

Liberalism and the Private Law of Property

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Abstract

This essay reviews Alan Brudner's neo-Hegelian theory of property. It critically analyzes Brudner's conceptualization of the moral significance of property for private sovereignty, his understanding of the relationship between individual independence and self-determination, and his account of what makes private law private. I argue that Brudner is wrong on all three fronts and, furthermore, criticize his account of the market's putative legitimization of property and public law's alleged amelioration of the injustices entailed by a private law libertarian scheme.

Notwithstanding these failures, I salute Brudner's ambitious and provocative project not only due to its many insights, but also because it helpfully elucidates the main strands of justification that property law must face. Indeed, a credible theory of property-for-self-determination must begin by remedying Brudner's errors as per the moral significance of property for private sovereignty, the relationship between independence and self-determination, and the distinctive nature of private law. This essay provides preliminary suggestions on all three fronts.

Introduction

The publication of a revised edition of Alan Brudner's *The Unity of the Common Law*¹ deserves an intellectual celebration. Brudner's book is a tour de force of Hegelian jurisprudence. It offers a profound—and profoundly challenging—account of private law (or, as he calls it, transactional law) in its entirety as well as no less ambitious accounts of the nature of both adjudication and legal theory, and a harsh critique of both formalism and functionalism. This essay engages only one piece of this masterful tapestry, although one which may, I think, prove crucial to some of the other themes Brudner develops. To simplify my exposition, I will refer to this piece as “Brudner's project.”

Brudner's project, as I understand it, is to defend the legitimacy of a robust law of property, one that respects both people's claim to independence and their even more fundamental claim to self-determination. Developing such a defense is a real challenge for two reasons. The first reason—that for property law to be legitimate it needs to be

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¹ Alan Brudner, *The Unity of the Common Law* (with Jennifer M. Nadler) (2d rev. ed. 2013). Subsequent references appear parenthetically in the text.

(roughly speaking) acceptable not only to its beneficiaries, but rather to us all—is quite familiar (think, for example, of the seminal contributions of both John Rawls and Robert Nozick). The second reason may be more surprising: a legitimate property law in a liberal society must be, at least at its core, part of private law, rather than public law. Both prescriptions, Brudner insists, derive from “the end of a liberal polity,” which is “to manifest in a public world the claimed end-status of the individual subject—to make that claim an objective reality” (28).

Brudner’s complex answer to this challenge is tormented and it eventually fails. But I believe that the journey is worth his while and ours. His project helps clarify, as I have just hinted, the strands of justification our property law must face. Moreover, the reasons for its failure—Brudner’s indefensible conceptualization of the moral significance of property for private sovereignty, his faulty understanding of the relationship between independence and self-determination and their respective roles in the law governing our interpersonal affairs, and his erroneous account of what makes private law private—point to a better account of the normative foundations of property law. Or at least so I argue.

I. Liberal Property with Atomistic Foundations

Ownership, Brudner argues, “is a relation between a human being and a thing through which that human being becomes validly the master or end of the thing,” i.e., “someone for whom that thing is rightfully a means” (96). One becomes “master of an object” once one has “the power to perform upon it all tokens of the action-types that are necessary and jointly sufficient to display mastery,” namely: “excluding, using, and alienating” (116-17). So ownership is not a bundle of “disconnected sticks,” but rather the “private sovereign[ty] over a thing” (117), and “the thing’s subservience to the person” is “direct” and therefore “prior” to any “relation among persons” it “validates” (106). Brudner suggests that we understand this Blackstonian conception of ownership² “as the realization of the self-related person’s project to confirm itself as the end of things” (132). As such, ownership is not subject—as it is in Kant’s account—to the “omnilateral review by a citizen legislature in a civil condition” (114), and is “prior to” any claim of distributive justice (131).

The state of nature in this narrative—in sharp contrast to its Lockean counterpart³—is not one of common ownership; rather, we begin with a state of rights-vacuum awaiting acts of acquisition that would establish exclusive rights. These acts, Brudner insists, are “conceptually necessary” in order to “*validate* a claim of end-status vis-à-vis a thing,” because prior to acquisition the person, “who claims to be an unconditioned end,” in fact “depends for its identity on the world of contingent things” (115). That contingency confers on things a misleading “appearance of an independence” (115), which is troublesome because even though they lack “free will” and therefore “can place no other being under an obligation not to use or destroy” them (113), things nevertheless appear to

² Blackstone famously conceptualized property as “sole and despotic dominion.” 2 William Blackstone, *Commentaries on the Laws of England* 2 (1779) (1766).

³ See Jeremy Waldron, *The Right to Private Property* 155 (1988).

convey precisely such an obligation, thus “challeng[ing] the person’s claim to unconditioned end-status” (115). This results in “an intellectual desire of personality for validation,” for realizing “the person’s claim of final worth” (115), which entails “a moral necessity for acquisition” (114) requiring the person to “make good its claim of authority over things” by putting “objects into a relation of subservience to it” (115).

Conceptualizing acquisition’s “intellectual significance” as fulfilling this moral injunction of validating “the person’s end-status vis-à-vis the thing” (118) implies that possession is in itself insufficient because it leaves “the thing with an appearance of independence” (122). Thus, use is a necessary additional incident “because using something as one pleases subdues it to the person’s free choice of ends” (122). But even with use “property is inadequate as a validation of end-status” both because “the intellectual right is thus far” anchored to the contingency of empirical possession and because in possession and use “the person finds itself again dependent on things”—this time “for the confirmation of its mastery of them” (125). Only exchange perfects acquisition-for-validation because “when exchange takes the form of an executory contract . . . ownership’s independence of matter and contingency is complete” (127-28) and because in alienating one’s possession one demonstrates her “independence of the material object by letting it go [while] remain[ing] the recognized owner of the object’s exchange value” (127). For both reasons, it turns out that “end-status is best embodied, not in the intellectual possession of the material object, but in the intellectual possession of an intelligible object—exchange value” (128), which entails the complete “emancipation” of property “from materiality” (127).

