal kiosks in places like post-Soviet Russia where formal ownership represents vulnerability to the state. See Katz, *supra* note 12, at 112 ("Moscow storefronts in the 1990s . . . were left unused while Russia made the transition to capitalism because too many regulatory and private entities had the power to veto any particular use . . . of these storefronts." (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 633-42 (1998))).

⁸⁶ See, e.g., Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1010 (2006) (arguing that, in the absence of social order, people will "resort to competing legal, normative, and coalitional enforcement mechanisms"); cf. Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709, 719-20 (2005) (suggesting that property owners may eschew formal state protections when they are too costly).

⁸⁷ There are echoes in this claim of Barzel's attempt to define the scope of the state in terms of its power to enforce contracts within a region. BARZEL, *supra* note 32, at 23.

⁸⁸ See DE SOTO, *supra* note 33, at 63 ("Property . . . is not mere paper but a mediating device that captures and stores most of the stuff required to make a market economy run."); DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 6 (1981) ("The security of property rights has been a critical determinant of the rate of saving and capital formation."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32 (6th ed. 2003) ("[L]egal protection of property rights creates incentives to exploit resources efficiently."); ADOLF WEBER, *IN DEFENCE OF CAPITALISM* 30-34 (H.J. Stenning trans., 1930) (explaining the economic significance of property rights). Theorists who explore the link between ownership and economic growth assume that *formal* property rights are more effective than *informal* property rights. See DE SOTO, *supra* note 1, at 158-63 (asserting that formal property rights lead individuals to use resources more efficiently). But see Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397, 453 (2008) (challenging the assumption that formal property rights are necessarily more efficient than informal ones).

rights from the perspective of state functioning. Those who write about the “public nature” of ownership have been concerned primarily with its uses as a tool for achieving moral ends, for example a more distributively just or virtuous society.⁸⁹ My aim has not been to join debates in moral philosophy about how we might justify particular burdens that states impose on owners. Rather, it has been to describe in a new way the basic building blocks of state-owner relations and so to illuminate the phenomenon of governing through owners.

The phenomenon of governing through owners is pervasive. It suggests a political role for private property rights not usually accounted for in the normal discourse about property and freedom. The usual view of the balance of power between state and owners suggests that the state cedes ground to owners when it defines and protects private property rights. But the special uses of a system of private property rights as a tool for governance suggests that this is not at all the whole story. States gain power too when they guarantee property rights. It is not enough to consider the contrast between *private* and *public* ownership, and what this means for our freedom to make certain kinds of decisions for ourselves—that is, to set private agendas for things. We need also to think about the contrast between *formal* and *informal* ownership, and what this means for our *vulnerability* to the state and its demands. Private property rights do not straightforwardly constrain state power; in some circumstances, they enhance it.

⁸⁹ See, e.g., J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 463 (1975) (considering the function of property in affirming liberty and autonomy); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 137 (2009) (suggesting that the distribution of property rights be judged “by the degree to which they” make possible greater “human flourishing”); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 768-78 (1999) (offering a theory of takings law “that accommodates the values of social responsibility”).