There are striking similarities between the rules governing territorial membership and property.¹ Citizens and permanent residents are entitled to remain in their country and to return to their country, giving them a “property-like” claim to permanent residence in that area. States claim jurisdiction over geographically defined territories and restrict foreigners’ access to their territories, excluding them from natural resources and social benefits. Much like property rules, territorial boundaries create and protect title bearers, establishing spatial demarcations backed by coercion or force, including the sanction of physical removal.

Theorists as different as Robert Nozick, Mathias Risse, and Carl Schmitt have drawn our attention to these property-like aspects of the states-system. Nozick suggests that those believing that a group of persons living in an area jointly own the territory…must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don’t have (with regard to the same land and resources).²

Risse too stresses that “in the minimal sense of maintaining exclusionary practices, a commitment to property is…implicit in the global order.”³ And Schmitt argues that the state’s right to its territory derives from a “radical title” to appropriate the land on which it rests.⁴ These thinkers all highlight that the division of the globe raises the question of what entitles agents to claim control of external objects.⁵ What justifies the state and its citizens in appropriating the land they collectively occupy?

This question was first theorized in a systematic way by the early modern natural law tradition, including Grotius, Pufendorf, Locke, and Kant. As Hugo Grotius explained:

those things which were wrested from the original domain of common ownership…[are] divided into two categories. For some are now public property, or in other words, they are owned by the people…[while] others are strictly private property, that is to say, they belong to individuals.

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¹ Ayelet Shachar, The Birthright Lottery, (Cambridge, MA: Harvard University Press, 2009), draws attention to these similarities.
Nevertheless, occupancy of public possessions is achieved by the same method as occupancy of private possessions (DJP, 320). 6

Is some foundational title created when a society appropriates an area and constitutes a legal order there? Grotius thought so. He argued that a set of individuals or an entire society could create such a title through occupation, simply by taking possession of a previously unpossessed place.

In theorizing the appropriation of land and territory, however, these thinkers faced an important objection. Grotius, Pufendorf, Locke, and Kant all began by postulating a primordial scenario in which goods were commonly held. Under the original law of nature, they argued, humanity’s condition was one of common ownership, in which people shared the earth’s resources equally among themselves. Yet beginning from this common ownership scenario might seem to undermine the legitimacy of appropriation. Private property and territorial boundaries are artificial institutions, brought into being by acts of human will. If common ownership is prescribed by the law of nature, then as G.A. Cohen puts it, why are these enclosures “not a theft of what rightly should (have continued to be) held in common?” 7

Lea Ypi has recently revived this objection as an argument against state territorial rights. Ypi’s thesis is that, in the absence of a global political association, territorial rights can only be provisionally and conditionally justified. 8 She argues that states “can continue to exercise territorially rights if and only if their citizens are also politically committed to the establishment of a global authority realizing an all-inclusive principle of right.” 9 Drawing on her reading of Kant’s political theory, Ypi asserts that all property rights depend for their validity on public coercive laws promulgated in a civil condition. According to Ypi, the original appropriation of territory by states and their citizens is therefore wrongful. States can overcome the initial wrong in unilaterally claiming land only by “invest[ing] political efforts in creating a kind of political association in which territorial claims can be subject to global, public arbitration.” 10 Ypi holds that “the status of territorial rights remains in question” until such a universal political association has been created. 11 Territorial claims are “provisional” until they are ratified (or revised) by a yet-to-be constructed global authority. 12

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10 Ibid, 288. I have also benefited from Jakob Huber’s discussion of Ypi in “No Right to Unilaterally Appropriate your Territory,” 12-13.


12 As Huber notes, the status of this provisional right remains “mysterious” in Ypi’s work. He distinguishes a “more moderate reading,” on which provisional right would justify respecting existing states’ territorial claims, from a “more radical reading,” on which “states represent really nothing more than a transitory
Ypi’s work shows that a classic objection to unilateral appropriation (familiar from debates about private property) may also have force when applied to territorial settlement. Yet the precise nature of this objection is unclear. What exactly is supposed to be wrong with the unilateral appropriation of space?

Though I share Ypi’s skepticism that full property can exist outside a legal framework, unlike her, I believe that individuals can bring about limited moral rights to space through unilateral appropriation. Following Grotius, I hold that a kind of foundational title is created when people occupy an area. I argue for this conclusion through an investigation of the history of debates about land acquisition, and by considering various formulations of the objection to unilateral appropriation. Though some of these formulations highlight plausible worries, I argue that they do not succeed in showing appropriation to be wrongful. Though the moral right to exclude others from external things would be more limited in the absence of a legal framework, such a right would still exist. This chapter also explores what I consider the most promising framework for theorizing foundational title to land, which I call Grotius’s primitive right.

The chapter proceeds as follows: first, I show that even in the absence of political institutions or social conventions regulating property, it is plausible to think we can acquire some exclusive rights over material goods. Two prominent views hold otherwise. According to legal conventionalism, all rights over material goods depend on positive law. According to social conventionalism, all rights over material goods depend on background social practices. But I believe these views entail repugnant conclusions. Legal conventionalism implies that stateless people are morally free to force each other off their land, or to take away one another’s goods. Social conventionalism implies that those who are not party to the relevant social conventions are similarly free to dispossess others. But these acts seem clearly morally wrong.

I believe these reflections give us reason to allow for some natural property rights. But how should we conceive them? Following Grotius, I argue that these are primitive rights of use and possession, not full property rights. Full property involves additional incidents of control, especially the right to transmit our property to others, and to exclude them from goods we are not personally using. These additional incidents, on my view, are conventional and stand in need of justification or consent. Thus, I take a hybrid view of property: while some limited forms of ownership obtain outside shared social institutions, and constrain how those institutions should be designed, not all aspects of property are similarly preinstitutional. Modern private property rights, in particular, are not natural rights.

Third, I argue that this hybrid theory of property—for which I find precedent in the modern natural law tradition—can support a plausible account of the foundational stage on an unstoppable path to an all-inclusive political community…that liberates us from the arbitrariness of existing boundaries.” Huber, “No Right to Unilaterally Appropriate your Territory,” 13.

title to land held by a state and its citizens. This account has several implications: first, land and territory may be permissibly claimed even if the earth remains commonly owned. Second, the existence of a moral right of territorial occupancy does not depend on its ratification by a political institution, including a global authority. But third, this foundational title is rather thin: in particular, it does not allow a state’s citizens to exclude outsiders from their land at will, and it may not always allow them to bequeath the territory to their descendants and successors. The “thinness” of my account of foundational title has implications for migration, colonialism, and territorial restitution that will be further explored in the remainder of this book.

One last preliminary before beginning: the account of foundational title I offer here is not an historical entitlement account. There is no importance, on my view, to the chain of title underlying current territorial claims. Further, common ownership persists in the story I will tell, as do the moral constraints it imposes. In this, I follow Kant, who conceives common ownership not as a temporal condition, but rather as a “a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with principles of right” (R. 6:262). Foundational title to land—at all times and places—should be understood as a non-transmissible right to use the common.