Brudner is aware of the “known problems” engendered by the “equation of first possession with unqualified ownership” (120), especially given the fact that “the acquisitive project”—being one of “a desire of the will rather than an appetite of the body”—is “inherently one of infinite accumulation” (126). But he claims that these problems can be properly addressed by his account. *Pace* the Lockean proviso, a person’s permission “to subdue all things to its ends . . . is unlimited by the survival needs of other persons,” because “for the justice paradigm ordered to the supposed unconditioned end-status of free will” such needs are merely contingent and thus “renounceable preferences with no standing to put an absolute end under an obligation to accommodate them” (113-14). A more challenging problem is that “in gaining proof of his end-status through the object, the first occupier also makes the object unavailable for the self-validation of others” (121) and it is thus unclear why they should be bound by this normative deprivation which they cannot freely recognize (126). But even this problem “of competitive claims of right to infinite accumulation” (126) is not insurmountable. Its solution emerges, Brudner insists, from his account of alienation, which makes it “a form of omnilateral approval for omnilaterally binding proprietary obligations” and thus “the perfection and legitimation of private property” (131). Exchange performs this ambitious role because a purchaser “recognize[s] the other’s ownership by awaiting his decision to alienate it and giving him an equal value in return”; furthermore, “all other persons” can also be said to implicitly recognize “hold-

ings acquired through open exchange,” because they “have passed on the opportunity to acquire something offered for sale in an open market, indeed have registered the cost of their disappointment in the value [one] must relinquish to own it” (128).

And yet if the story ended here, it would have been self-defeating because private property thus conceived entails “self-estrangement” in two ways: “one, a vulnerability to the arbitrary will of others and, two, an obligation to comply with a natural law unconcerned with this vulnerability” (133). This vulnerability derives from the truism that “real autonomy” or “self-determination”—namely: “the condition of someone who acts according to a plan of life that expresses values formed upon reflection and who can see in the overall pattern of his or her life the embodiment of such a plan” (135)—is dependent upon “material conditions” or “agency goods” (133). And because the “natural law paradigm” is “blind” to this “precondition” of autonomy, it is “indifferent to (but implicated in) the relations of domination and subordination that private property left alone engenders” (133). With “no entitlement to mutual concern for their real autonomy—for their ability to shape their lives in accordance with self-determined conceptions of what gives point to life”—people may end up living “solely for the projects of [others]” (133-34).

This is a formidable challenge, which the law must face if it is to preserve “its own integrity” (142). Hence, property law’s “counter-principle” that underlies a set of “equitable interventions” (139): proprietary estoppel, “quasi-property,” contractual licenses, constructive trusts insofar as they are used in the matrimonial context, and the unjust enrichment doctrine of mistaken payments (134-39, 256-57, 262-64). These “marginal cases,” Brudner explains, attend to considerations “of power and dependence within which a party seeks enforcement of its property,” and they protect “the agent’s real autonomy against a formal right” so as to ensure that “the person against whom the law of property is being enforced” can see it “as capable of self-imposition by an end” (141-42). Similar reasons justify rules that curtail ownership, either in order to prevent “exercises of the power to exclude or alienate that deny to some the equal opportunity to author their lives,” or to “protect the agency goods of persons (e.g. residential tenants, labourers) vulnerable to the exercise of proprietary power” (149). The same reasons also underlie a more general “right to the material and cultural preconditions of an autonomous life,” notably to “the minimum level of resources needed to liberate the mind for the pursuit of self-authored projects and to guarantee independence from those who would otherwise control the means of subsistence” (147). This “marginal system” is crucial for the legitimacy of the “dominant system” (143) because once “an absolute property” becomes “an external power” it no longer passes the “test of self-imposability by an end” (142, 145-46). Indeed, “a being with end-status is entitled to a system of law supportive of its ability to shape a life it can view as its own,” rather than merely “its capacity for uncoerced choice” (254-55). Moreover, “because self-determination is a good necessarily common to free agents, it is qualified to legal implementation, for such a good is capable of grounding equal entitlements and reciprocal obligations” (255).

Nevertheless, Brudner insists that this counter-principle does not negate the dominant atomistic principle (151) because it supplements, rather than supplants, the “natural law paradigm” (31, 155-57), perfecting, rather than creating, already existing and socially valid property rights (144, 157). This feature implies that “the public-law or equitable part of transactional law is logically constrained to operate [on] the periphery [of] a legal framework ordered to the atomistic person” (355). In consequence, “the only duties the parties owe each other are . . . duties not to transgress personal boundaries” (355), rather than to attend to others’ right to self-determination (255). Thus, the peripheral doctrines that curtail ownership do not govern the relation “between person and person,” but are rather premised on a “public law idea,” which “governs the relation between law (court) and person” (142), so that “the uncompensated transfer of resources” and “the discharge of a duty of beneficence” are merely “by-products of the court’s activity” (140). Likewise, “the positive right to the conditions of self-determination . . . is held against the commonality” and thus “implies no affirmative duty in a *private* individual” (148).

