The Human Right to Private Property

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THE HUMAN RIGHT TO PRIVATE PROPERTY

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For private property to be legitimately recognized as a universal human right, its meaning should pass the test of self-imposability by an end. In this Essay we argue, negatively, that the prevailing (libertarian) understanding of private property cannot plausibly face this demanding standard and, affirmatively, develop a liberal conception which has a much better prospect of facing property’s justificatory challenge. Private property, on our account, is an empowering device, which is crucial both to people’s personal autonomy (understood in terms of self-determination) and to their relational equality (understood in terms of reciprocal respect and recognition among persons). The liberal conception of the human right to property has both vertical and horizontal significance—it implies respect from both the public authority and other individuals—which means that it is thoroughly political but not necessarily statist.

Our account generates important implications, both domestic and transnational ones. Domestically it implies that whereas some property rights should be subject to strong constitutional protection, state law should facilitate other types of private and non-private property institutions, and these property institutions may well be subject to nonowners claims to access and, more broadly, to being treated respectfully. Furthermore, our conception of the human right to property requires that everyone must have the unusual authority typical to full-blown private ownership. Transnationally, our analysis highlights a freestanding dimension of relational justice, which is relevant across borders even given that our distributive obligations are statist. This injunction of relational justice in transnational interactions questions the adequacy of the current state of the law, according to which these interactions are mainly governed by choice of law rules that conceptualize them as wholly subsumed under the capacities of the parties as citizens of their respective polities.

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I. INTRODUCTION

The Universal Declaration of Human Rights announces that “[e]veryone has a right to own property,” and that “[n]o one shall be arbitrarily deprived of his [or her] property.”1 To the extent that this announcement reflects an intuitively compelling implication about the status of individual natural persons as free and equal,2 there is a series of persistent (and rather consequential) puzzles regarding the nature of this particular human right, if it is one.

The right to private control of property, perhaps more than any other human right, is—as Jeremy Bentham famously announced—a product of the law or, more precisely, a creature of what John Austin would later call a command issued by the sovereign.3 This positivistic overtone becomes clearer (but not more analytically correct) in contemporary society, where an increasingly significant part of the rights relating to property is the product of top-down legislative or regulatory regimes.4 How can these seemingly contradictory features of the right to private property co-exist? In which sense, if any, can the right to private ownership limit—or may even transcend—state sovereignty, given its profound dependency on political authority? And how should the answers to these questions affect our interpretation of the Declaration’s use of arbitrariness that should circumscribe the limits of states’ authority to take property?

Furthermore, a textual reading of the Declaration seems to echo a very specific understanding of property as a human right, one which focuses solely on people’s formal opportunity to become owners and conceptualizes violation only in terms of deprivation of preexisting recognized rights to private property. This private law libertarian understanding of property, as we shall call it, also dominates, again implicitly,


2 The qualified language of the test attests to the fact that the right to property is not included in all the international instruments that form the canon of human rights law. See, e.g., MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available in http://opil.oulaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e864?rskey=K1Flqx&result=10&prd=EPIL.


4 The “positivistic” view under discussion should not be confused with legal positivism (of either Bentham or Austin); the alleged intimate connection between the state and a system of private property reflects Bentham’s approach to political morality, rather than to the classical question of jurisprudence, what law is.
contemporary international investment law,\textsuperscript{5} which may not be surprising given its crucial (even though, again, quiet) contribution to the development of a practice which Martii Koskenniemi terms “informal empire,” namely: “a horizontal structure of horizontal relationships between holders of subjective rights of dominium—a structure of human relationships that we have accustomed to label ‘capitalism.’”\textsuperscript{6} Whatever the virtues of an international system of commerce based on such a right may be, shouldn’t its vices at least make us pause before we embrace its underlying private law libertarian conception of property as the one that best accounts for the status of private property as a human right?

Our inquiry of these questions in this Essay begins with a brief sketch of our understanding of the most plausible case for conceptualizing private property as a human right, which is indeed quite different from this (in)famous rendition. Private property, on our account, is an empowering device, which is crucial both to people’s personal autonomy (understood in terms of self-determination) and to their relational equality (understood in terms of reciprocal respect and recognition among persons). More specifically, private property implies respect from both the public authority and other individuals, and it is this two-dimensional respect for natural persons’ status as free and equal—both vertical \textit{and} horizontal—which is, as we argue in Part I, the normative core of the human right to private property.\textsuperscript{7}

This understanding means, as we claim in Part II, that the human right to private property is neither pre-political nor is it apolitical; quite the contrary: private property expresses a fundamentally political idea of being with others in the world. But our proposed account of the human right to private property also explains why it is not contingent in the Benthamite sense. Admittedly, to be valid and viable private property obviously requires a conventionalist constitution, elaboration, implementation, and enforcement. But given that a significant part of the normative weight of the human right to private property does not rely on its aggregative role, but rather on its prominent place in establishing and sustaining people’s inter-personal relations as free and equal persons, these are conventions that, all else is being equal, any humanist polity must develop. And because an important subset of the normative value of private property is fundamentally horizontal, rather than only vertical, these conventions are not essentially statist. We do not deny the comparative advantages of the liberal state (in terms of both competence and legitimacy) in promulgating these conventions. However, we insist that private property

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\textsuperscript{7} We say \textit{natural persons} in order to emphasize the limits of our proposed normative account of the human right to property. Thus, artificial persons—including, in particular, business organizations (but also communities of various kinds)—stand beyond the scope of the inquiry.
need not depend on the state for its (legitimate) existence. This conceptual point is further motivated by the increasingly significant role that interpersonal transnational interactions play in our lives.

Indeed, our proposed account of the human right to private property entails significant implications both in the domestic and the global domain, which we outline in the last Part of this Essay. Domestically, it sets important constraints on the scope of the claims made on behalf of private property. Since its core justification is rooted in our social relations as free and equal persons, the scope of private property is partially determined by reference to this ideal of social relations. Furthermore, appreciating the significance of private ownership to our social existence as free and equal implies that each of us is entitled to be a private owner not only in the uncontroversial sense that none should be denied the formal opportunity to become an owner, but also in the more demanding sense that our conventions (laws) that govern private property demand none should be denied the real opportunity to secure this status.