1. Grotius’s Primitive Right

What does it mean for the earth to be initially commonly owned? As John Simmons notes, “a natural community of things is not an unambiguous notion.” Dating back to Samuel Pufendorf, it has been traditional to distinguish two ways of understanding this initial scenario. A negative common is unowned by anyone and equally open to all persons, each of whom has a liberty-right to use the world, though no exclusive claim-right to anything. A positive common is one in which all persons jointly own the world, in the sense of holding some “undivided proportional share” in it. The nature of this proportional share is open to further specification, as (1) a protected liberty to use the undivided common, (2) equal influence in decision-making about the undivided common, (3) an equal share in the (to-be-divided) common, and so on.

Grotius stakes out an intriguing position with respect to common ownership: he claims that some exclusive rights are consistent with common ownership, on its best interpretation. Even prior to the invention of private property, he argues, humans would have had moral rights over material resources. As Grotius puts it, “a certain form of ownership did exist” prior to the institution of private property, “but it was ownership in a universal and indefinite sense” (DJP, 317), which he further glosses as “the power to

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14 I cite Kant’s writings by the standard German edition, Kant’s Gesammelte Schriften, edited by the Prussian Academy of Sciences (Berlin, Walter deGruyter & Co. 1900--). These numbers are noted in the margins of English translations. Translations are from Mary J. Gregor, ed., Immanuel Kant: Practical Philosophy, (Cambridge: Cambridge University Press, 1996).
16 Ibid, 238.
make use rightfully of common property” (*DJP*, 315). “[T]o have made use of Things that were then in common, and to have consumed them, as far as Nature required, had been the Right of the first Possessor: and if any one had attempted to hinder him from so doing, he had been guilty of a real Injury” (*DJBP*, 1.2.1). Grotius’s limited natural right over material goods—which I call the *primitive right*—is a preinstitutional claim, not a human creation. It is a rightful power to make exclusive use of commonly owned things.

William Blackstone, a later expositor of the Grotian view, argues in this vein that common ownership

seems ever to have been applicable, even in the earliest stages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer…Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice.17

What arguments might be given in favor of this primitive natural right of possession and use, as postulated by Grotius and Blackstone? I believe the primitive right is best justified on grounds that it is instrumental to protecting other, more familiar, rights. Every plausible moral theory holds that we are bound by a number of general duties that we have done nothing voluntarily to incur, including duties to respect others’ self-preservation and freedom. Certainly natural law thinkers take this view: they hold that we are bound by the law of nature to respect others’ sphere of sovereign decision-making, their *suum* (*DJBP*, 1.1.5). Grotius argues that this sphere of sovereignty is partly preinstitutionally defined: thus, “our Lives, Limbs, and Liberties had…been properly our own, and could not have been (without manifest Injustice) invaded” (*DJBP*, 1.2.1).

Yet it is difficult to see how we could fulfill these basic duties without sometimes also respecting others’ possession of material goods, when those goods are currently serving as essential supports for basic rights to life, limb, and liberty. Clearly it is necessary to appropriate some material goods (at the very least: food and drink, clothing, shelter, and the means of producing them) in order to guarantee self-preservation. Further, it also seems necessary to appropriate external things in order to enjoy freedom. Almost any activity that we might want to undertake requires the use of external objects. Imagine, for example, that I want to paint a landscape. In order to carry out this project, I need rights over the paint, brushes, and canvas sufficient to enable me to execute it.

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without fear of someone else coming in and interfering with what I have done.\textsuperscript{18} If we were unable to use anything without the permission of other common owners, then we would be pervasively subject to their authority in our choices about what to do. They would exercise a veto power on our ability to set our own goals. Thus, if there is a background requirement of justice to respect others’ self-preservation and freedom, it seems in consequence that there ought to be a background requirement to respect at least some claims to use and possess external things.

How extensive is the primitive right? Grotius says that this right gives us a claim to use things “as far as Nature required.” Since each human being has a natural right to self-preservation, she also has the right to the necessary means for it. Some interpreters have read Grotius as limiting usufruct to basic survival needs, but he speaks more expansively of the use-right: some external goods, he says, “are necessary to being, while others are necessary only to well-being; or, one might say that they relate respectively to safety and comfort” (\textit{DJP}, 23). He refers to many uses of things that are not directly tied to survival, e.g., our right to use the sea to sail from place to place.

Grotius also stresses that there are limits to the primitive right, although these remain rather vaguely defined in his work: “there was an equality to be observed in that state, where all things were common, that one as well as another might have the liberty of using what was common” (\textit{DJB P}, 2.10.1.2). Why would there be such limitations? Note that the duty to respect others’ freedom—which in part grounds respect for primitive rights—is itself a limited duty. One does not have a duty to respect another’s life-projects full stop. Instead, one has such a duty only insofar as those projects are compatible with the freedom of other people, including their enjoyment of an opportunity to form similarly valuable plans and projects. Any act of legitimate appropriation for one’s own use, then, must be consistent with a rule that would allow others a similar use. This expresses the idea—familiar from Locke—that to be justified, our appropriation must leave “enough, and as good” for others. An appropriation must therefore comply with a fair share constraint in order to be respectful of others. I say more about this constraint in Chapter 4.

Does the primitive right impose correlative duties? Grotius suggests so: “no Man could justly take from another, what he had thus first taken to himself” (\textit{DJB P}, 2.2.2). As long as it is consistent with the fair share constraint, our use of a thing places others under a moral duty to respect that use. Grotius illustrates this with a famous analogy from Cicero: “though the theater is common for anybody that comes, yet the place that everyone sits in is properly his own” (\textit{DJB P}, 2.2.2). The theater remains common, but each theatergoer has a right against the others to his seat for as long as he is using it. Like the theater, the world in “early times” is common, according to Grotius, but anyone who has laid hold of a particular good may claim it as his, for the period of his own use. This holds at least so long as he dispossesses no one, and respects the fair share constraint.

Is the primitive right reducible to a simple duty to respect someone else’s body? Kant argues, in this vein, that some material objects may fall within the compass of our duty not to assault others, when they are physically attached to those objects \((R, 6:248)\). He calls this a title to “empirical possession.” But Grotian primitive rights seem more extensive than this, as the analogy to the theater suggests. In the theater, you may get up to get a drink or void your bladder and return to your seat without losing your claim—your occupation of the seat does not cease as soon as you are no longer physically attached to the space. That seems appropriate, for otherwise our claims to external things would be too limited to guarantee self-preservation and freedom. Consider shelter: under an “empirical possession” system, one could claim only as much space as one’s body took up. Others could come and share other bits of your cave, say, so long as they could do so without touching you. Were our claims to material things as minimal as this—constrained to what we could physically touch or hold, for the time we were holding it—it is unlikely we could secure our other rights in a preinstitutional scenario. For that reason, I think our basic duties to others give us reason to respect uses of things that are more extensive than Kant’s right of empirical possession.

As is apparent, I find Grotius’s primitive right plausible. The basic argument is that even absent the social institution of (full liberal) property or an act of collective consent, we can acquire limited moral rights over material goods, when those goods serve as essential supports for our other natural rights, by playing an integral role in our self-preservation and projects—so long as we confine our use within reciprocally justifiable limits. Suppose I come across a plot of land where you have built a hut, are tending a small garden, and have built various art projects. Does the fact that these goods are necessary to your sustenance and plans give me reason to refrain from interfering with them? I believe so. The fact that a material good is an essential support for someone else’s preservation and projects, I think, grounds a pro tanto moral duty on me to respect her use of it, even if I did not consent to her possession. If I have (or can procure) a place to live and food to eat somewhere else, then I ought to leave your hut, garden, and art projects alone. On the other hand, the strength of these pro tanto duties depends greatly on the background situation. If I am starving, or lack any space in which to pursue my own projects, then I may be justified in interfering with “your” goods in order to obtain sufficient resources for myself. In this situation, interference is not a failure to respect your personality, but a justified attempt to appropriate the resources necessary for my own.