Brudner celebrates this structure because he believes that “a legal formation presupposing dissociated persons” (352) must remain “a semi-autonomous order within a totality that actualizes a positive right to self-determination” (152). Moreover, he argues that “a private law adapted to hypothetically dissociated individuals” must—as a matter of “moral necessity”—dominate “transactional law in a liberal polity” (39). Significant as it is, Brudner insists, real autonomy should not supplant free will as the ultimate value of private law, because “[w]ithout separate recognition for the dignity of free will, the equal dignity of agents is lost, for dignity would then rest on the moral achievement of autonomy, leaving the heteronomous without rights” (158). Moreover, a “systemic realization of the right to self-determination” would require “the thoroughgoing submersion of a sphere of private sovereignty in the absolutism of the common welfare” (151), effacing or nullifying “the independent end-status of the person that equity was supposed to perfect” (354). In order to prevent the common good from turning “to despotism” (356) we need to make sure that each person is entitled to stand “outside the polity as an isolated atom” (154). This means that “while the conception of freedom as self-determination [correctly] regards abstract agency as an incomplete conception of freedom, it must nevertheless acknowledge that capacity and its dignity as the foundation of its own richer conception” (262). In order to make sure that individual rights are not to be treated as “variable conclusions of the collective welfare . . . thus denying the end-status of individual personality,” the “natural law pertaining to human interactions” should be shaped as “a sphere ordered to formal will rather than real autonomy”; it must be a law “not for citizens, but for dissociated free wills,” owing each other “respect but not concern” (110-11, 255, 262). In other words, because “[i]ndividuals who regard themselves as dignified ends independently of all relation must see themselves as having stable reality in a state of dissociation from each other,” the law governing “their actions’ impingements on each other” must not rely on any “common or social destiny” (99-100).

Indeed, Brudner insists that the core of property law (or, for that matter, the laws of contract, tort, or unjust enrichment) must not regard individuals “as members of a collective unit” and must not be “directed at the common ends” of their “cooperative union” or “political association” (352-53). Brudner dismisses the understanding of private law as “the body of law that regulates the transactions between the individual subjects of a political authority,” according to which “even the Soviet Union had a private law” (54). Rather, properly understood, private law “is law for persons regarded as ends outside of human association—as morally self-sufficient atoms,” and as such it “pertains to occasional interactions of hypothetically dissociated and self-interested persons, ignoring their common ends and member obligations even in a civil condition” (353). As should be clear at this point, Brudner’s provocative account of property law summarized above (and its parallel analyses of contract, tort, or unjust enrichment) is aimed at providing a normative justification for a “cohesive political society directed at the common good” to adopt “a semi-autonomous formation” that “counterfactually envisages persons as dissociated atoms” and accordingly “sees their transactions as engaging (except at the margins) no justice but the justice that is specific to the parties” (25-26, 357). Brudner claims that, at least within a liberal political order, adopting this understanding of private law—in which the core of private law is apolitical in the sense of being “intelligible apart from the ends of political association” (18)—is nothing short of a “moral necessity” (8, 28).

II. From Apology to Insult

Brudner’s project stands at the core of property theory in a liberal society and his account captures important insights on liberal property. As he argues, to gain legitimacy, property law must pass the test of self-imposability by an end. As he further claims, property is key for both people’s independence and their self-determination, which are both crucial for a liberal polity. Finally, as Brudner intimates, at core property is part of private law, because property (unlike welfare) participates not only in the construction of society, but also in the constitution of our interpersonal relationships.

But Brudner’s neo-Hegelian account of property ultimately fails. To see why, recall that Brudner’s account of the legitimacy of Blackstonian ownership begins with exchange and ends with public law amendments. Alas, the former provides at best a shaky foundation and at worse an apology that might obscure injustice, while the latter cannot plausibly remedy this injustice and might add insult to its injury.

For Brudner, the open market is supposed to perfect the private sovereignty which unilateral acquisition generates. Passing on an opportunity to buy is tantamount, in this view, to implicitly recognizing “the rightfulness of exclusive possession,” making the open market “a form of omnilateral approval” (131). But this proposition must be wrong. In a world of (quite stark) unequal distribution of wealth—that is: in our world—failing to bid for property rights in land, commodities, IP, and the like is often (or maybe even more often than not) a result of lack of opportunity; so how can one (dare to) ascribe recognition to those whose approval is most needed for legitimation? Brudner may re-

spond that the recognition at hand is merely formal: recognizing the *possibility* of exchange, even if protesting its unfairness due to the unjust distribution in which it is conducted. But this type of recognition is so thin—it does not imply recognition of a *right* to exchange—that it cannot purport to contribute to the legitimation of that exchange.

Brudner acknowledges the problem of unequal opportunity to bid, and then domesticates this difficulty. “Perhaps this is not a complete legitimation,” he says, but because formal right “sees end-status as reposing solely on free will,” it is “indifferent to how buying power is distributed” so that this inequality has “no interpersonal salience”; and even if the “recognition of private property through market exchange” is “inadequate for full justice in holdings,” we must nonetheless “grant that it has . . . a legitimation story for exclusive possession that is at least plausible” to “attract respect such that a just distribution of *welfare* must supervene on a valid *property* rather than constitute such a property” (131).