Our foray into the transnational domain is more preliminary and speculative, but not less important. We argue that transnational interactions involving private property should be based on the same interpersonal respect that undergirds this system of property in domestic settings. This proposition implies that the scholarly debate as per the (statist or cosmopolitan) scope of distributive justice obscures a freestanding dimension of relational justice, which is relevant across borders even if, for the sake of the argument, our distributive obligations are statist. Furthermore, the injunction of relational justice in transnational interpersonal interactions questions the adequacy of the current state of the law in which these interactions are governed mostly by choice of law rules that conceptualize them as wholly subsumed under the capacities of the parties as citizens of their respective polities.

II. PROPERTY, AUTONOMY, AND RESPECT

Let us assume, with Jeremy Waldron, that private property rules are typically organized “around the idea that contested resources are to be regarded as separate objects each assigned to the decisional authority of some particular individual (or family or firm).”

8 Jeremy Waldron, Property Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 3, 6 (Dennis Patterson ed., 1996).
Our task here is not to address these debates at large. Rather, we seek to investigate the possibility of conceptualizing private property as a human right.9 This inquiry implies that we need not consider certain justifications that prominently figure in positivist or statist accounts of private property. Whatever its virtues may be by way, for example, of efficiently allocating scarce resources, economizing on communication costs, facilitating civic virtues, or decentralizing governance, these collective benefits do not qualify as even putative premises for property’s status as a human right. If property rights should be able to claim universal validity and thus justifiably supersede otherwise legitimate decisions of government officials, legislatures, and even constitutional assemblies, the moral status of basic human rights ought to be conspicuously clear so as to meet the bar of legitimacy—and, all else is equal, demand coercive enforcement—irrespective of any state-democracy pedigree.10 This means that if property rights can plausibly be regarded as human rights, it must be due to their significance for the maxim of treating every person as a human being whose dignity—or normative agency—fundamentally matters (or something along these lines).11

One possible way along this path is offered by libertarians (like Robert Nozick) and private law libertarians (such as Ernest Weinrib and Arthur Ripstein) who interpret this maxim as being exhausted by people’s formal independence (or negative liberty).12 We (and others, of course) have discussed this interpretation and its pitfalls at some length elsewhere,13 so we will not rehearse (most of) our qualms here. Instead, we turn

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9 From another perspective, our inquiry is limited to the study of private property as a human right, and while we think that some of our conclusions may be relevant to other human rights, others might not, indeed should not, travel outside our limited domain.

10 It may even be plausible to suspect that some human rights (property among them) are prerequisite for democratic rule. In particular, it may be a prerequisite for the very possibility of forming a democratic society whose members regard one another as substantively free and equal agents. See Avihay Dorfman, Property and Collective Undertaking: The Principle of Numerus Clausus, 61 U. TORONTO L.J. 467, 515 (2011).

11 See respectively Ronald Dworkin, Justice for Hedgehogs 315 (2011); James Griffin, On Human Rights 44-58 (2008). As the text implies, we reject a strict separation between law and morality in our (tentative) approach to the concept of human rights. Needless to say that defending this approach to human rights is beyond the scope of this Essay. For some of the challenges it must face, see Rowan Cruft et al., The Philosophical Foundations of Human Rights: An Overview, in The Philosophical Foundations of Human Rights 1, 4-23, 31-40 (Rowan Cruft et al. eds., 2015).


immediately to a competing interpretation, which situates private property on more satisfying normative foundations by following H.L.A. Hart’s observation that if people are to lead the fully human life they are entitled to, they should have a right to self-determination; and while this requires a measure of independence, it “is not something automatically guaranteed by a structure of negative rights.”

People have a right to private property, in this view, because, and to the extent that, it is conducive to self-determination (or self-authorship), namely: to our right “to have, to revise, and rationally to pursue a conception of the good.” And private property is a human right—and not a right simpliciter—to the extent that it is crucial to our self-determination and insofar as it is made equally available to us all. A regime of private property complies with such demands if it provides all individuals a like entitlement to the authority over others with respect to certain resources when, and to the extent that, this authority secures the possibility of developing their own life-plans rather than the plans imposed on them by other persons or by society at large. The unique contribution of private property to our autonomy lies in the forbearance private property demands, whose significance is not captured by the assurance of having the “stuff” we may need or want, but is rather focused on the requirements it places on others, in both the vertical and horizontal dimensions.

The vertical dimension—the respect private property requires from governments—is surely important but quite trite. By contrast, clarifying the demands of private property in the horizontal, interpersonal dimension is helpful for both elucidating the potential virtue of private property beyond the state and underscoring the significant justificatory challenge of according private property this status of a human right. Morris Cohen’s classic contribution on Property and Sovereignty can serve, especially in a conference on Sovereignty and Property, as a useful springboard for this purpose.

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16 Developing a life-plan implies, as we have just noted (following Rawls), the ability to revise, which both explicates and justifies the unique (oftentimes semi-immutable) status within private property systems of the power to alienate and more generally to exit. See Dagan, supra note 13, at 163-64.
18 It is also important to explore the complex interconnections between these dimensions. This inquiry is beyond the scope of this Essay.
20 There are, to be sure, a few aspects in which we find Cohen’s account unsatisfactory, notably as per his
While Cohen did not commit himself to any definition of property, he highlighted two crucial features of property rights. One feature is that “a property right is not a relation between an owner and a thing, but between the owner and other individuals in reference to things.” The other is that the private authority which typifies private property implies that property law does not merely protect people in their possession. Rather, “the dominion over things” that “the legal order confers on those called owners” empowers them in their interpersonal relations and thus also implies “imperium over [their] fellow human beings.”

As Cohen recognized, property’s intrinsic relationality and its unique form of empowerment are importantly connected. But whereas Cohen looked at the way the former entails the latter, it is no less important to appreciate the inverse relation. Private property vests practical authority in an individual (the owner) to fix, in some measure, the normative discussion of the justifications of property (Cohen, supra note 19, at 15-21) and his claim that outside “organized society [] there are things but clearly no property rights.” Id., at 12. We focus on, and build upon, only the three propositions for which Property as Sovereignty became canonical: property’s intrinsic relationality; property as empowerment; and property’s justificatory challenge.