2. The Unilateralism Objection

A potential objection to the primitive right, however, is that the unilateral appropriation of things wrongly interferes with the freedom of other common owners. I now want to investigate this objection, asking what kind of infringement of freedom might be at stake.

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19 For explanation, see Ripstein, *Force and Freedom*, 94.
Samuel Pufendorf powerfully presses this worry against Grotius: he objects that “taking must not presently be construed acquiring: the former being a bare natural Action, whereas the latter includes a moral Effect.” Pufendorf holds that upon supposition that all men had originally an equal power over things, we cannot apprehend how a bare corporal act, such as seizure is, should be able to prejudice the right and power of others, unless their consent be added to confirm it; that is, unless a covenant intervene (DJNG, 4.4.5, see also 4.4.4).

Even the most basic rights to food and shelter, according to Pufendorf, must be created by human agreement: “all Dominion, capable of producing any Effect against the claims of others, takes its rise from some Act of Men” (DJNG, 4.5.8). Before people could consume anything, a first covenant was necessary to introduce what Pufendorf calls “qualified communion,” where “the substances of things belong to none, but their fruits become a matter of property when gathered” (DJNG, 4.4.12). Otherwise, as Richard Tuck puts it, “even goods picked for personal consumption could legitimately be snatched from the mouth of the prospective consumer.”

Yet if unilateral appropriation seems potentially problematic, Pufendorf’s position seems equally so. This is the truth in Locke’s dictum that “if such a consent as that were necessary, Man had starved, notwithstanding the Plenty God had given him” (Locke, 2T §28). Being unable to appropriate anything—even for our own use—in a commonly owned world would undermine our other rights and claims, including self-preservation and freedom.

To put Pufendorf’s view in its best light, we should note that by “agreement,” like Hume, he has in mind a rule-bound practice or convention, not an explicit compact. A convention, following David Lewis’s classic analysis, is an arbitrary but practically useful solution to a recurring coordination problem among a given population. Pufendorf holds that property conventions evolve in stages, beginning with the initial rule allowing people to privately consume food and drink; then moving to property in moveable goods, like clothing, houses, and stores of provision; then to property in things that require industry and improvement, like household goods, cattle, tools; and finally to property in land, money, and exchange. The theory of convention, as developed by Lewis, holds that an essential part of the solution to such coordination problems rests on the agents’ attempts to replicate the practical reasoning of the other agents involved. When agents cannot communicate or explicitly agree, one way of forming concordant expectations about their behavior is for both agents to focus on a salient aspect of the situation they face: some feature of one of the choices that conspicuously sets it apart.

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from the others and renders it unique.\textsuperscript{25} If a population of individuals can settle on a salient rule defining who has claims to which material things, then they will have created conventional rights of property.

Still, even this revised account of Pufendorf’s position faces a problem. Though it can explain why members of the relevant conventional practice might have a duty to respect one another’s property, it cannot explain why an outsider is bound by their rules. Think of Christopher Columbus sailing up to the island of Hispaniola in 1492: since he had never interacted with the native inhabitants before, he shared no property conventions with them. But it still seems that he and his sailors wronged the inhabitants by forcing them off their land (at least absent any compelling justification of necessity). Yet the social conventionalist view cannot account for this wrong, since the hallmark of the conventionalist approach is the claim that duties to respect rights in material goods do not arise until a system of conventions comes to be generally recognized and respected within a given population.

Given the costs to Pufendorf’s conventionalist position, it seems especially important to get clear on the nature of his moral objection to unilateral appropriation. Consider four interpretations of Pufendorf’s worry:

Unilateral appropriation is \textit{prima facie} objectionable, because…

(1) \textbf{Constraint}: it removes from other common owners the option of using a particular good.

(2) \textbf{Distribution}: other common owners might lack a fair share of what was initially possessed in common.

(3) \textbf{Robbery}: it violates the property rights of other common owners of the good.

(4) \textbf{Authority}: as a moral equal, no individual has the authority to impose new obligations on another that this other person does not accept.

Consider first \textit{Constraint}. On this view, consent to appropriation is necessary because taking an object for one’s own use removes from others the option of using it. Yet others often \textit{permissibly} interfere with our options through perfectly legitimate exercises of their rights, some of which involve using physical space. As Jeremy Waldron puts it, “everything that is done has to be done somewhere.”\textsuperscript{26} The fact that you are standing in this space may interfere with my ability to stand there now. But surely you do not need my permission to take up space with your body. You don’t need such permission because the ability to stand somewhere, free from assault, is already covered under your general right to bodily integrity. If our rights to self-preservation and freedom


similarly “cover” the right to use external things necessary to secure these rights, then others’ consent to our use is not necessary.

Consider next Distribution. On this view, taking too much space might interfere with the freedom of other common owners. Freedom requires a fair share of opportunity to engage in valuable activities, and an appropriator who hoards resources may deprive others of needed opportunities. This is a very plausible worry. But the distributive objection could potentially be met by a system in which people were allowed to use only a fair share, highlighting once again the importance of the fair shares constraint mentioned earlier. Of course, how to define fair shares is a fundamental question, and I return to it in Chapter 4. But fundamental as it is, Distribution does not rule out unilateral appropriation as such. As long as proper limits can be specified, and as long as individuals are capable of respecting them, there is no further objection to appropriation itself.

Consider next Robbery. Should we think that an appropriator commits a kind of theft? For this to be the case, we would have to conceive the initial common ownership scenario in such a way that all exclusive use of goods without others’ consent was ruled out. But that would leave people unable to secure their self-preservation and freedom, since they could not perform even the most basic acts without others’ permission. So we should not conceive the initial common ownership scenario that way. Everyday examples of common possession support this: at a family-style meal—where all the food is the common possession of all the guests—we do not ask the consent of the other guests before serving ourselves a portion, so long as we leave enough for others to eat; at the movie theater, we do not ask the consent of all moviegoers before sitting down, so long as there are enough seats. Instead, so long as an appropriator respects reciprocally justifiable limits on appropriation, he simply particularizes the common, in a way that is already morally permissible. 27 In the primordial scenario, the division of the common may not yet have historically occurred, but there is nothing in the morality of the situation that should prohibit its occurrence.

The best way to interpret Pufendorf’s worry, I believe, is Authority. The thought is that by appropriating, I create new rights that did not exist before, by deliberately imposing a duty on others to respect my possession. Were I to have this ability, it would make me a kind of legislator for others, placing their moral duties under my control. 28 By a bare act of will, I could change their moral situation. Such unilateral authority, Pufendorf argues, is at odds with the natural freedom and equality characteristic of a state of nature, in which no one is marked out as superior to anyone else (DJNG, 5.13.2). An agreement works to counteract this concern, ensuring that individuals together impose duties to respect property on themselves. Authority articulates a powerful and plausible worry.

