

# Revising International Law: A Liberal Account of Natural Resources

FERNANDO R. TESÓN\*

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\* © 2015 Fernando R. Tesón. Fernando Tesón, a native of Buenos Aires, is the Tobias Simon Eminent Scholar at Florida State University College of Law. He is known for his scholarship relating political philosophy to international law (in particular his defense of humanitarian intervention), political rhetoric, and global justice. He has authored *Justice at a Distance: Expanding Freedom Globally* (Cambridge University Press, 2015) [with Loren Lomasky]; *Rational Choice and Democratic Deliberation* (Cambridge University Press 2006) [with Guido Pincione]; *Humanitarian Intervention: An Inquiry into Law and Morality* (3rd edition fully revised and updated, Transnational Publishers 2005); *A Philosophy of International Law* (Westview Press 1998); and dozens of articles in law, philosophy, and international relations journals and collections of essays.

Before joining FSU in 2003 he taught for 17 years at Arizona State University. He has served as visiting professor at Cornell Law School, Indiana University School of Law, University of California Hastings College of Law, the Oxford-George Washington International Human Rights Program, and Universidad Torcuato Di Tella, Buenos Aires, Argentina. He has dual U.S. and Argentine citizenship.

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In this Article, I defend the view that natural resources originally belong to individuals who have legitimately established private property claims over them. Natural resources do not belong to a collective entity such as the people or the state. My argument is simple. Relying on the Lockean contractarian tradition, I argue that individuals must delegate any resource controlled by the state. This is because all powers of the state are, morally, delegated powers. A group’s claims over natural resources is entirely derivative of the original claims of its members. Only individuals can originally appropriate natural resources; only they have the right to use or sell them, to the state or others.

I proceed as follows. First, I discuss the international law rule according to which peoples or states have permanent sovereignty over natural resources. Second, I attempt to clarify *what* are natural resources and *who* is the right-holder. Third, I present my argument for rejecting the above-mentioned rule: for moral and empirical reasons, title on natural resources should be vested in individuals, not in peoples or states. I conclude with a discussion of common ownership, the view that global natural resources are owned, not by states or individuals, but by humanity as a whole. I indicate the reasons why that position should be rejected as well.

#### I. THE STATE AS OWNER: THE RULE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

International lawyers accept the principle of Permanent Sovereignty over Natural Resources (“the Rule”). The Rule appears in a number of international documents. The International Covenant on Economic, Social, and Cultural Rights provides: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.”<sup>1</sup> The original source, UN General Assembly Resolution 1803, reads: “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”<sup>2</sup> Finally, the Rule can be found in the so-called Charter of Economic Rights and Duties of States, which, like Resolution 1803, is a non-binding resolution by the United

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1. G.A. Res. 2200 (XXI), at 49 (Dec. 16, 1966).  
2. G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962).

Nations General Assembly: “Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”<sup>3</sup>

There is little doubt that the Rule, under a traditional positivist analysis, is accepted as a principle of international law.<sup>4</sup> The Rule has been endorsed even by capitalist states that recognize private property have endorsed the Rule. The underlying idea is that international law is supposed to be agnostic among economic regimes. The formulation in the Rule that the state may *freely* dispose of natural resources means, in part, that the state has the discretion to nationalize or privatize.<sup>5</sup> This Article, however, is not about the legal status of the Rule, but about its moral status. It will argue that the Rule is unjust because it fails to recognize the moral and economic importance of private property rights.

The Rule has two parts. The first part purports to establish a collective *title*: states, nations, or peoples have a permanent right over natural resources. This title excludes other states, nations, or peoples. The second part is a rule of *good governance*: it enjoins governments of those entities, who supposedly act on behalf of the people, to exercise this right for the development and well-being of the people.<sup>6</sup> The Rule appears in national constitutions as well. The Mexican Constitution, for example, proclaims: “The property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation.”<sup>7</sup> More specifically: “All natural resources in national territory are property of the nation, and private exploitation may only be carried out through

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3. *Id.*

4. *See generally* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997).

5. *See* G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962); *see generally* Peter Leon & Webber Wentzle, International Best Practice and Resource Nationalism, Address Before the Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School (Oct. 10, 2010) (discussing the impact of resource nationalism in developing countries).