21 What follows can also be read as a response to the recent invocation (or resurrection) of approaches which reject these features, insisting that property is first and foremost the law of things that can, indeed should, be analyzed and defended irrespective of its relational implications. See ALAN BRUDNER, THE UNITY OF THE COMMON LAW ch.3 (2013, with Jennifer M. Nadler); J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Henry E. Smith, Property as the Law of Things, 125 HARV. L. REV. 1691 (2012). For more elaborate critique, see respectively Hanoch Dagan, Liberalism and the Private Law of Property, 1 CRIT. ANAL. L. 268 (2014); Avihay Dorfman, Private Ownership, 16 LEGAL THEORY 1 (2010); Christopher Essert, Property in Licenses and the Law of Things, 59 MCGILL L. J. 559 (2014); Avihay Dorfman & Assaf Jacob, The Fault of Trespass, 65 U. TORONTO L.J. 48 (2015). Cohen’s approach—and ours—need not imply disregard to the significance of the person-resource relationship, and it is clearly divorced from the view of property as a formless bundle of rights. But it insists that property is irreducibly relational.

22 Cohen, supra note 19, at 12. Here Cohen obviously followed Wesley Hohfeld’s insight that as a species of “jural relations” property rights imply rights vis-à-vis people, and not things. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 720 (1917). This analytical insight goes even further back to Kant’s doctrine of private right which is a doctrine of fundamentally relational rights. See ERNEST J. WEINRIB, THE JURISPRUDENCE OF CORRECTIVE JUSTICE ch.2 (2016) (unpublished manuscript) (on file with the authors); RIPSTEIN, supra note 12, at 93. To this extent, we share two of Kant’s most basic conceptual observations concerning the structure of private ownership: its relational character and the centrality of ownership’s normative power. As will become clear in due course, however, we part ways by insisting that the latter feature is not a natural right and that state support for the poor is not sufficient to render such right legitimate.

standing of others in relation to an object. Indeed, owners do not only have the power to control an object against non-owners’ competing claims, but also the authority—the normative power—to determine what others may or may not do with this object. This unusual authority, which commands deference regarding both what an owner plans to do with an object and her decision concerning the permissibility of others using her object, implies—as Cohen’s metaphoric use of imperium suggests—that private property requires non-owners to defer to owners’ authority to fix their own normative situation.

Herein lies the complex interaction of property’s empowerment and its relationality. Private property empowers owners not only by securing them the means of self-determination but also, and even more significantly, by making their intentions, and hence their subjectivity, a source of demands on others’ conduct. A non-owner’s respect of the owner’s right to property is part of the former’s respect of the latter’s right to self-determination exactly because it implies a recognition of the owner as reason-providing for that non-owner. This sense of empowerment is thus relational through and through. It also helps refine Cohen’s insistence that our (power-conferring) system of private property is responsible for the vulnerabilities of non-owners. As Cohen argued, my power to control “things [that] are necessary to the life of my neighbor . . . confers on me power, limited but real, to make him do what I want.” This meaning of “property as power” is certainly important. But it only captures private property’s “power as influence,” namely: the causal relation between ownership and non-owners’ vulnerability, which is necessarily contingent. Appreciating the normative power accorded to owners highlights a non-

24 See Dorfman, supra note 13, at 405-07.

25 Thus, Chris Essert mischaracterizes the view outlined in the main text above by supposing that the duty against committing trespass sets the basic norm of private ownership. See Christopher Essert, Legal Powers in Private Law 41-43 (unpublished manuscript). But this supposition is false. As just mentioned, the basic normative setting is the normative power and its correlative liability of non-owners. The duty against trespassing (which, contrary to Essert’s position, must be a duty against unauthorized use of another’s object, rather than a duty against using another’s object as such) is best seen as a necessary outgrowth of this more basic juridical relationship of power/liability. Another point worth emphasizing at this stage (because it shows up in Essert, supra, at 40-41) is that the special relational authority vested in private ownership does not imply that owners get to determine the content of the rights and the duties that arise in the course of exercising their normative powers as owners. See Dorfman, supra note 6, at 492.

26 Cohen, supra note 19, at 12.

27 Cohen, supra note 19, at 11.

28 Indeed, our emphasis on the relational, horizontal dimension should not be interpreted as suggesting that a given property system can be evaluated without regard to the “power as influence” aspect, which necessarily hinges on the system’s overall shape.
contingent sense of non-owners’ vulnerability because law’s demand that they respect the owner’s authority is unmediated by any further facts about the world.\footnote{For a recent discussion of the distinction between these two meanings of power, see Essert, supra note 29, at § 4.B.}

As Cohen intimated, the interpersonal implications of the normative power owners enjoy vis-à-vis others are both significant and not easily defensible, because for these others private property potentially poses a normative threat. Cohen was careful not to necessarily condemn private property for having these attributes. Rather, he insisted that “it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.”\footnote{Cohen, supra note 19, at 14.} This analogy to the challenge of legitimating government may have been aimed at highlighting property’s justificatory challenge, but it in fact fails to fully capture its depth, because unlike public officials, a private property owner enjoys some measure of liberty to posit her subjectivity—her intention, judgment, and, indeed, point of view—as a source of legal claims over anyone else. When public officials occupy a position of discretionary authority over others, they purport to speak and act in the name of the state; therefore, their demands ought to be justified by reference to the reasons that render legitimate the state’s authority, say, the good of democratic legitimation, the demands of right reason, and so on. Private owners, by contrast, purport to influence the practical deliberation of others not merely by way of reporting or identifying such independently-existing reasons for action, but rather by forming the expectations that others recognize their judgments as reason-providing for them. But subjecting non-owners to such an authority—typified, as it is, by a profound “accountability deficit”—offends the moral equality that exists between owners and non-owners by virtue of their shared status as private persons, which means that the demand for an adequate justification of private property is particularly pressing.\footnote{See Dorfman, supra note 7, at 498-501.}

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As we hinted at the outset, it is unclear—at least to us—that this significant justificatory challenge can be met.\footnote{An adequate inquiry of this question probably requires to compare a world governed by the most justifiable form of private property as a human right (such as the one developed herein) and one which successfully uproots private property. It is an open question, one which happened to plague Marxism, what counts as success in doing away with private property.} But here again our current task is rather modest: to articulate the most plausible understanding of private property that may account for the widespread recognition of private property as a human right. Some of the reasons for the relative
acceptability of this understanding will come up only in Part IV where we spell out some of its implications. At this stage, it is enough to establish why the liberal conception of property we offer here fares better than its major rival—the libertarian conception of property we mentioned at the outset.