But is Authority successful against Grotius’s primitive right? I don’t think so. Notice that on the Grotian account, it is not the appropriator who legislates the duty to

28 For this way of putting it, see van der Vossen, “Imposing Duties and Original Appropriation,” 4.
respect others’ use of material goods: instead—so long as that use helps to secure background moral rights—pre-existing morality legislates that duty. I respect your possession of this object not because of your arbitrary choice to seize this particular thing, but rather because morality requires respecting your possession of things in cases where that possession secures your self-preservation and freedom, and is consistent with my own. Of course, by taking up a particular good, the appropriator does trigger these background moral duties, but this is unproblematic. We trigger particular “applications” of others’ moral duties all the time: when I cross the street, I trigger a requirement that drivers slow down to stop, thus “applying” their general duty not to unjustly threaten my life; when I post a flyer on a common message board, I trigger a duty on others not to post their flyers on top of mine, thus “applying” their general duty to respect my legitimate projects; and so on. Likewise, by taking up and using part of the world, an appropriator activates a particular application of others’ background duties of justice, viz. the duty to respect his self-preservation and freedom. But the appropriator does not claim any moral power to create sui generis duties for other people that they wouldn’t already have had. Thus, Pufendorf’s authority worry is circumvented.

We should distinguish the four worries just examined from a fifth, related, objection:

(5) Interpretation and Enforcement: No individual has the standing to enforce her interpretation of property rights upon a moral equal who reasonably disagrees with that interpretation.

I attribute this objection—to which I am sympathetic—to Kant’s Doctrine of Right. However, I propose to set the objection aside for now. Notice that unlike the other four possibilities just canvassed, Interpretation and Enforcement is not an objection to appropriation. To the contrary: Kant’s “Postulate of practical reason with regard to rights” (R, 6:257) purports to show that appropriation is morally required. However, Kant argues that property can only be held “provisionally” in the state of nature, because the definitive shape of the rights we have acquired through appropriation remains a matter of dispute, since each individual lacks the rightful authority to interpret and coercively enforce her property claims. For this reason, property can be held “conclusively” only once a civil condition is established. In a condition of disagreement, individuals have a duty to acknowledge one commonly authorized, omnilateral arbiter of their property rights, a “judge competent to render a verdict having rightful force” (Kant R, 6:312). I fully concede that primitive rights are subject to pervasive problems of indeterminacy and vagueness, which render them fragile, unstable, and problematically enforceable in a state of nature, and require authoritative adjudication to solve. Yet even fragile and unstable claims can pre-exist the institutions that adjudicate and enforce them, so long as appropriation is not itself wrongful, and one can imagine actors trying to respect these moral claims—though less successfully—even in the absence of authoritative institutions.

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29 For further discussion, see David Estlund, Democratic Authority, (Princeton: Princeton University Press, 2008), 143. Ripstein, Force and Freedom, 151; van der Vossen, “Imposing Duties and Original Appropriation.”
I merely flag the *Interpretation and Enforcement* worry now, proposing to return to this issue later in the book.

3. The Extent of Primitive Right

Let me briefly summarize my argument up to this point. I have claimed that it is permissible to unilaterally appropriate external objects even in the absence of a civil state or social convention regulating property. Our background moral duties to respect others’ self-preservation and freedom license an additional requirement to respect at least some claims to material goods. Controversially, I have held that all this is consistent with common ownership, on its best interpretation.

I now want to ask: how extensive are these primitive rights? How many incidents of ownership do they encompass? Are they full liberal property rights?

Following Honoré, let me define full liberal ownership (which I use synonymously with the Roman law term *dominium*) as “the greatest possible interest in a thing which a mature legal system recognizes.”[^30] Nozick glosses ownership, in this vein, as involving “a permanent bequeathable property right.”[^31] I believe the interest acquired through appropriation in the state of nature would fall considerably short of a full liberal ownership right. There are two relevant differences: first, primitive rights confer more limited claims to exclude; and second, primitive rights do not extend to contractual transfer.

Let me first consider exclusion. Full liberal ownership specifies criteria for acquiring permanent legal title to things regardless of the role those things play in the owner’s life, and it allows the title-holder to exclude others from the good at will.[^32] If you enjoy full liberal ownership of a theater seat, you may keep others out of it even when you are not sitting there, and even if you don’t like seeing plays. You may simply be an investor who buys theater tickets to sell them at a profit. As Pufendorf puts it, “such is the force of dominion that we are able to dispose of things, which belong to us as our own, at our pleasure, and to keep all others from using them…” (*DJNG*, 4.4.2).

Yet primitive rights, as I interpret them, confer a claim to exclude others from objects only insofar as those objects serve as essential material supports for a person’s normal life-activities. Why doesn’t primitive right extend to discretionary exclusion? Consider a “state of nature” case: suppose I come across a hut and plot of land where someone once lived but which has gone unused for some time. It is clear, however, that the would-be “owner” wishes me to refrain from “his” land, as is apparent from the “No Trespassing!” signs. Is it self-evident that I am morally obliged to refrain from trespass—say, that I have a duty not to shelter in the hut for the night? I deny that it is. The “natural” duty to respect others’ possession, as I interpret it, is based on a prior moral

requirement to respect someone’s self-preservation and life-projects, so long as these are compatible with the reciprocal claims of others. In this case, however, it is not clear how my use of the area would constitute an interference with anyone’s life-projects. Of course, my use may contravene the would-be owner’s intentions, but natural morality does not require me to respect anyone’s intentions.

It is of interest here that even Locke stresses the ways in which property in the state of nature is limited by the requirement of ongoing use. He holds that individuals may not appropriate in order to waste goods or allow them to spoil, and he comments that most useful natural products are of “short duration” (Locke 1980, §46). For this reason, Locke concludes that an appropriator in the state of nature “had no right, farther than his use called for any of them, and they might serve to afford him conveniences of life” (Locke 1980, §37, see also §31). Locke also stresses that this requirement, in the state of nature, “did confine every man’s possession to a very moderate proportion” (Locke 1980, §36), such as not to “prejudice the rest of mankind.” As Scanlon notes, this use-requirement is essential to Locke’s case for natural property rights: limiting natural property to what can be included within the compass of a normal life helps to ensure that an appropriator does not “entrench” upon others. Full liberal ownership, however, removes this limit, conferring on people expansive rights over things they do not use.

Full liberal ownership also differs from the primitive right in a second way: it involves powers of transfer, including rights to alienate, loan, rent, bequeath, and to derive income, all of which enable the possibility of market exchange. Grotius sees alienability as essentially differentiating full property from primitive rights: “the law of nature gave indeed a right to use things; as for instance, to eat or keep them, which are natural acts, but not to alienate them. This power was introduced by the fact of men, and therefore it is by that we must judge of its extent” (DJBP, 2.6.6). Since most of our economic plans depend on the institution of market exchange, the economic projects that we could form in a state of nature absent this institution would be quite limited. So the natural duty to respect uses of material goods essential to others’ life-projects, in my view, applies centrally to non-economic uses. I do not deny, of course, that there can be duties to respect economic plans as well; but the shape and scope of these duties, I believe, depends on further conventional institutions.