Asserting that the Hegelian legitimation story for Blackstonian ownership through unilateral acquisition is plausible, however, does not render it plausible. Maybe we should opt for a system that embraces Blackstonian ownership while remedying its failures through a just distribution of welfare (I turn to this option shortly). But this alternative must then be justified on its own terms and cannot gain any normative credence from the imaginary approval the market generates.⁴ As Brudner concedes, equating first possession with private sovereignty generates unjust dependence of the have-nots, thus undermining their right to self-determination. As he further acknowledges, no system that fails to respect people’s real autonomy can be a plausible candidate for a self-imposed law. Brudner correctly claims that unilateral acquisition with no Lockean proviso indeed typifies the common law of property (114). Exactly because it is both clearly unjustified and nonetheless embarrassingly part of our law, property theory should be particularly cautious *not* to entrench it any further by turning (unjust) contingency into (moral) necessity.⁵

But maybe approval and thus legitimacy can come from the public law layers Brudner adds at the margins of this unacceptable regime of Blackstonian ownership. On its face, Brudner’s division of labor between private and public law, wherein private law is strictly self-centered, while public law is responsible for the significant shortfalls of such law vis-à-vis people’s right to self-determination, seems similar to the one advocated by neo-Kantian property theorists. But there are important differences. Neo-Kantians argue that the state should function both as a guarantor of people’s robust property rights against one another, and as the authority responsible for levying taxes in order to fulfill a public duty to support the poor so as to secure everyone’s independence.⁶ Neo-Hegelians do not accept this picture in its entirety: they argue, as we have seen, that in addition to the redistributive apparatus of the welfare state, a liberal law must also constrain the private sovereignty such a

⁴ See generally Roy Kreitner’s contribution to this issue.

⁵ This is, of course, one of the most important insights of both legal realists and critical legal scholars. See Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* 32-33 (2013).

⁶ See Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, in *Corrective Justice* 263 (2012).

Blackstonian ownership entails; they also claim that law needs to attend not only to people's independence, but also to their self-determination. These two differences are significant and may ameliorate some of the deficiencies of the neo-Kantian blueprint.⁷ But even with these refinements the emerging regime is not capable of self-imposition by an end.

The most fundamental difficulty of Brudner's scheme lies exactly in what he presents as its most promising virtue: assigning all the responsibility for people's self-determination to public law. The only ones who are duty-bound to respect our right to self-determination in this Hegelian world are the legislators and regulators of the welfare system as well as the judges who refuse the enforcement of property rights when such an enforcement is likely to generate unacceptable vulnerability; as individuals, by contrast, we are free to ignore our fellow-citizens' claims for self-determination as long as we strictly respect their independence. Brudner believes that this social contract allows us to benefit from both worlds: that is, to properly respond to the demands of real autonomy while complying with the strict injunctions of the law of isolated atoms. Alas, as usual, one cannot have the cake and eat it too.

Situating at the core of private law the dissociated and self-interested persons whose only duty to one another is to avoid boundary transgressions, and sanctioning the private sovereignty of ownership even where its justification is feeble, renders our right to self-determination irrelevant to our interpersonal relationships. And even if we assume—a dubious assumption, to be sure—that our legislators, regulators, and judges flawlessly trace the vulnerabilities such an unjust property regime generates, and perfectly respond via either wealth redistribution or a refusal to enforce property rights, this marginalization inevitably means that the right of self-determination is profoundly undermined, because a significant part of a life-plan involves relationships with others so that an important aspect of our real autonomy is dependent upon our standing vis-à-vis others. Like its Kantian counterpart, Brudner's Hegelian blueprint leaves the propertyless as passive recipients of welfare, thus entrenching their subservient status rather than their dignity and independence. This insult is fortified (and not ameliorated) by Brudner's supplementary equitable interventions, which are not conceptualized as the exaction of a duty by a wronged right-holder, but rather as by-products of the court's guardianship of its own integrity. Indeed,

⁷ As I argued elsewhere, the public law of tax and redistribution is unlikely to supplement private law with rules adequately remedying the injustices of a libertarian private law, if not in terms of distribution at least in terms of interpersonal dependence. The reason for this is threefold. First, the realities of interest group politics in the promulgation of tax legislation render egalitarian tax regimes, such as one based on Rawls's difference principle, a matter of political theory rather than of empirical reality. This difficulty is intrinsic to the concept of democracy, which respects people's preferences and not only their principles. Furthermore, because our understandings of the responsibilities of owners and the limits of what we perceive to be their legitimate interests are influenced by our legal conception of ownership, an extreme libertarian private law regime might undermine social solidarity and dilute people's responsiveness to claims from distributive justice. Finally, treating the propertyless as passive recipients of welfare and mere beneficiaries of the public duty to support the poor entrenches their dependent, subservient status rather than their dignity and independence. Shifting dependence from the context of private law to that of the individual's relationship with the state via the welfare bureaucracy does not solve the problem and, indeed, might actually exacerbate it. See Hanoch Dagan, *Property: Values and Institutions* 63-66 (2011).

because by (Brudner's) definition this prong of his program does *not* govern our interpersonal relationship, it cannot even attempt to address the most fundamental injustice of the system of unqualified unilateral acquisition, which is relational. Even if they fully succeed in their Hegelian task, these peripheral doctrines could not possibly redeem the legitimacy of this system—make it a worthy end to espouse—because in and of itself even a just redistribution of material resources cannot correct the social order of a private law premised on unqualified unilateral acquisition which unjustly skews the relations in which people stand to one another.⁸

III. The Normative Significance of Blackstonian Ownership

As I have indicated at the outset, there are three reasons for the normative collapse of Brudner's Hegelian property theory. The first relates to the normative significance of Blackstonian ownership. As may be recalled, the value of unqualified ownership for Brudner lies in its confirmation of the end-status of a person vis-à-vis the world of things and is therefore prior to any interpersonal relations. Unilateral acquisition is a moral injunction because unowned things challenge the person's claim of final worth; and given that the requirement of personality validation is infinite, the entailed acquisition project is one of infinite accumulation.