In its libertarian, or private law libertarian, understanding, property is part—indeed the cornerstone—of a scheme of entitlements for interpersonal interactions that is guided by one underlying commitment: the ideal of people relating as formally free and equal persons. This ideal implies that “each person is entitled to be his or her own master . . . in the contrastive sense of not being subordinated to the choice of any other particular person.” Accordingly, it requires that no one gets to tell you what purposes to pursue and is therefore “not compromised if others decline to accommodate you.” Quite the contrary: “Because the fair terms of a bilateral interaction [in this view] cannot be set on a unilateral basis, considerations whose justificatory force extends only to one party are inadmissible.”

Such a clear indictment against any form of interpersonal accommodation exacerbates the alarming implications of private property’s spectacular private authority—and the concomitant entailed vulnerability (if not subordination)—for non-owners. Recall that to qualify as a human right, private property needs to comply with (if not contribute to) the maxim of treating every person as a human being whose dignity—or normative agency—fundamentally matters; it needs, in other words, to pass the liberal test of “self-imposability by an end.” It is hard to see how a structure that systematically fails to respect people as substantively free and equal persons can be a plausible candidate for a self-imposed law. Ascribing to non-owners, to whom the argument for property’s legitimation is first and foremost owed, any form of consent to such a system is not merely hypothetical, but rather counterfactual. Moreover, the predicament of such a system’s legitimacy is not significantly ameliorated by the private law libertarians’ subscription to a welfare system and other public law devices committed to fulfill a public duty to support the poor so as to secure everyone’s independence.

Private law libertarianism follows the traditional liberal notion of division of labor between the responsibility borne by the state to provide a fair starting point for all and the responsibility of the individual to set and pursue her ends using her fair share. By

33 RIPSTEIN, supra note 12, at 4.
34 Id. at 14, 34, 45.
35 WEINRIB, supra note 12, at 36.
36 BRUDNER, supra note 21, at 142.
37 See RAWLS, supra note 17, at 268-69 (arguing that whereas state institutions, such as the tax system, enforce rules of distribution, private law institutions are supposed “to leave individuals and associations free to act
assigning all the responsibility for people’s self-determination and substantive equality—the ultimate values to which liberals (including private law libertarians) are committed—to the public law, this strategy indeed makes the legitimacy of private property wholly contingent upon the state, thus rendering private property and the (welfare) state mutually dependent at a deep conceptual level. 38 This is, after all, the deontological version of Bentham’s observation (mentioned at the outset) concerning property’s symbiotic relationship with the (Austinian) state. In that, private law libertarianism obscures the horizontal dimension of private law’s justification by collectivizing it. Furthermore, by placing the dissociated persons, whose only duty to one another is to avoid transgressing pre-politically fixed boundaries, at the core of private law, this conception of private property leaves intact, and so authorizes, the interpersonal vulnerability which is Cohen’s main concern, and ours. This is so because private law libertarianism supports non other than horizontal obligations of non-interference, to the exclusion of involuntary duties of interpersonal accommodation. 39 Thus, even if we assume—a dubious assumption, to be sure—that public law measures flawlessly trace and address the vulnerabilities such an unjust property regime generates, it would necessarily run afoul of the ideal of respecting and recognizing one another as substantively free and equal. Perhaps this worry may be set to one side in a world of perfect interpersonal independence. However, the world we occupy is radically different than that in the sense that relationships with other persons often affect our lives as free and equal persons in deep and profound ways. Therefore, the libertarian conception of private property cannot possibly address property’s justificatory challenge especially given the difficult accountability deficit which constitutes the unique private authority that typifies private property. 40

Indeed, if any conception of private property can hope to pass the test of self-imposability by an end, it must repudiate this vision of private law and private property. Such repudiation underlies the view of private property briefly outlined above. Indeed, for us the value of private property lies in a certain vision of being with others in the world. It hangs on the respect ownership implies from others—both other individuals and the polity as a whole—to the owner’s subjectivity and her right to self-determine according to her own conception of the good. Law’s recognition of the authority of owners in this view is not justified by reference to their aloofness—their property rights are not merely constraints

38 See generally WEINRIB, Poverty and Property, supra note 12.

39 See generally ARTHUR RIPSTEIN, PRIVATE WrONGS (2016).

on the permissible means of others; they are not merely limits (analogous to certain physical limitations) on what is available to non-owners. Rather, the authority of owners is founded on a requirement of reciprocal respect and recognition among self-determining persons. It is thus understood as part of a genuinely liberal private law that establishes frameworks of respectful interaction conducive to self-determining individuals, which are indispensable for any social setting where individuals recognize each other as genuinely free and equal agents.41

This conception of private law takes the canonical liberal commitment to individual self-determination (and not merely formal independence) and to substantive (and not merely formal) equality seriously. Therefore, it rejects the private law libertarian adherence to an uncompromising policy of no interpersonal accommodation, and casts instead our interpersonal relationships as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating a robust conception of relational justice. This notion of relational justice, which we develop and defend elsewhere,42 implies that non-owners’ right to self-determination must be treated with respect. Incorporating the demands of relational justice in private law and evaluating existing doctrines vis-à-vis such an ideal are complex tasks that are beyond the scope of this Essay.43 For our purposes it is enough to conclude with its undefended promise. If private law can indeed live up to the challenge of relational justice, then the autonomy-enhancing virtues of a conception of private property grounded on self-determination and reciprocal respect makes it an attractive candidate for the status of human right.

41 We do not deny that some such interpersonal practices arise independently of political authority, others are the unique creations of such authority, and yet an intermediate category of practices may require some degree of legal facilitation. However, except in the context of practices that are rightfully exempt from any legal treatment—either because legal enforcement might destroy their inherent moral value or since legal intervention might backfire by crowding out internal motivations—private law is deeply involved in setting out the terms of interaction amongst those engaging in the vast social domain of interpersonal practices. To be sure, insofar as social norms respond to the dictates of just relationships and are taken to have a broad obligatory nature so that they in fact govern people’s interpersonal relationships, they may suffice. But this is only because they would then be law-like. If, however, this is not the case—and it is hard to see how it could be the case in our contemporary social environment—delegating this responsibility to social practices is at best tantamount to indirect and opaque endorsement of private law libertarianism.