Why shouldn’t primitive right extend to transfer? Even in a state of nature, one might promise one’s goods to someone, and morality might require one to follow through on that promise. And surely if I come across two people in the forest bartering their nuts and apples, it would be wrong for me to run up and snatch the goods as they are passing between them. But the institution of contractual transfer differs significantly from the prepolitical morality of promise-keeping and non-interference. Most importantly, the institution of legal contract requires the participation of the community in securing and

36 I owe this example to Nicolas Cornell.
enforcing the agreement.\textsuperscript{37} Yet I doubt persons in a state of nature would have any parallel obligation to enforce other people’s promises. If by promising Bernard your apples in exchange for his oranges, you could place me and others under an obligation to risk our lives to guarantee your agreement, you would wield an unacceptable amount of power over us. So in the state of nature, I conclude that if you and Bernard fail to keep your promises, you have no remedy apart from self-help. Securely enforceable contracts, of the kind presupposed by large-scale market exchange, depend on conventional institutions created by the state. Moreover, the state may permissibly attach conditions—including taxation—to its provision of this valuable service.

So I believe that even in a state of nature, and as a matter of minimal human morality, we would recognize certain rights over material goods that allow us to meet our needs, and to engage in (largely non-economic) personal plans and projects. But I doubt that our recognition of this interest would extend to recognition of full liberal ownership, in the modern sense. The key question is how far background morality can take us. In my view, it would be consistent with background morality for the state of nature to be organized around a much weaker system of entitlements than full liberal ownership: for example, a system that limited our powers to exclude others from objects apart from use, that required a person’s possessions to revert to the community at her death, or that did not include an enforceable claim to \textit{inter vivos} transfer.

One might object that while there may exist some prepolitical entitlements of the kind postulated by my “primitive right” thesis, these do not amount to “property” as that term is normally used.\textsuperscript{38} Property is usually taken to involve direct rights over a thing itself. Primitive rights, on the other hand, involve only indirect rights to things. Primitive rights are generated insofar as certain moral duties to \textit{persons}—in specific empirical circumstances—create a derivative requirement not to interfere with a person’s use of a particular object. Primitive rights, we might say, are not really \textit{rights to the thing}; instead, they are other rights that (indirectly) \textit{happen to concern the thing}. As Kant puts it, the primitive right “does not go beyond the right of a person with regard to himself” (6:250).

This objection is correct, and it highlights a key way in which primitive right falls short of full property. For my purposes, whether or not we wish to label the primitive right “property” is morally unimportant, so long as we recognize that it protects some “property-like” interests. In particular, I have argued for a Grotian conception of the personal \textit{suum} and its adjuncts. On this view, the primitive right goes beyond familiar duties not to interfere with another’s body, by grounding duties to respect others’ possession of goods when these goods are essential to their temporally extended plans and projects.


\textsuperscript{38} Again, I thank Nicolas Cornell for the objection.
How much “property-like” content can our background moral duties generate? Arthur Ripstein has argued that nothing short of full private property suffices to guarantee individuals’ freedom. He holds that

freedom requires that you be able to have usable things fully at your disposal, to use as you see fit, and so to decide which purposes to pursue with them, subject only to such constraints imposed by the entitlement of others to use whatever usable things they have. Any other arrangement would subject your ability to set your own ends to the choice of others, since they would be entitled to veto any particular use you wished to make of things other than your body.39

Under a usufruct system, people are free to use things so long as nobody else is using them. Ripstein argues that this renders one’s ability to set and pursue purposes objectionably dependent on the choices of others. Freedom, in his view, requires full property.

While there is some plausibility to Ripstein’s account, I doubt freedom requires full liberal property. Instead, I believe it can be secured by a more limited set of possessory rights.40 A possessory right confers a power to exclude other people from the use or occupation of certain goods. One need not be an owner of private property to have a possessory right of this kind. A tenant has a possessory right over his apartment, which gives him the claim to exclude others from occupying it without his consent. At the limit, even a society in which all property was state-owned could accommodate possessory rights, by granting all citizens exclusive rights to a dwelling and its contents for predictable durations (e.g., a long-term lease to housing).41 If this is correct, then freedom does not require full private property (especially in the means of production and exchange).

Can Grotius’s primitive right ground possessory claims? I believe so. To the extent that goods are essential to our temporally extended life-activities, primitive right generates a claim to exclude others from them. Return to our earlier example, in which I come across a plot of land where you have built a hut, a small garden, and art projects. The purpose of that example was to suggest that I ought morally to recognize a duty not to trespass on your land, because (a) you are clearly physically occupying it, (b) it is essential to your temporally extended life-projects, even if you are not currently present there, and (c) my use of it would risk setting back these projects (it may interfere with your current or future plans, or leave traces that disturb you, or you might come back and find me, causing distress). So we should conceive of a primitive right as comprising two elements: first, a claim not to be forcibly interfered with in our uses of commonly owned things, so long as we confine that use to a fair share; and second, a claim to possess those goods that are essential to normal temporally extended life-activities. Typically, this

39 Ibid, 19.
40 Since property rights, as Ripstein understands them have two parts, possession and use (Ripstein 2009: 67), it’s not clear he would reject my argument.
means that individuals should be able to exclude others from personal dwellings and the moveables kept therein. More controversial is whether primitive right can ground a claim to exclude others in the exceptional case where it is certain that a person’s life-projects \textit{will in no way be set back} by that use. Suppose I can take a nap in your hut, leaving absolutely no trace, and I am sure that you will never find out.\footnote{Arthur Ripstein, “Beyond the Harm Principle,” \textit{Philosophy and Public Affairs}, 34:3 (2006), 215-245.} I deny that primitive right would ground a claim to exclude here. But I also fail to see how this use infringes your freedom.

To sum up, then, primitive rights are more limited than full liberal property rights in two ways. First, full private property confers a claim to exclude others from things even when they are not essential to anyone’s life-activities. As Scanlon puts it, “a system of property rights goes beyond this primitive right by specifying formal criteria of ownership. If a person is deprived of something to which he has acquired title in the specified way, then his property right has been violated whether or not the taking makes any difference to his life at all.”\footnote{T.M. Scanlon, “Nozick on Liberty, Rights, and Property,” in \textit{Reading Nozick}, ed. Jeffrey Paul, 1981, 125.}

In addition, full liberal ownership also involves rights to transfer—typically, the right to alienate, loan, rent, and bequeath—and to derive income, all of which enable the possibility of market exchange.\footnote{Tully, \textit{A Discourse on Property}, 88.} In putting into place an institution that allows for enforceable transfers of property, civil society enables transactions that would not be possible in a state of nature. As Blackstone puts it, though “the original of private property is probably founded in nature…certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.”\footnote{Blackstone, \textit{Commentaries}, 1.1.3.}

4. Conventional Private Property

Why move from primitive rights to full liberal property? On Grotius’s account, primitive rights might have been sufficient, “had men persisted in their primitive Simplicity, or lived together in perfect Friendship” \textit{(DJB P}, 2.2.2.1). But instead, humans began to want “to live in a more commodious and agreeable manner” \textit{(DJB P}, 2.2.2.3). People’s desire for a more commodious lifestyle led them to labor the earth. Once a division of labor was in place, common use became impossible, “first by Reason of the Distance of Places where each was settled, and afterwards because of the Defect of Equity and Love, whereby a just Equality would not have been observed, either in their Labor, or in the Consumption of their Fruits and Revenues” \textit{(DJB P}, 2.2.2.3).