To appreciate the ambition of this claim, compare it to two seemingly related positions: (1) As with the more familiar view that founds unqualified ownership on "the interest in exclusively determining the use of things," which is in turn grounded in "the freedom it provides to shape our lives,"⁹ Brudner also resists Wesley Hohfeld's proposition that as a "jural relation" ownership is first and foremost about "the conduct of human beings," and thus must be understood "*not as a right 'against a thing,'*" but rather as one "against persons," so that property is relational through and through.¹⁰ However, unlike this exclusive-use school, which needs to struggle (some say unsuccessfully)¹¹ to derive private sovereignty from the interest in using things, Brudner's agency-validation account makes absolute sovereignty an inherent feature of ownership. (2) Another view—inspired by Hegel—justifies claims to ownership by reference to our attachment to the resources we hold, which is both explicated and justified to the extent that those resources reflect our identity.¹² Like Brudner's account, this personhood theory of property finds in-

⁸ See Hanoch Dagan & Avihay Dorfman, Just Relationships (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537); cf. Samuel Scheffler, Equality and Tradition: Questions of Value in Moral and Political Theory 191, 200, 205, 234-35 (2010); Elizabeth Anderson, What Is the Point of Equality?, 109 Ethics 287, 314, 336 (1999).

⁹ J.E. Penner, The Idea of Property in Law 59 (1997); see also, e.g., Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1693 (2012).

¹⁰ Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710, 720-21 (1917).

¹¹ See Avihay Dorfman, Private Ownership, 16 Legal Theory 1, 5-16 (2010).

¹² See Margaret J. Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982). As Jeremy Waldron explains, such reflection of self is in turn justified because it fosters our moral development. See Waldron, *supra* note 3, at 370-77.

trinsic (and not merely instrumental) value in the relationship of humans to things. But personhood theory does not marginalize the intersubjective aspect of ownership; quite the contrary: the phenomenon of reflection-and-attachment is thoroughly social. People perceive certain resources as more reflections of their selves than others since others—to whom the external image of the self is communicated—also share with them the same symbolic meaning. Furthermore, rather than a claim for an infinite accumulation of absolute rights to things, personhood theory implies that different resources, which are variously constitutive of their possessors' identity, should be subject to different property configurations: whereas the law should (as it does) vigorously vindicate people's control of their constitutive resources, the more fungible an interest, the less emphasis property law needs to place on its owner's control.¹³ Brudner's emphasis on the significance of exchange value pushes, of course, in the opposite direction.

Brudner's account points to an insight about ownership that—whatever their other credentials may be—neither exclusive-use nor personhood theory captures, and which may explain the resilience of the Blackstonian conception of property (and its recent resurgence) notwithstanding its well-known difficulties. A realm of “sole and despotic dominion” which is dependent neither on use nor on reflection of self indeed plays an indispensable role in a liberal polity committed to people's rights to independence and self-determination. By shielding the individual from claims of other persons and from the power of the public authority, such unqualified ownership guarantees an untouchable private sphere, which is a prerequisite to personal development and autonomy.¹⁴

But the Hegelian path to Blackstonian ownership is mysterious. Brudner asserts, rather than explains, its main premise: that the sheer existence of an unowned thing challenges the end-status of human beings. It is, however, unclear why the final worth of persons should imply their complete mastery over all that is nonhuman. To be sure, the dependency of our survival and our ability to adopt a life-plan and live thereby on material things indeed requires that we may justifiably—as John Locke intimated¹⁵—use things. But this does not render the sheer appearance of independence of things morally troublesome. Assuming that our rights to independence and self-determination are secure, should not our final worth imply the self-confidence—at least vis-à-vis that which does not (claim to) have such a status—to calmly reflect upon our distinction from the world of things, rather than developing an infinite desire for its conquest? Is it possible that all this talk of self-validation is just an exercise in rationalizing some of the less appealing features of human history?

¹³ See Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 40-49, 63-108 (1997). For the distributive implications of personhood theory, see Margaret Jane Radin, *Reinterpreting Property* 12 (1993); Waldron, *supra* note 3, at 377-86.

¹⁴ See, e.g., John Rawls, *Political Liberalism* 298 (1993); Bruce A. Ackerman, *Private Property and the Constitution* 71-76 (1977).

¹⁵ See John Locke, *Two Treatises of Government* 303 (Peter Laslett ed., 1960) (1690).

The heroic Hegelian effort to derive the private dominion of Blackstonian ownership only from our relationships with things is an attempt to bypass Hohfeld's important lesson. The failure of this attempt should not be surprising. Property is irreducibly relational¹⁶ and the interpersonal implications of the normative power Blackstonian owners enjoy vis-à-vis others are both significant and—as we have seen in the previous part of this essay—not necessarily always defensible. For these others the introduction of Blackstonian ownership to the state of nature potentially poses a normative threat¹⁷ (which may caution against conceptualizing the state of nature as a rights-vacuum). None of this necessarily implies a fatal blow to the normative significance of Blackstonian ownership. Because (as Brudner argues) beings with end-status are entitled to a system supportive of their independence and self-determination, and because *some* mastery over things is indeed a crucial component of such a system, Blackstonian ownership may well pass the test of self-imposability by an end. But before proceeding to sketch the regime of property-for-real-autonomy and the admission criteria it presents to Blackstonian ownership, we need to consider two additional claims Brudner makes: that self-determination must be situated at the margins of property law and that a liberal private law must be apolitical. If either of these claims is correct, then property-for-real-autonomy may be an oxymoron. But why should they be correct?