6. *See* Dorothee Cambou & Stefaan Smis, *Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic*, 22 MICH. ST. INT'L L. REV. 347, 359 (2013).

7. Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 02-05-1917, últimas reformas DOF 07-10-2015 (Mex.).

concessions.”<sup>8</sup> But the Rule is older than Mexico or the United Nations.<sup>9</sup> The old English common law of property includes the traditional notion of *imperium*, according to which the Crown had the ultimate title over land and resources.<sup>10</sup> Under the Rule, states are free to establish any system of property in resources. Natural resources belong to the state.

Several political philosophers have accepted the idea. Leif Wenar, for example, argues that the people *collectively* own the resources in the territory, and that any trade or utilization of resources by the government must have been delegated democratically by the people.<sup>11</sup> Cara Nine writes that collective entities are the proper agents of acquisition of resources, and that those collective entities are the trans-generational managers of natural resources.<sup>12</sup> In any of these versions, private property rights are mere conventions that may be adopted or rejected for reasons of utility.<sup>13</sup> The state is not obligated to recognize any private property rights.

In its modern incarnation, the Rule traces its origins to the process of decolonization.<sup>14</sup> In that context, it made eminent sense. It reflected a justified reaction against the European colonial practice of appropriating the resources of the colonies. Modern international law rejects colonialism, and with it, the notion that one state could colonize an entire society and exploit that territory’s resources for the colonizer’s benefit. However, with

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8. *Id.* The Argentine Constitution, interestingly, provides that the *provinces* (and not the federal government) have original dominion over the natural resources in their territories. Art. 2, § 124, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), <http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf> [<https://perma.cc/2ELZ-9W5B>].

9. The United Nations, founded in 1945, and the Mexican Constitution, 1917, postdate the long established Rule that natural resources belong to the state. See Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 02-05-1917 (Mex.); Mats Ingulstad & Lucas Lixinski, *Raw Materials, Race, and Legal Regimes: The Development of the Principle of Permanent Sovereignty over Natural Resources in the Americas*, WORLD HIST. BULL., Spring 2013, at 34, 34–35; *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/aboutun/history/> [<https://perma.cc/7NJ8-48EV>] (last visited Dec. 20, 2015).

10. For the historical development of the common law of property, see KENELM DIGBY ASSISTED BY WILLIAM MONTAGU HARRISON, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY (Oxford, Clarendon Press, 5th ed. 1897).

11. Leif Wenar, *Property Rights and the Resource Curse*, 36 PHIL. & PUB. AFF. 2, 9, 16, 19–20 (2008).

12. See CARA NINE, GLOBAL JUSTICE AND TERRITORY 72–93, 144 (2012); but see David Miller, *Territorial Rights: Concept and Justification*, 60 POL. STUD. 252 (2012), <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9248.2011.00911.x/epdf> [<https://perma.cc/8VTR-G9CZ>]. Nine and Miller differ in the nature of the collective entity entitled to appropriate resources. International lawyers unanimously endorse the Rule.

13. See Jeremy Waldron, *Property and Ownership*, STAN ENCYCLOPEDIA OF PHIL. (Sept. 6, 2004), <http://plato.stanford.edu/entries/property/> [<https://perma.cc/SF8M-U78X>].

14. Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT’L L. 785, 792–93 (2012).

the end of colonization, the Rule morphed into the principle that *collective entities*—peoples, nations, states—own the resources in their territory.<sup>15</sup> That idea in turn led naturally to the notion that *governments* have the ultimate *imperium* over those resources, since governments are supposed to act on behalf of the people. The Rule thus served to reaffirm the power of the state over land and resources.