While brief, Grotius’s view seems to go as follows: at some point, humans were no longer content to live on what each person could produce independently. So they decided to divide their labor and to specialize economically, to facilitate the creation of a
social surplus. A division of labor, however, requires some system of exchange, and to work well, exchange requires people to have more extensive claims to goods than the primitive right allows. If people are entitled to benefit from a good only insofar as they use it in their daily life, they have no incentive to produce anything beyond what they can personally use. Otherwise, their neighbors would simply “free ride” on their efforts, consuming the extra value they have created, and the laborer would receive no benefit from his pains. Incentives for greater productivity thus tell in favor of instituting more robust and permanent rights over material things. Otherwise, the cooperative benefit of an extensive social surplus could not be sustained. As Blackstone explains: “as human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable...But no man would be at the trouble to provide [these conveniences] so long as he had only an usufructuary property in them, which was to cease the instant that be quitted possession...”

Accordingly, Grotius stresses that dominium rests on a human agreement to produce a “new sort of right” (DJBP, 2.2.2.5).

Thus also we see what was the original of property, which...resulted from a certain compact and agreement, either expressly, as by a division; or else tacitly, as by a seizure. For as soon as living in common was no longer approved of, all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by right of first possession, what could not have been divided (DJBP, 2.2.2.5).

In terms of the distinction with which we began, then, full liberal property is a conventional right. Once dominium is introduced, as James Tully puts it, “there is a new definition of what is one’s own, and one’s rights over it.” Liberal private property depends on an agreement to establish new conventions—allowing for discretionary claims to exclude and to alienate—that are added to the natural primitive right.

As we have seen, these new rules require more than the will of a single individual to be legitimately established. One person’s unilateral claim to impose such rules would involve unwarranted legislation for others, of the sort to which Pufendorf’s Authority worry objects. Grotius solves this problem by invoking a primordial agreement to move from the primitive right to full liberal ownership. If all persons together consent

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46 Blackstone, Commentaries, 2.1.
47 Grotius changed his theory of property over the course of his lifetime. His earlier work De Jure Praedae had argued that property was the direct product of occupation, and did not require consent. Private property rights are simply natural use-rights that have been sustained for a long period of time, and have slowly come to be recognized by others as involving additional incidents, e.g. the right to exclude apart from use and to alienate. For further discussion, see Marcelo Araujo, “Hugo Grotius, Contractualism, and the Concept of Private Property,” History of Philosophy Quarterly, 26:4 (2009); Andrew Fitzmaurice, Sovereignty, Property, and Empire 1500-2000, (Cambridge: Cambridge University Press, 2014), 90; Risse, On Global Justice, 102-103.
48 Tully, A Discourse on Property, 83.
to the imposition of duties to respect private property, then these duties can be made compatible with their natural freedom and equality. Grotius sees this agreement to introduce full property as having been made prior to the introduction of government. Once governments arise, Grotius holds that they are obliged to respect and enforce the private property rights already established.

Yet the consent theory of property is subject to a number of devastating objections. First, the hypothesis that humanity ever actually agreed to institute liberal property rights seems implausible: when exactly was such an agreement made? Second, if any dissenters had existed at the time of the proposed transition, they would not have been morally required to recognize the new dispensation; instead, they would have retained their primitive common rights, allowing them to use anything not currently being occupied by others. Finally, even if such an agreement were actually concluded, it is unclear how the consent of ancestors would bind their children. Each generation would have to continually consent to private property, again and again, for it to remain legitimate.

There is also a worry about whether, on Grotius’s account, the transition to full liberal private property is worthy of our consent (separate from worries about whether it historically received it). The transition to full property seems to involve agents exchanging their most fundamental rights—to self-preservation and freedom—for a potentially more luxurious standard of living. But Grotius holds that “the Civil Law can enjoin nothing with the Law of Nature forbids” (DJBP, 2.2.5). So full property, which allows individuals to exclude others from goods at discretion—regardless of the effects on those others’ self-preservation and freedom—threatens to contradict the fundamentals of Grotius’s theory. (Grotius himself solves this problem by postulating a continuing right to others’ property in cases of necessity, which allows us to secure our preservation by self-help, at the expense of an ongoing instability in property rights).

Perhaps because of these worries, later thinkers (like Rousseau and Kant) offered a different—and I think more successful—story about the justification of conventional property rights, linking it to the institution of the legitimate state. How might legitimate states bring about conventional property? First, well-ordered governments have the moral power to create new obligations for their subjects, which—following Pufendorf—is required for duties to respect full property to bind. Rousseau argues, in this vein, that private property becomes legitimate only when it is brought under the general will. Second, the legitimate state can also regulate these conventional property rights so that the inequalities they create do not threaten natural rights to self-preservation and freedom. The legitimacy of full property, on this view, is tied to the availability of institutions that can regulate ownership in an ongoing way. As Rousseau argues, the state must ensure that “all have something and none have too much of anything,” substituting “a moral and legitimate equality for whatever physical inequality nature may have placed between men” (SC 1.9). So while some primitive “property-like” rights are indeed

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50 Thanks to Jacob Weinrib for suggesting to me this line of thought.
possible in a preinstitutional scenario, modern forms of private property are not best understood as natural rights: instead, they are created by human institutions and are valid only because these institutions have been legitimately authorized and have certain regulatory and redistributive powers.\textsuperscript{52}

5. Rights to Territory

I now turn to what this hybrid view has to say about territory more specifically. Does a society have some kind of foundational title over the geographic space it controls, a title that outsiders might be obliged to recognize? If so, is this a primitive right, conferred by preinstitutional morality? Or is it a full liberal ownership right \textit{[dominium]} of a more ambitious kind?

Suppose that foundational title to land is based on the primitive right. It would look rather thin. On that principle, the inhabitants of a particular place could exclude others from spaces that were essential to their life-activities, so long as they confined these activities within the bounds of a fair share. But they could not claim the discretionary right to exclude others from their territory at will. Any claim to exclude, under the primitive right, would depend on showing that outsiders’ settlement would harm the social, cultural, and economic practices of the locals (and, further, that these practices are consistent with the fair share constraint). Indeed, outsiders would be able to use land that the local inhabitants were also using, so long as they did so in ways that did not undermine the inhabitants’ legitimate activities.

Nor could local inhabitants necessarily claim the right to alienate and bequeath land to their successors. If the same land remained essential for the life-activities of descendants, then they too could claim primitive rights to it. But if the descendants move elsewhere, or their social, cultural, and economic practices substantially change, then their ancestors’ land may no longer be essential to their lives. If so, they may lack any claim to keep others from the area. So primitive rights to geographic space can be expected to shift as peoples’ attachments and activities change. On this view, the land \textit{itself} should not be thought of as an object of full proprietary control. Instead, the earth’s land remains in common ownership, though—as we have seen—we should understand common ownership as compatible with limited exclusionary practices.

Suppose instead that we understand foundational title as a right of full property. As we have seen, conventional property rights confer more robust claims to exclude than do primitive rights. Since \textit{dominium} extends to the very substance of a thing, on this view, a state would have a permanent and discretionary right to exclude outsiders from its land, even from areas that were not actively being used. Outsiders would lack any claim to settle these spaces, or to travel through the area without the owners’ permission. The terms under which foreigners might be entitled to enter that space would be up to the receiving society, and no wrong would be done if they decided not to allow outsiders access at all. Since \textit{dominium} creates permanent titles, land could also be bequeathed to

\textsuperscript{52} Schlatter, \textit{Private Property}, 157.
the current inhabitants’ successors, even where it was not essential to their plans and pursuits.