43 We begin to undertake these missions, in Dagan & Dorfman, supra note 40.
III. POLITICAL, BUT NOT NECESSARILY STATIST

A discussion of private property as a human right may be expected to treat it as pre-political or apolitical. Thus, a long tradition of natural lawyers presented private property as the pre-political baseline for our social contract, which as such sets the bounds of its legitimate demands.44 Private law libertarians, in turn, do not subscribe to this position—they allow for generous taxing and policing powers on the part of the state45; but for them the private law of property is apolitical: it pertains to “persons regarded as ends outside of human association”—to “morally self-sufficient” persons—and it should ignore any “common ends and member obligations even in a civil condition.”46

The understanding of private property sketched above is neither pre-political nor is it apolitical.47 As an empowering device property cannot be pre-political. To be sure, private property, as we will argue presently, is not purely conventionalist in the sense of being grounded in some express or tacit consent of the governed, at least insofar as the case for its status as a human right can be fully defended. But subscribing to a system that takes seriously the human right to private property is not entailed—as it is often presented by natural lawyers—from respect for autonomy’s prescriptions as per the legitimate limits of a social contract. Quite the contrary: empowering private individuals with the unique authority of ownership follows from the injunctions of such respect as per the way our social contract should actively design our interpersonal interactions.48

Indeed, the right to private property as we understand it expresses a fundamentally political idea of being with others in the world. Private ownership is not the same as a (natural?) duty to refrain from interfering with the external freedom of others; rather, it constitutes a common framework of property coordination49 structured around the owner’s demand for recognition from other persons. Private ownership is irreducibly political because no private individual living in the state of nature—or for that matter a private

44 See, e.g., NOZICK, supra note 12.
45 See, e.g., RIPSTEIN, supra note 39, at Ch.10.
46 BRUDNER, supra note 21, at 353. Modern Kantians, to be sure, are careful to admit that whereas the introduction of property rights is required by the right to independence, it also threatens this independence, and that this “conceptual tension” can only be broken by a transition to “the civil condition of law-governed society,” which fulfills the public-law duty to support the poor. RIPSTEIN, supra note 12, at 90. As Part II clarifies, we believe that this qualification underrates the justificatory challenge of private property. It is therefore not surprising that we find the response they offer to it inadequate. See infra text accompanying notes 65-68.

47 The argument here builds on Dagan, supra note 13; Dorfman, supra note 13, at 425-40.
48 Cf. HANOCH DAGAN & MICHAEL A. HELLER, THE CHOICE THEORY OF CONTRACTS Ch.3 (2016).
citizen of the state invoking her natural right to freedom—can legitimately claim the
authority over other persons with respect to determining their use of and access to property.

Political does not mean contingent or statist, however. Private property is not a
convention *simpliciter*; it does not serve only as a solution to a recurring coordination
problem (although it certainly plays this role as well). As a human right, private property
plays a crucial role, which we analyzed above, for both people’s self-authorship and their
relational equality. This role implies that this convention is very different from other,
garden variety conventions. By enacting or developing a convention of this kind society
empowers people “to become full agents” and to engage with others in relationships of
mutual recognition and respect. Given the human predicament, in which people’s
embodiment and development “involve dependent, interdependent, and mutually enriching
relationships with others,” any polity committed to respecting people’s dignity or
normative agency—that is: to human rights—is obligated to have (or establish) such a
convention.\(^51\)

This conclusion may justify the prominent role of the right to private property in the
constitution of liberal states. Entrenching vertical and horizontal respect to people’s
subjectivity—to their right to self-determination according to their own conception of the
good—nicely coheres with the traditional commitment of the liberal state to individual
autonomy and to substantive equality. The state is also, quite understandably, an obvious
locus for promulgating the right to private property. The state enjoys significant
comparative advantages—in terms of both legitimacy and competence—in performing the
necessary tasks of elaborating, implementing, and enforcing the right to private property
(in both its vertical and its horizontal dimensions) because even in our era of increasing
transnational interconnectivity the state is still “the most comprehensive legally-based
social organization of the day.”\(^52\) But acknowledging these advantages and thus
recognizing the central role of the state does not imply that the right to private property is
*necessarily* statist. In fact, in sharp contradiction to its private law libertarian counterpart,\(^53\)
our (thoroughly liberal) conception of the human right to private property is non-statist.

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\(^50\) As the text implies, we need not and do not take a position as to whether this convention arises by deliberate
design, incremental adaptation, or rather spontaneously, say, from “a general sense of common interest.”
DAVID HUME, A TREATISE OF HUMAN NATURE 490 (bk. 3, pt. 2, §2) (1765) (1739-1740). Cf. James E. Krier,

\(^51\) See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481,
520 (2008) (as per the convention of promise).

be sure, Raz also claims, in line with the discussion which follows, that this significance of state law does
not justify to exclusively concentrate on state-law or to neglect “other law-like phenomena.” *Id.*

\(^53\) See *supra* text following note 37.
The reasons for insisting on this characterization are only partly contingent. Contingently, it seems increasingly unsatisfying to limit our attention to the right to private property at the border given the receding social (as well as economic and cultural) significance of inter-state boundaries and the global reorganization of life in our time. The increasing presence—in terms of quantity, intensity, and quality—of transnational interactions certainly justify the urgency of thinking about property (as well as about contacts and torts, of course) as substantive concerns of international law. It is, in other words, quite curious to observe that alongside the development of substantive bodies of international labor law, international environmental law, or international IP law, the transnational substantive norms of private law—of property, contracts, and torts—are still prescribed mostly by reference to choice of law rules, namely: that our transnational interactions that involve these norms are still conceptualized as fully mediated by our national identities.

Herein lies the conceptual, non-contingent reason for the non-statist importance of the human right to private property. This right transcends the state because a significant part of its normative weight has nothing to do with our relationship with or through the state. The horizontal dimension of this right, as elaborated above, governs our interpersonal relationship, that is: our interactions with other persons in their capacity as private individuals, and not as co-citizens. Admittedly, even in this context the human right to private property depends for its effective instantiation on some institutional apparatus with legitimate enforcement powers. But because these relationships are not mediated via the state and their significance does not rely on their aggregate consequences, the right to private property—like the interpersonal human rights underlying private law more

54 The qualified language of the text derives from our recognition of the possible work of transnational law’s implicit endorsement of the dubious private law libertarian approach. See infra text accompanying notes 5-6.