IV. On Independence and Self-Determination

Brudner defines his theory as a “teleological account[] of the perfectionist kind,” that is: one in which “official actions merely certify as suitable for enforcement the obligations already inherent in the relationships constitutive of fully human life” (3). He further acknowledges, as just noted, that a fully human life entitles people to self-determination, which requires a measure of independence, but “is not something automatically guaranteed by a structure of negative rights.”¹⁸ Finally, Brudner correctly claims that the conception of freedom as self-determination “does not contradict” the conception of freedom as free agency, but rather “includes [it] within a more robust understanding of freedom—one that buttresses the end-status involved in agency but that agency is too frail to support on its own” (143).

¹⁶ Emphasizing the relational nature of property does not imply disregard to the significance of the person-resource relationship. Two familiar accounts of this significance are referred above as the personhood theory of property and the property-for-safe-haven argument.

¹⁷ Indeed, as Morris Cohen famously stated, thinking of property law “as merely protecting men in their possession” obscures the fact that “dominion over things is also *imperium* over our fellow human beings.” Cohen was careful not to necessarily condemn private property for having these attributes. But he insisted that property law needs to justify “the extent of the power over the life of others” which it “confers on those called owners.” Morris Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 11-14 (1927).

¹⁸ H.L.A. Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 836 (1979).

And yet, unlike other contemporary liberal thinkers—notably Joseph Raz¹⁹—Brudner refuses to allow the ideal of self-determination or self-authorship, which he himself calls “*real* autonomy,” to take the center stage in private law. As we have seen, this refusal is a key feature in the Hegelian architecture of property law, which allows the conception of freedom as free agency or independence to solely shape the law governing our interpersonal relationships, and marginalizes self-determination to other, public law peripheral doctrines. Brudner seems to raise two apprehensions about allowing self-determination to play a role at the core of property law. The first derives from his characterization of self-determination as a good, raising the concern that as such its promotion by law would efface people’s (separate) individuality. The second worry—about the dignity of the capacity of abstract agency and its role as the foundation of self-determination—points to the risks of assigning independence a merely instrumental role. Both concerns are important for the legitimacy of law in a liberal society; neither, however, justifies Brudner’s solution.

When Brudner raises the specter of the despotism of the common good and the moral necessity of allowing individuals to stand outside their polity, he seems to invoke the famous charge of John Rawls against utilitarianism—the dominant consequentialist political theory of our time—which “does not take seriously the distinction between persons.”²⁰ Self-determination, like aggregate welfare, is a good, whose promotion requires both resources and collective action, and therefore a caution may be in place. But if the nature of self-determination as a good is in itself sufficient to render it illegitimate for the law to espouse, then deporting people’s right to self-authorship to the public law margins of transactional law—where the state uses its coercive power and our tax money for the promotion of that purpose—should be deemed equally illegitimate. This is clearly not Brudner’s position: unlike libertarians, he allows, indeed requires, public law to interfere with people’s property (and thus their independence) in order to secure others’ self-determination. The reason for this is that although it is indeed a good, self-determination—being “a good necessarily common to free agents” (255)—is also very different from welfare. As Brudner reminds us, self-determination represents a rich conception of freedom; its value is what makes our independence worthwhile: we are all entitled to be free from coercion because this freedom is necessary for each of us if we are to each write by him- or herself the (separate) story of our (separate) lives. This is why, like H.L.A. Hart, Brudner must be unimpressed with Robert Nozick’s attempt to “lump together, and ban as equally illegitimate, things so different in their impact on individual life as taking some of a man’s income to save others from great suffering and killing him or taking one of his vital organs for the same purpose”; like Hart, Brudner must think that the former does not “ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons”; therefore, with Hart,

¹⁹ See Joseph Raz, *The Morality of Freedom* (1986); see also, e.g., James Griffin, *On Human Rights* 149–58 (2008).

²⁰ John Rawls, *A Theory of Justice* 27 (1971).

Brudner must recognize the significance of the “unexciting but indispensable chore” of distinguishing “between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life.”²¹

This type of inquiry yields rather nuanced ramifications as per property law. On the one hand, it implies that eradicating the fee simple absolute—the property form most resembling Blackstonian ownership—would have entailed, as I have suggested above, an excessive restriction of liberty, because it would have erased the possibility of private sovereignty, eliminating the possibility of people to retreat to their own safe haven. But on the other hand, such Hartian analysis also implies that as long as this property institution remains a viable alternative, this conclusion does not necessitate its hegemony, nor does it provide any support for its dubious foundation on unilateral acquisition. As we will see below, the implications of the significance of Blackstonian property for individual liberty are quite different.