Grotius offers us something close to a “primitive right” account of foundational title. He holds that common ownership is not fully extinguished once rights to property and territory are established: instead, “Men may…have a Right to enjoy in common those Things that are already become the Properties of other Persons” (*DJBP*, 2.2.6). Common ownership requires nations to permit outsiders ongoing liberties to use their land, including allowing those engaged in a just war to occupy a neutral country; the use of water, food, and other things that can be shared without detriment; free passage over lands and waterways; and free trade for goods and merchandise.53 Outsiders may stay in any country they are passing through. They may also claim permanent residence if they are stateless, so long as they agree to obey the laws of the local political authority. Finally, if there is any “waste” land within a jurisdiction, outsiders may claim it, again as long as they agree to submit to the laws. As Richard Tuck emphasizes, this amounts to “a formidable set of constraints on property in land.”54

A fundamental part of Grotius’s argument is the distinction between jurisdiction—which a local state *can* claim—and *property*, which it cannot. As Grotius explains, “There are two things that belong to nobody of which one may take possession: Jurisdiction and the Right of Property, as distinguished from jurisdiction.” For this reason

[...] if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction” (*DJBP*, 2.2.17).

Jurisdiction over territory comprises an “eminent right”—the right of “a Community…over the Persons and Estates of all its Members for the common benefit” (*DJBP*, 1.1.6)—which allows the local political authority to make rules governing real property there. But jurisdiction does not extend to the claim to exclude outsiders from areas that are unoccupied or unused. The common right authorizes outsiders to occupy unused land, so long as their occupation does not undermine the valuable projects of local inhabitants.

An even more limited account of foundational title may be found in Rousseau. Like Grotius, Rousseau concedes that some primitive rights to land pre-exist the state. These primitive claims are based on what Rousseau calls the “right of the first occupant.”

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53 Another important residue of common ownership, for Grotius, is the right of necessity. In moments of necessity, Grotius argues, “that antient Right of using Things, as if they still remained in common, must revive, and be in full Force” (*DJBP* 2.2.6.2). People in dire need have a perfect right to use others’ goods. This is not just a claim to charity; instead, they can permissibly seize these goods and defend their own use of them.

54 Tuck, *Rights of War and Peace*, 104.
In general, to authorize the right of the first occupant to any piece of land, the following conditions must apply. First, that this land not yet be inhabited by anyone; second, that one occupy only as much of it as one needs to subsist: In the third place, that one take possession of it not by a vain ceremony, but by labor and cultivation, the only sign of property which others ought to respect in the absence of legal titles (SC 1.9).

In limiting the right of the first occupant to “what is needed to subsist,” Rousseau adopts a stricter account than Grotius. But like Grotius, he holds that there is a limited pre-political duty to respect those uses of land that are essentially linked to others’ “core” moral rights.

Like Grotius, Rousseau also derives the state’s right to its territory from its members’ primitive rights. “With regard to other Powers,” he argues, the state “is master of all of its members’ goods only by the right of the first occupant which it derives from private individuals” (SC 1.9). Since this right of the first occupant, on Rousseau’s account, is limited to land that is labored for subsistence, outsiders retain moral claims to settle and use land superfluous to current occupants’ essential interests:

Indeed, does not granting the right of the first occupant to need and to labor extend it as far as it can go? Can this right be left unbounded?...How can a man or a people seize an immense territory and deprive all mankind of it except by a punishable usurpation, since it deprives the rest of mankind of a place to live and of foods which nature gives to all in common? (SC 1.9).

While Grotius and Rousseau understand societies’ foundational titles as based on the primitive right, Pufendorf instead interprets it as a much more robust claim to ownership, a kind of national property. He therefore holds that any political community has a right to refuse visitors, since a “property-holder must have…the final decision on the question, whether he wishes to share with others the use of his property” (DJNG, 3.3.9). Since dominium extends to the very substance of a thing, states can exclude outsiders from the areas they control at their discretion.

Pufendorf argues that the duty to receive foreigners is an imperfect duty that—while morally binding—cannot be enforced except in cases of extreme necessity. Since other humans are dependent on our help and assistance, we ought to bestow benefits on them, where we can do so at little cost to ourselves. Thus, “among the duties of humanity, there is included the farther one of admitting strangers, as well as of kindly providing travellers with shelter and hospitality” (DJNG, 3.3.9). Yet these imperfect duties of humanity fall outside strict justice, so it is up to the property-owners to judge how best to act on them. For that reason, nations many “take such Measures about the Admission of Strangers, as they think convenient; those every being excepted, who are

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56 Fitzmaurice, Sovereignty, Property, and Empire, 112.
driven on the Coasts by Necessity” (DJNG, 3.3.9). Indeed, there are certain cases in which a state fails to have a duty to accept any outsiders at all. If “any one Nation, contented with what it finds at home, utterly refrains from all foreign Travel, it does not appear what Obligation such a State can have to admit those who would visit it, without a weighty or necessary cause” (DJNG, 3.3.9).

Further, since dominium creates permanent titles, a nation may exclude outsiders even from spaces that are not actively being used:

Occupy by the whole confers on the community, as such, a dominion over all things contained within the tract which they thus possess…Nor is it necessary that all things which are first occupied in a general way, should afterwards be divided amongst particular and distinct proprietors. Therefore, if in a Region thus possessed, anything should be found which is not ascertained to a private Owner, it must not presently be looked on as void and waste, so that any one person may seize it as his Peculiar; but we must suppose it to belong to the whole People (DJNG, 4.6.4).

For Pufendorf, even desert islands belong, as a matter of property, to the states that claim them. Some commentators have read Pufendorf’s position as a condemnation of the European colonial practices of his time, and a defense of the right of indigenous nations to exclude settlers. 58

Should we adopt Pufendorf’s robust understanding of the foundational title to land? As we have seen, conventional rights of full property require legitimate authority to be established. Otherwise, their creation involves unwarranted claims to impose duties on others, of the sort to which Pufendorf himself objects. But can that legitimate authority be shown?

Consider three ways it might be argued for:

(1) First, like Pufendorf, we could invoke a tacit convention of the human race to allow states to hold their territories in full property. As we have already seen, though, this hypothesis faces serious objections: it’s not clear that human beings have ever voluntarily endorsed such a convention, and—even if they had—it’s not clear how it would bind future generations, in particular those would-be migrants who strongly dissent from it.

(2) Second, we could argue that states are bound to respect territories as national property because a convention to that effect has been established among states themselves, which have come to a mutual agreement as to how the earth’s spaces are to be divided. Practices of international recognition are often thought to be constitutive in this way for states’ territorial claims. 59

58 Baker, “Right of entry or right of refusal,” 1435.
problem with this view is that the commonly recognized rules of a conventional practice do not bind anyone other than the voluntary participants in that practice. Thus, the conventional rules made by states could bind only the participating states. In particular, they would not place non-participating states under any obligation, nor would they bind dissenting individuals. These people would preserve their original common rights to use any spaces not essential to the life-activities of others.

(3) A final option is that the right to hold territory in full property might be established by a legitimate global authority. Were there such an authority with the rightful power to create and adjudicate formal titles, then at least according to some thinkers in the natural law tradition (Rousseau and Kant), its subjects would be placed under an obligation to respect these titles. The trouble with this view is that no current international organization claims the authority to regulate states’ territorial boundaries. (Though the International Court of Justice sometimes rules on territorial disputes, cases can only be referred to it on the basis of consent between the states involved, and its decisions are unenforceable).