55 Notice that this feature, which we hope to upset, would typify even the (otherwise attractive) program of a so-called “cosmopolitan law of conflict of laws” that seeks to denationalize conflict of laws doctrine in the sense of forcing it to ignore any domestic national legal objectives and “do justice to the transnational integration of democratic legal systems.” Florian Rödl, Democratic Juridification without Statisation: Law of Conflict of Laws Instead of World State, in AFTER GLOBALIZATION: NEW PATTERNS OF CONFLICTS AND THEIR SOCIOLOGICAL AND LEGAL RE-CONSTRUCTION 29, 45-46 (Christian Joerges & Tommi Ralli eds., 2011).

56 We do not claim that this feature is unique only to property rights. Indeed, this Essay can be read as a preliminary inquiry into the concept of universal horizontal human rights.
generally—is not, need not, and indeed should not be tied only to specific national systems.\textsuperscript{57}

**IV. IMPLICATIONS: CONSTITUTIONAL AND TRANSNATIONAL**

This unique status of the right to private property as conceptualized herein highlights its divergence from both its traditional natural law conceptualization and its traditional positivist understanding. Unlike the former, private property on our account is thoroughly political and thus part and parcel of our social contract, rather than a constraint on its legitimate content.\textsuperscript{58} But unlike the latter, the right to private property does not depend only on the sovereign’s prescriptions. The specific norms that guarantee the (vertical and horizontal) viability of this right are not necessarily state-based, and their content is constrained. In Part II we sketched the normative underpinnings of this constraint: the underlying justification of the right to private property as a human right which serves our right to self-determination and relational equality. It is time now to flesh out some of its more specific prescriptions and their implications for both the domestic and the global domains.

**A. Domestic Implications: Pluralism, Accommodation, Equality**

*Pluralism and Accommodation.* The domestic implications of this conception of the right to private property—and of private law more generally—are wide-ranging and their cumulative effects quite significant. Broadly speaking, a polity respectful of people’s right to self-determination and their relational equality must conceptualize private law as a set of ideal frameworks for respectful interaction between self-determining individuals. Indeed, as we argue elsewhere, only private law can form and sustain the variety of frameworks necessary for our ability to lead our conception of the good life; and only private law can cast them as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice. Hence the two animating principles of a liberal private law—structural pluralism

\textsuperscript{57} Cf. Hugh Collins, *Cosmopolitanism and Transnational Private Law*, 8 EUR. REV. CONT. L. 311 (2012). A full-blown investigation of the potentially universal scope of our conception of private law, grounded on the commitments to individual autonomy and relational equality, must be left to another occasion.

\textsuperscript{58} Our jurisprudential position, at least in the abstract way in which it is presented in the main text, can be further elaborated by reference to various strands of non-positivism (John Finnis’s rendition of natural law and a reconstructed version of Kant’s theory of natural rights are first to come to mind). That said, it can also be made compatible with various strands of legal positivism (especially those who emphasize legal positivism’s possible rejection of the moral/legal distinction, also known as the separation thesis).
and interpersonal accommodation.\textsuperscript{59} A discussion of these principles, let alone of their doctrinal implications, is far beyond the scope of this Essay. But mentioning them here is important because it helps to situate the human right to private property in the fabric of a private law that also complies with these underlying commitments, which in turn point out to two “admission criteria” this right must pass if it is to comply with the liberal test of self-imposability by an end.

Thus, the injunction of structural pluralism implies that alongside full-blown private property institutions typified by the unusual private authority discussed in Part II, private law should offer other property institutions that facilitate other types of interpersonal relationships (e.g., more communal or more utilitarian). In other words, rather than aspiring to exclusivity, private property functions best as part of a broad and diverse repertoire of property institutions—such as various forms of co-ownership—conducive to self-authorship.\textsuperscript{60} This prescription of heterogeneity entails important implications insofar as the scope of the claims for private authority encapsulated in full-blown private property is concerned. Recall that this unique private authority is crucial because—and thus insofar as—it is conducive to secure (vertical and horizontal) respect to people’s self-determination. Some property rights—a right to a basic home or home-like space is an obvious example—nicely fall, at least in our conventional understanding,\textsuperscript{61} within this framework.\textsuperscript{62} But the spectacular demands of the human right to private property do not follow from the normative foundations of other property institutions. Property rights that rely on such other justifications—namely: most types of property rights (especially in commercial contexts)—need not, and often should not, be absolute. (Needless to say that this prescription is also relevant—indeed crucial—in transnational contexts, especially as per the proper meaning of the right of property in international investment law.\textsuperscript{63}) In such categories of cases, and especially where nonowners’ claim to access the resource at hand is important for their own self-determination, owners’ dominion should be—as it often is—


\textsuperscript{61} For the recent debate on this front, see GREGORY S. ALEXANDER & HANOCH DAGAN, \textit{PROPERTIES OF PROPERTY} 309-20 (2012).

\textsuperscript{62} As the text implies, while we think that the selection criterion (significance to personhood) for the identification of the type of resources that can be the object of the human right to private property is universal, the specific identification of resources that comply with it (e.g., homes) is, to some extent, conventional. See \textit{Hanoch Dagan, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES} ch. 3 (1997).