Brudner’s second concern seems to derive from the subtlety of the right to self-determination. One worry he mentions is that we might confuse respect for people’s right to self-authorship with respect for the accomplishment of a worthy life-plan. But this would clearly be a mistake and a rather straightforward one. There is another, more intricate concern, which relates exactly to the relationship between self-determination and independence. The fact that—as I have just hinted—the value of independence lies in its contribution to self-determination, may suggest that the former is but a means to the latter. Understanding independence as an instrumental value—a value which “derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or . . . can be used to produce”²²—may imply that our commitment to people’s independence must necessarily retreat and give way every time it seems to conflict with the norms that best promote their real autonomy.²³ Such an easy path to override people’s independence, however, is exactly the target of Isaiah Berlin’s famous warning: that skipping the *intrinsic* significance of negative liberty might imply (and for some has implied) a *carte blanche* for ignoring people’s “actual wishes,” which may be driven by “irrational impulse, uncontrolled desires” and the like, “in the name, and on behalf, of their ‘real’ selves.” The resulting coercion and oppression of such views led Berlin to insist that “some portion of human existence must remain independent of the sphere of social control” and that “[t]o invade that preserve, however small, would be despotism.”²⁴

These consequences suggest that thinking about independence in sheer instrumental terms fails to capture its value. Libertarians (and neo-Kantians) may find these warnings as a premise for thinking about independence as law’s ultimate value. But the choice we face is in fact not binary. A value can be “intrinsically valuable,” namely: “valu-

²¹ Hart, *supra* note 18, at 834-35.

²² Raz, *supra* note 19, at 177.

²³ Cf. Will Kymlicka, *Contemporary Political Philosophy* 123-24 (1990).

²⁴ Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 118, 126, 132-33 (1969).

able even apart from [its] instrumental value”—or its contribution “to producing certain consequences”—without being also “of ultimate value.” Although a value of this type (think, for example, of the values of community and of art) is either explained or justified by reference to another, ultimate value, or lies in its being “a constitutive part” or essential ingredient of that ultimate value, its contribution to that value is not fully captured in instrumental terms.²⁵ Berlin’s lesson for our purposes is clear: although independence is not an ultimate value, it is neither merely instrumental, but is rather intrinsically valuable.

As an intrinsic value, independence must be taken seriously by every decent liberal polity and this prescription entails some obvious implications for property law. It reinforces our conclusion regarding the indispensability of the fee simple absolute form for liberal property law. It also implies that while the protection of private property from governmental interference need not be absolute, it should, as it is, be legally—or, even better, constitutionally—guaranteed. But again, none of this implies the sole dominion of independence in the interpersonal domain. Being of an intrinsic—but not of ultimate—value makes our treatment of independence challenging: we need to make sure that it does not sidestep the ultimate value (real autonomy) of which it is a constitutive part or transgress other values constitutive of real autonomy, while simultaneously safeguarding against its own derogation to a mere means to a superior end.²⁶ This challenge cannot be faced with the magic formula of division of labor between private and public law. Rather, it requires that in shaping both the doctrines governing the public law of property (think about the intricate discussions of the proper boundaries of regulatory takings law²⁷) and those dealing with our interpersonal relationships, we must make the type of unexciting but indispensable judgments—qualitative and maybe even quantitative—Hart alluded to. Brudner seems nervous about exactly this kind of analysis, which he fears may “turn law’s rule into politics by other means” (40). With Berlin I suggest that we should be less concerned with the acknowledgement that we must abandon “the notion of a final harmony,” and instead recognize that this type of judgment is “an inescapable” feature of “the human condition.”²⁸

V. Private Law, Property, and Real Autonomy

Brudner conceptualizes private law as the law that pertains to occasional interactions of self-sufficient atoms because he believes that this understanding is normatively necessary. But the legal architecture for which this conceptualization stands is, as we have just seen, ill-suited to the (important, to be sure) normative tasks Brudner ascribes to it. Moreover, as I

²⁵ Raz, *supra* note 19, at 177-78.

²⁶ To appreciate the complexity of this task think of how one who conceives of both healthiness and deliciousness as constitutive of dinner goodness needs to accommodate these potentially conflicting concerns.

²⁷ See Dagan, *supra* note 7, pt. II.

²⁸ Berlin, *supra* note 24, at 168-69, 200.

have argued above,²⁹ founding the law governing our interpersonal relationship on atomistic premises is morally unacceptable because it reifies a social order that unjustly skews our human relations, thus irredeemably undermining our right to self-determination.

Brudner argues that we must follow his unorthodox account of the distinction between private and public law because the conventional understanding—in which the former regulates “horizontal dealings among private parties,” while the latter “pertains to government or to the vertical relation between government and individuals”³⁰—is morally vacuous. But the moral failure of his account actually points to the normative significance of this traditional understanding. The distinctive normative task of private law—against which its particular test of self-imposability by an end should be shaped—is to facilitate mutually respectful interpersonal relationships that are conducive to our self-determination while safeguarding our independence. To be sure, the public schemes of just distribution (and redistribution) and of regulation are often also needed in order to secure this task; but they are never sufficient. Whereas private law to some extent relies on public law, and to some extent is also required to assist public law in achieving justice in holdings—a complex topic which is beyond my scope here—its core, irreducible mission is in providing credible institutions supporting such ideals of interpersonal relationships, which are intrinsically valuable for our self-authorship. Rather than being the apolitical law of self-sufficient atoms, private law is the law that reflects and shapes the thoroughly political—although not necessarily statist³¹—ideals of our interpersonal relationship.

Indeed, as Samuel Scheffler claims, whereas it is right to refuse to treat “the values and norms governing human interpersonal relation” only in terms of their aggregate social consequences, the proper division of moral labor between private or public should not be understood as providing a justification “for the unrestricted pursuit of self-interest.” Rather, this division of labor—and the entailed distinction between private law and public law—“is appealing because it offers a strategy, not for the reconciliation of egalitarian justice and personal acquisitiveness, but rather for the joint accommodation of diverse values.”³² This means that while the principles that regulate individual transactions may need to pay *some* attention to their aggregate effects, the normative concerns of society as a whole should not supersede private law; they should not be allowed to erase our varied and complex ideals of just relationships among self-determining individuals that must remain at the core of the law of interpersonal interactions, namely: our private law.