I conclude, then, that in the absence of a legitimate international authority, the only account of foundational title available to us is the one based on the primitive right.

An important criticism of the “primitive right” tradition is that it may license colonialism. Richard Tuck argues, in this vein, that Grotius endorses “a strong version of an international right…to appropriate territory which was not being used properly by indigenous peoples.” Lea Ypi also suggests that “the most plausible defenses of territorial rights…have in fact been endorsed throughout history (and the history of political thought) to legitimize colonial enterprises.” Yet as Andrew Fitzmaurice shows, the primitive right has equally often been wielded to defend the claims of native peoples to land essential to their subsistence and social practices. Throughout the colonial period, occupancy views were used to argue that the natives “could no more be dispossessed of their land than the Europeans dispossessed by the Indians,” because they had natural rights—binding against all humanity—to occupy it.

It is true that under primitive right, claims to exclude are more limited than they would be in a full property system. But some moral claims to exclude do exist, and these can be drawn upon to defend local inhabitants against unwanted colonization. Specifically, as I argue in Chapter 5, it is wrong to settle in another country in cases where (1) one comes with intent to politically control the population against their will, or (2) one possesses an adequate territorial base somewhere else, lacks an urgent interest in moving, and seeks to settle in a new place under conditions where settlement would harm the plans and practices of prior occupants. Since primitive right can ground claims to

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60 Ripstein, *Force and Freedom*, 149.
62 Ypi, “What’s Wrong with Colonialism,” 163.
63 Andrew Fitzmaurice, *Sovereignty, Property, and Empire*, 68.
exclude—at least in these “limit cases”—it need not endorse the expropriation of non-state peoples.

Still, on the primitive right account, locals can claim to exclude outsiders only from land that is used as part of their life-activities. An obvious question is: what counts as “unused land?” Is land unused when it is kept free of human habitation for environmental or recreational reasons, such as a national park? Or for aesthetic reasons, such as a mountain landscape? I believe the best reconstruction of the primitive right should take a wide view of use. “Use” need not be tied to agricultural cultivation, or specific, culturally-inflected ways of engaging with land. Nor need “use” always involve continued physical occupation—keeping land in an unaltered state to maintain a public park is one way of incorporating that land into one’s activities. The key fact is that the inhabitants must have ongoing, temporally extended projects involving that specific place, and there must be signs by which outsiders can recognize this (though recognition may require due diligence in investigation). It seems reasonable, however, to think that the duty to respect another person’s life-projects is particularly stringent when it comes to land that is inhabited, less stringent when it comes to land that is used for economic and cultural practices, and perhaps considerably less stringent when it comes to land that is used only for recreational or aesthetic purposes.

Third, on the Grotian account, primitive right is further limited by a fair share constraint. Even granting the expansive definition of “use” outlined above, local inhabitants may only claim a fair share of space for their practices. Space over and above that fair share can permissibly be settled and used by others, no matter how central the projects and attachments associated with it. So inhabitants are not permitted to deny outsiders access to areas kept for recreation or environmental purposes (or indeed, for any purposes) if this involves claiming more than their fair share of land. Is this “proviso” a license for colonialism?

While any distributive limit will justify the entry and settlement of outsiders in some cases, I believe this is a consequence we have moral reason to accept. No right to exclude outsiders can be made compatible with each person’s equal common right to the earth unless it rests on some comparative assessment of the urgency and weight of competing claims to space. This means we will have to balance the risk of harms to prior occupants’ life-projects against the interests of would-be migrants in settling. As I develop in more detail later, when incomers have urgent reasons to settle, when incomers have urgent reasons to settle, this will outweigh the risk of trivial harms to local inhabitants. So one needs to think about (a) the urgency of the entrant’s interest in coming, as well as (b) whether or not she has access to another territorial base that would fulfill this interest, and then (c) weigh these concerns against the potential setback to the locals’ plans. Any right of locals to use part of the earth’s surface to maintain a specific way of life must be suitably limited if it is to impose moral duties on others.

Finally, how do primitive rights and full property rights interact? The hybrid view developed here holds that states’ foundational titles to territory are based on

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64 David Miller, *Strangers in our Midst*, (Cambridge, MA: Harvard, 2016), 41, raises these questions.
primitive right, but also that states may permissibly develop regimes of conventional property that go beyond primitive right and bind the state’s constituents *inter se*. But do these full property rights bind outsiders?

Some thinkers within the natural law tradition—namely Rousseau and Kant—argue that they do not. For example, Rousseau suggests that while “public possession” is “stronger and more irrevocable” than individual possession in a state of nature, it is not “more legitimate, at least to strangers” (*SC*, 1.9). Kant further argues that “only in a universal association of states (analogous to that by which a people becomes a state) can [property] rights come to hold *conclusively*” (*R.* 6:350). These views may seem problematic. But I think they look more compelling when we think of future circumstances that could radically shift our understanding of “fair shares” of territory. Under possible climate change scenarios, for example, large parts of the earth may in the future become uninhabitable. If this occurs, then there may be a moral case, under primitive right, for territorial redistribution. This may not leave real property rights, as they currently exist in domestic law, entirely unaffected. So outsiders’ claims under primitive right may constrain conventional property rights in certain ongoing ways, and even force revisions to them.

6. Conclusion

To sum up, in this chapter, I have made four main, interrelated arguments:

(1) First, I have argued in favor of a primitive natural right to material goods—including land—in the tradition of Grotius. Certain rights over objects arise even without conventions or the legal state, simply in virtue of our moral obligations to respect others’ self-preservation and freedom.

(2) Second, I rejected challenges to the primitive right that would suggest that unilateral appropriation is necessarily a violation of common ownership. Even if goods are owned in common, there is nothing wrong with an individual taking up a particular good, so long as she respects reciprocally justifiable limits on appropriation.

(3) Third, I have held that liberal private property is not based on primitive right, but instead requires further conventions that depend on authorized institutions. So pre-political property rights are limited in scope.

(4) Finally, I have held that claims to occupy and control territory should be understood as primitive rights, rather than full property rights. This means that while the state and its citizens can claim the right to occupy territory, they cannot—without further authorized international institutions—claim the right to exclude outsiders entirely.

Of course, many contemporary philosophers have understood property quite differently, as a right the state confers on individuals in pursuit of a broader agenda of
distributive justice. Following (their reading of) Rawls, most political thinkers see property rights as nothing more than the legitimate expectations acquired by agents as they comply with the rules of distributively just institutions.\(^{65}\)

My argument implies that not all aspects of property should be understood this way. I think that sustained reflection on the claim of a distributively just state to its own jurisdictional space should lead us to withdraw the view that property has no natural aspects. Moreover, these natural aspects apply to individuals as much as to political communities. If I am correct, then property is not an entirely conventional institution; instead, central elements of it rest on our primitive natural right to exclusive use of the common.

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\(^{65}\) Rawls, *Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 268. It’s not clear that Rawls himself is actually a pure conventionalist, since he endorses a basic liberty of personal property (see Rawls, *Justice as Fairness: A Restatement*, (Cambridge, MA: Harvard University Press, 2001, 114), which he says “would include certain forms of real property, such as dwellings and private grounds.” Emphasizing this basic liberty would bring him closer to the hybrid view argued for here.