\textsuperscript{63} See Arato, \textit{supra} note 5, at 261-71.
subject to limitations and qualifications, including at times to rights to entry of other (categories of) people.\textsuperscript{64}

\textit{Equality of Private Ownership}. There is another admission criterion which our account prescribes—another prerequisite to the legitimacy of treating private property as a human right worthy of rigid constitutional protection—which is particularly important to our preliminary defense of this right’s compliance with the test of self-imposability by an end. The human right to private property, which is premised on the significant role it plays in our social existence as free and equal, must reject the private law libertarian approach to the problem of inequality, in which poverty can be tackled by allowing non-owners to extend their scope of free action to involve the resources held \textit{by the state} (say, in the form of public spaces, public housing or, more generally, support for the poor).\textsuperscript{65} Indeed, while for private law libertarians turning non-owners into private owners may be one possible response to inequality or a possible side effect of such response, on our account it is the \textit{point}, and thus the core, of any acceptable response.\textsuperscript{66}

In this sense, our account resembles, and can indeed draw on, Waldron’s important claim that, unlike justifications to property that rely on a specific causative event (as in Locke’s claims of labor or Hegel’s claims of occupation), \textit{general} right-based justifications to property, which build on its importance as such, imply that every human being is entitled to private property.\textsuperscript{67} Thus, with Waldron and, more broadly, with contemporary liberal egalitarianism, our account supports a “\textit{radical}” redistributive program, governed by “a requirement that private property, under some conception, is something all [persons] must have.”\textsuperscript{68} However, perhaps because our inquiry is limited to the \textit{human} right to private property, and perhaps (relatedly) because Waldron defends a far less robust conception of

\textsuperscript{64} For more, see Dagan, \textit{supra} note 13, at ch. 2. The text hints at a structural difference between the appropriate constitutional analysis of rights, such as freedom of conscience, the scope of which at least roughly follows their scope as human rights, on the one hand, and—on the other hand—rights, such as private property, whose normative underpinnings implies a significant gap between their scope as constitutional rights and their proper scope as human rights. Developing this proposition is beyond the scope of our present inquiry.

\textsuperscript{65} Weinrib, \textit{supra} note 12, at 284-89; Ripstein, \textit{supra} note 12, at chs. 8-9.

\textsuperscript{66} Cf. \textit{Property-Owning Democracy: Rawls and Beyond} (Martin O’Neil & Thad Williamson eds., 2012).


\textsuperscript{68} See Waldron, \textit{supra} note 67, at 444.
private property, our account also departs from, and to this extent takes an even more “radical” turn than Waldron’s. State (or private law-based) provision of public access, however broadly defined and implemented, may supplement but never supplant private ownership for all, because such a provision cannot substitute the role of private ownership in structuring people’s interaction in and around external objects in relations of freedom and equality to each other. On our view, to play on Waldron, all persons must have the unusual authority characteristic of full-blown private ownership, rather than merely Waldron’s reference for “some conception” of private property.69

B. Transnational Implications: Beyond the Distributive Paradigm of Global (or Statist) Justice

The question whether, and if so—to what extent, these distributive obligations carry over to the global plane is a matter of lively scholarly (and public) discussion. Our analysis has no direct implications as to the debated question, namely: whether the scope of distributive justice is statist or cosmopolitan. But it exposes the hidden presupposition of both sides to this debate and offers a fresh avenue for exploring our transnational obligations.

As Thomas Nagel famously argued, the statist (which he termed political) conception of justice insists that, unlike humanitarian duties, demands of distributive justice stop at the border because only within the state—the “collectively imposed collective authority”70—each member plays a dual role “both as one of society’s subjects and as one of whose name its authority is exercised.”71 Indeed, for Nagel “the special presumption against arbitrary inequalities in our treatment by the system” is premised on and justified by the fact “that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences.”72 The state is special because it “makes unique demands on the will of its members—or the members make unique demands on one another through the state—and those exceptional demands bring with them exceptional obligations, the positive obligations of [distributive] justice.”73

Nagel’s claims have been criticized not only by cosmopolitans who argue that the concern for the fair distribution of resources is universal in scope. One important line of

71 Id., at 128.
72 Id., at 128-29.
73 Id., at 130 (the emphasis is ours).
argument, forcefully articulated by Joshua Cohen and Charles Sabel, is to dispute the exclusivity of the state as a locus in which “individuals are both subjects to law’s empire and citizens in law’s republic.”

Contemporary global politics triggers, on this view, intermediate stages between the robust demands of distributive justice and the minimal duties of humanitarianism, because they are typified by “a direct rule-making relationship between the global bodies and the citizens of different states,” as well as by “conditions of interdependence, cooperation, and institutional responsibility.” This criticism disputes Nagel’s sharp privilege of the state, but it implicitly shares his assumption that some sort of institutional mediation constitutes, rather than merely facilitates, demands of justice. Iris Marion Young’s critique, by contrast, does not accept this assumption, and is thus closer to our intervention. “[P]eople have obligations of justice to one another,” she claims, not due to these institutions; in fact, these institutions are only “instruments” in the service of discharging our interpersonal obligations which are premised on the “social connections of civil society.” Specifically, Marion Young identifies cases of “structural injustice” generated by “social processes,” which “put large categories of persons under a systematic threat of domination or deprivation” while enabling others “to dominate or have a wide range of opportunities.” Although in these cases there is no “direct relationship between an action of an identifiable person or group and a harm,” the producers of and participants in these structures “are implicated” in such injustices given their contribution to it, and are thus jointly responsible to “organize collective action to reform [these] unjust structures.”

Our analysis suggests that there is another dimension to the inquiry as to our transnational obligations, one that supplements (rather than supplant) whatever obligations we have on the global level from either humanitarianism or distributive justice. This dimension turns neither on our role as co-participants in global institutions nor on our involvement in unjust structures. This dimension is profoundly relational. It is rooted in our unmediated demands for justice as persons whose interpersonal transnational interaction should be governed by reciprocal respect, which, in turn, aspires to inform the entitlements that (ex ante) determine the terms of these interactions, rather than merely respond to their (ex post) aggregate effects. We thus argue that in an era typified by extensive transnational interpersonal interdependence we can no longer analyze these relationships solely through the prism of the private international law. The problem with

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75 *Id.*, at 169.
77 *Id.*, at 114.
78 *Id.*, at 115, 118-23.
this traditional body of law is that it views the parties as citizens of their respective polities and, so, fails to make sufficient normative space for their status as persons as well. This is why these choice-of-law rules must be supplemented with this more foundational layer of mandatory norms of interpersonal human rights.79