Thus, in its inception the Rule had a purely *external* dimension: it vested title to resources in the collective entity in whose territory the resources lay. It had the purpose of excluding *foreigners*, especially colonial powers, from those resources. But with the end of colonization, the Rule acquired an *internal* dimension as well.<sup>16</sup> Under the Rule, the collective entity has a title that is superior to whatever private property title the subjects could assert. What was once an assertion of rights of the colonized people against invaders now became an assertion of domestic governmental supremacy against individual property claims. Private property rights, on this view, are privileges granted by the state, as the Mexican constitution says.<sup>17</sup> The state can legitimately expropriate resources because the state owns them in the first place. Unlike, perhaps, other human rights, the right of private property, if enforced in a territory, is not natural. It is a mere creation of the law.<sup>18</sup>

The Rule has internal problems and ambiguities. I will examine two. The first one is the question of exactly *what* are natural resources. The second is the question of exactly *who* is the owner of natural resources.

#### A. What are Natural Resources?

The first puzzle is to figure out what natural resources are. The Organization for Economic Cooperation and Development defines natural resources as “natural assets (raw materials) occurring in nature that can be used for economic production or consumption.”<sup>19</sup> The Google dictionary defines natural resources as “materials or substances such as minerals, forests,

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15. See SCHRIJVER, *supra* note 4, at 166.

16. *Id.*

17. Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 02-05-1917, últimas reformas DOF 07-10-2015 (Mex.).

18. The idea that property rights are merely conventional goes back to Hume and is largely endorsed by modern political philosophers. See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). For reasons in the text (and others that cannot be developed here) I reject this view.

19. *Glossary of Statistical Terms: Natural Resources*, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=1740> [<https://perma.cc/Y9RP-59SN>] (last updated Dec. 2, 2005).

water, and fertile land that occur in nature and can be used for economic gain.” Similarly, Chris Armstrong defines natural resources as “any raw materials (matter or energy) which are not created by humans, but are available to sustain human activities.”<sup>20</sup> In a lengthy treatment of the subject, Nico Schrijver proposes the concepts of “natural wealth” and “natural resources.” Natural wealth comprises “those components in nature from which natural resources can be extracted.” Natural resources are, then, “supplies drawn from natural wealth . . . which can be used to satisfy the needs of human beings and other living species.”<sup>21</sup>

Natural resources, then, occur in nature and are useful to humans. They do not include manufactured goods, money, or similar non-natural objects. Thus defined, natural resources include a vast range of goods, from oil to tomatoes. Defenders of the Rule, however, rarely mention tomatoes. This raises the problem of how to identify in a principled way the natural resources subject to the Rule. One possibility is to say that the state owns natural resources because it owns everything.<sup>22</sup> The Rule would just be a special case. In Argentina, for example, the government expropriated individual retirement accounts worth \$30 billion.<sup>23</sup> This expropriation cannot be justified under the Rule, since money is not found in nature. The government must appeal to the more sweeping rule that the state owns everything. Yet, from an economic standpoint, the distinction between natural and non-natural resources is dubious. All things that have market value are tradable. The point here is that the Rule is arbitrary. It might as well say that the state owns everything, not just oil and minerals, and be done with it.<sup>24</sup> This is the position adopted by the Charter of Economic Rights and Duties when it decrees that every state has permanent sovereignty over *all its wealth* and *all economic activities*.

Nor is the distinction between land and resources particularly helpful. Chris Armstrong suggests that arguments for land and arguments for resources should be separate because resources are removable from the land, so we can intelligently ask questions whether rights over each should

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20. Chris Armstrong, *Against ‘Permanent Sovereignty’ over Natural Resources*, 14 POL., PHIL. & ECON. 129, 144 (2015).

21. SCHRIJVER, *supra* note 4, at 19.

22. See discussion *infra* pp. 1131–33.

23. See Matt Moffett, *Argentina Makes Grab for Pensions Amid Crisis*, WALL ST. J. (Oct. 22, 2008, 12:01 AM), <http://www.wsj.com/articles/SB122460155879054331> [https://perma.cc/DA5M-H5VD].