²⁹ See *supra* text accompanying note 8.

³⁰ See Michel Rosenfeld, Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction, 11 Int'l J. Const. L. 125, 125-26 (2013); see also, e.g., Peter Birks, Introduction, in English Private Law xxxvi, xliii (Peter Birks ed., 2000) (private law concerns “the rights which, one against another, people are able to realize in courts,” or more precisely “rights which a claimant can *if necessary* realize through the courts”) (emphasis added).

³¹ Indeed, properly conceptualized, private law can, and probably should, inform the substantive law that should govern the interpersonal interactions across borders.

³² Scheffler, *supra* note 8, at 123-25, 135.

Fleshing out, let alone defending, this conception of private law or its property law manifestations is beyond the scope of this short essay.³³ But nonetheless it may be helpful to conclude with an outline of an autonomy-based property law and of the particular role of Blackstonian ownership—what Brudner calls simply property—in its scheme.

Given the diversity of acceptable human goods from which autonomous people should be able to choose as well as their distinct constitutive values, an autonomy-based property law must recognize a sufficiently diverse set of robust frameworks for people to organize their life and shape their interpersonal relationships. Moreover, because many of these plural values cannot be realistically actualized without the active support of viable legal institutions, property law should, within limits, facilitate the coexistence of a sufficiently diverse set of property institutions—such as co-ownerships, common interest communities, partnership, and of course the fee simple absolute—each governed by a distinct regulative principle with the boundaries between these institutions open, enabling people to freely choose their goals, principles, forms of life, and associations by navigating their way among them.

For this diversity to be meaningful to self-authorship, law's supply should not be merely demand-driven; rather, property law should favorably support innovative property institutions even absent significant demand, including institutions based on minority views and utopian theories, insofar as these outliers have the potential to add valuable options for human flourishing that significantly broaden people's choices. The significance of multiplicity to self-determination also means that whereas the inclusion of Blackstonian ownership in property law's repertoire is crucial, the availability of other equally valuable and obtainable proprietary frameworks of interpersonal interaction makes autonomy more, rather than less, meaningful. Therefore, Blackstonian ownership should not be conceptualized as either the "core" or the "default" of our understanding of property.³⁴

But crucial it nonetheless is. Blackstonian ownership is singular among property institutions in its jealousy to our independence; and because independence is not merely an instrumental value, but is rather intrinsically valuable, a liberal polity must, as noted, offer its members the realm of solitude Blackstonian ownership represents. Thus understood, Blackstonian ownership is neither prelegal nor apolitical in Brudner's sense. Quite the contrary: as Avihay Dorfman claims, this property institution "expresses a fundamentally political idea of being with others in the world," one structured around "an idea of *recognition*," namely: "the acknowledgment by others of the owner's intentions and hence subjectivity as a genuine source of demands on their conduct."³⁵

³³ See Hanoch Dagan & Avihay Dorfman, *The Justice of Private Law* (unpublished manuscript); see also Dagan, *supra* note 5, chs. 5 & 8; Dagan, *supra* note 7, pt. I; Hanoch Dagan, *The Utopian Promise of Private Law* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397395); Hanoch Dagan & Michael A. Heller, *Freedom of Contracts* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325254).

³⁴ Contra Smith, *supra* note 9, at 1705.

³⁵ Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. Toronto L.J. 402, 435 (2014).

For such demands for recognition to pass the liberal test of self-imposability by an end, Blackstonian ownership must be part of a broad and diverse repertoire of property institutions conducive to self-authorship. But this is not its only admission criterion; in order to secure legitimacy, it needs to comply with (at least) two further conditions: one regards its legitimate scope; the other relates to its universality. Thus, insofar as the role of Blackstonian ownership is to provide individuals private sovereignty over the external resources necessary for their independence and self-determination, this property institution can properly cover only the kind of resources, and as many resources, as needed to secure that purpose. Beyond such property-for-safe-haven rights—think about law’s privilege of homeownership, for example³⁶—there may well be other justifications for property rights, but they need not, and oftentimes should not, be absolute. 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—subject to some rights to entry of other (categories of) people.³⁷ Furthermore, substituting the dubious grounding of Blackstonian ownership of self-validation vis-à-vis the world of things with its foundation on personal autonomy implies that the legitimacy of this property institution relies not on a specific event (occupation), but rather on its importance as such. This means that every human being is entitled to some such property rights or, more precisely, entitled to as much Blackstonian ownership as needed to sustain human dignity; it thus implies that law’s enforcement of Blackstonian owners’ rights cannot be justified if it does not simultaneously guarantee, at least to some extent, similar property rights to non-owners.³⁸

³⁶ For this privilege and the academic controversy over its justification, see generally Gregory S. Alexander & Hanoch Dagan, *Properties of Property* 309-20 (2012).

³⁷ See generally Dagan, *supra* note 7, ch. 2. This proposition may also provide the proper foundation for Brudner’s interesting claims regarding industrial property (159-60).

³⁸ See Waldron, *supra* note 3, at 115-17, 423, 425-27, 430-39, 444-45; Jeremy Waldron, *Homelessness and the Issue of Freedom*, in *Liberal Rights* 309 (1993); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 *Can. J.L. & Jurisprudence* 217, 228, 242-45 (1993).