* * *

This is obviously a broad claim that we cannot develop here.80 For now, it is enough to identify, rather than pursue, its possible implications insofar as the human right to private property is concerned. Consider the recent predicament of members of numerous rural communities, especially in developing countries, whose reliance on access to land is threatened by transfers of land they do not hold formal title to. As one report documents, in many of these large-scale land acquisitions—the so-called land rush (or green rush)—“those who are selling or leasing land are not the ones who are actually using it,” a situation often generating displacements.81 The formal legal regime in the developing transnational markets where these transfers take place allows potential buyers to accept as a given, and indeed rely on, the property rights as they are prescribed by the host country, because the conflicts of law rule pertinent to land points out to the lex situs, namely: provides that title will be determined according to the law of the jurisdiction in which the property is situated.82 There is, to be sure, an exception to this rule, dealing with grave infringements of human rights that the courts of other countries would refuse to sanction. But the rare cases in which this exception was invoked dealt with deprivations of hitherto recognized property rights, such as a Nazi statute that purported to strip fleeing German Jews of their rights by annulling their German citizenship.83

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79 We do not advocate the substitution of private international law with a full-blown body of international private law in recognition of the justifiably local features of our private law doctrines, which derive from their dependence on contextual considerations, both internal to the particular social practices in which they are situated and external to it, including the liberal state’s commitments to distributive justice and democratic citizenship. See Dagan & Dorfman, supra note 40. Cf. Amnon Lehavi, Land Law in the Age of Globalization and Land Grabbing, in RESEARCH HANDBOOK ON COMPARATIVE PROPERTY LAW * (Michele Graziadei & Lionel Smith eds., forthcoming 2016) (emphasizing the enduring local dimension of land law). This limitation does not undermine the significance of our claim, because by focusing on the human right to private property our thesis is limited to the prescriptions of the minimal requirements of property systems.


82 See, e.g., Peter Hay et. al., Conflicts of Laws 1231 (5th ed. 2010).

At this point, our account of the human right to private property does not offer a quick formula for resolving the new challenging encounters between sovereignty and property as exemplified by the global land rush. But it does allow us to see the inadequacy of the traditional private international law and the main ways in which it needs to be revised. The required reform has two aspects: substantive and structural. Substantively, our account entails a different understanding of the concept of “grave infringements” of the human right to private property; structurally, it implies that the obligation to respect this right is not only vertical, but also horizontal.84

We begin with the structural aspect which is particularly important in the land rush context that is often typified by unrepresentative, indeed unaccountable, governments.85 Because the significance of the human right to private property is not limited to people’s relationships in their capacity as citizens, the demand to respect the property claims of members of these rural communities is not directed merely to their governments or to courts of other jurisdictions. The legality of the vertical interactions between the buyer and the state and between the state and the displaced person cannot render redundant the horizontal dimension of interaction between the buyer and the displaced person. Part of the value of the human right to private property, we argued, lies in its horizontal dimension; a dimension which is non-statist and thus does not turn on the mediation of choice of law rules. This means that the human right to private property commands the direct—viz., unmediated—respect of other participants in the transnational practice of private property. Insofar as the global land rush involves violations of the human right to private property, “buyers” are participants in, and not merely implicated beneficiaries of, these infringements. The buyer who fails to respect the displaced person in connection with the latter’s entitlement to control the purchased land commits an international private wrong.

But how could these land transactions constitute violations of the right in question? They may not count as rights’ violations as long as traditional private international law

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84 We acknowledge, of course, that the structural reform may also be more difficult to implement because this would require an institutional and procedural framework, which, in turn, may place constraints on the content of the human right to private property. (To fully understand legal—as opposed to moral—rights, one indeed must attend to their institutional instantiations.) Studying these dimensions, however, is beyond the scope of this Essay. For our purposes it is enough to add that even if they are unlikely to develop, a revision of the choice of law exception along the lines of the substantive reform can serve as a “second-best” solution.

defers to domestic property rules save for outrageous cases of expropriations we mentioned above. But this traditional regime is inadequate not only because it fails to respect (as we have just mentioned) the horizontal dimension of the human right to private property, but also because this right is not only attacked in cases of exercise of excessive deprivation of recognized property rights. Quite the contrary: the human right to private property is also undermined if a state’s system of property fails to recognize people’s claims to private property in ways that are flatly inconsistent with the normative foundations of that human right. More specifically to the cases at hand, by limiting the scope of putative infringements of the human right to private property to expropriations (outrageous or not), the traditional approach improperly subscribes to a private law libertarian understanding of property, thus marginalizing—or maybe even eradicating—its liberal premises of self-determination and relational equality. Substituting this conception with the liberal conception of property we developed above implies that the human right to private property can also be violated by omission, namely: by a failure to recognize such a right even where both self-determination and relational equality mandate such recognition. This means, as we argue elsewhere, that there may well be cases—such as, possibly, those of the rural communities affected by the land rush—where although land users lack formal title, their claims are sufficiently backed by these foundational property values that they must be recognized and secured before any other measure of economic development is adopted, so that a failure to do so should be deemed an arbitrary deprivation of their human right to property, properly conceived.86

V. CONCLUDING REMARKS

For private property to be legitimately recognized as a universal human right, its meaning should pass the test of self-imposability by an end. Because the private law libertarian understanding of private property cannot plausibly face this demanding standard, it must be rejected notwithstanding its long use (and abuse) in transnational contexts. The liberal conception of private property, as articulated in these pages, has a much better prospect of facing property’s justificatory challenge. This alternative conception is grounded in our rights to self-determination and relational equality and thus has both vertical and horizontal significance, which means that it is thoroughly political but not necessarily statist. The liberal conception of the human right to property implies that some property rights should be subject to strong constitutional protection. But it also implies that state law should facilitate other types of private and non-private property institutions, that these property

institutions may well be subject to nonowners claims to access, and (most significantly) that everyone must have the unusual authority typical to full-blown private ownership.

Taking the human right to private property (in this liberal interpretation) seriously entails a new equilibrium between property and sovereignty. On the one hand, it disavows the broad deference of traditional international law to states’ schemes of property rights, deepening the intrusion to their sovereignty in the name of the human right to private property beyond the existing category of outrageous expropriations. 87 But on the other hand, our proposed interpretation of that right also upsets the quick association, which typifies contemporary international investment law, of every diminution of an owner’s estate with an infringement of her human right to property and may thus supply the necessary normative underpinning to some recent voices for revising this view that overly interferes with states’ sovereignty. 88

87 It should, however, be noted that breach of international law has already been used to justify such an intervention. See Kuwait Airways Corp. v. Iraqi Airways Co., [2002] 3 All E.R. 209 (H.L.).

88 For these voices, see Arato, supra note 5, at 263-64.