24. Schrijver says that including “economic activities” in the Rule adds nothing, except the obvious fact that the state has “economic jurisdiction” in its territory. SCHRIJVER, *supra* note 4, at 18–19.

be allocated separately.<sup>25</sup> I find this claim unpersuasive. Suppose I legitimately own my library, by which I mean the actual shelves and the books in them. Of course, since each book is removable from the library, it is *possible* to think of this or that book in the library as belonging to someone else. But my claim over the library is not *weakened* by the fact that books are removable. If it were established that one of the books in the library is on loan, then it would be true that I do not own *every* book in the library. But the reason is that someone actually has a better title over the book, not that the book is removable. The same is true with resources. Resources lay in the land, and the fact that resources are removable from land is irrelevant for the purposes of title. The private law has well-developed rules that apply equally to unmovable and movable objects, and even to fugacious objects like oil.<sup>26</sup> There is no reason why the private owner's title over a resource should be lessened merely by its removability. The owner's claim over resources is as strong or as weak as his claim over land. If I own my backyard and *also* have gold laying there, my title over each of those two resources is equally strong or weak. In order to own the gold, someone must show a better title than the one the landowner has over the gold—by virtue of owning the land. The mere fact that gold is removable does not create such title.<sup>27</sup>

Moreover, defenders of the Rule have failed to distinguish between different types of resources. I grow tomatoes in my backyard and I have also gold laying there. Tomatoes are also removable, yet I have not heard many people making credible arguments for the view that the state owns those tomatoes. The usual argument for the Rule focuses almost exclusively on oil, minerals, water, and the like. It rarely focuses on tomatoes. One common argument is that certain resources such as oil, minerals, forests,

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25. Armstrong, *supra* note 20, at 131–32. Anna Stilz also excludes resources in her argument for state territorial rights. See Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 574 n.3 (2011), [http://scholar.princeton.edu/sites/default/files/Stilz\\_Ethics\\_0.pdf](http://scholar.princeton.edu/sites/default/files/Stilz_Ethics_0.pdf) [<https://perma.cc/5WT2-MFHQ>]. David Miller, in contrast, treats them together, as do I. See Miller, *supra* note 12, at 252–54.

26. For an early treatment of the common law, see Wm. E. Colby, *The Law of Oil and Gas: A Consideration of Landowners' Rights, Particularly as Developed in California*, 31 CALIF. L. REV. 357 (1943).

27. Perhaps all Armstrong means is that the fact that resources are removable from land allows the *possibility* of assigning differential rights to land, on one hand, and resources, on the other. But the law can assign differential rights even in objects that are not separable. A tract of land, for example, can belong to two owners by undivided half, and the bundle of rights of each may be different. Legal “removal” does not require physical removal.

and the like, are more important for development than farm products. I find this argument specious. What is or is not important for development depends on contingent economic factors such as the society's comparative advantages. Some oil-rich countries are developed; others are not. So why then identify only these particular resources? The real reason is that the state wants my gold because it is particularly valuable. Tomatoes are not, and thus can be left in private hands. Equally vacuous is the appeal to the public interest. The state may decide that it is in the public interest to leave the tomatoes in private hands, while it is in the public interest to nationalize gold. But of course, this is just another way of saying that the state *wants* the gold while it is not particularly interested in tomatoes. There is no separate argument showing why grabbing the gold is in the public interest. In fact, if economists are right, other things being equal, leaving resources like oil and minerals in private hands would be more efficient, and therefore truly in the public interest.

The scope of the Rule, therefore, is unclear. If, as the Charter of Economic Rights says, the state owns *all* wealth, then of course it owns natural resources and the Rule is superfluous. If instead the Rule covers only natural resources, then it is unclear how one is supposed to distinguish between many different things that occur in nature. This indeterminacy, of course, is not fatal to supporters of the Rule. They may claim that the state owns everything and the Rule is just a special case, or that the state owns natural resources and has the discretion to expropriate whatever resources the state judges to serve the public interest, or to assign private property rights in them.

#### *B. Who is the Right-Holder under the Rule?*

The three documents quoted at the beginning of the Article answer this question differently. The owners of natural resources are nations, peoples, or states. The term *nation* either has no meaning in international law, or it is co-terminus with "*people* or *state*." I will therefore discuss peoples and states as candidates for owners of natural resources under the Rule.

According to the Covenant, the right-holders are *peoples* rather than states.<sup>28</sup> There are two conceptions of *people*. The first one is the *nationalist* conception; the second is the *collectivist* conception. On the nationalist conception, people are a qualified form of community characterized by some strong ethnic trait such as language, race, or religion.<sup>29</sup> David Miller defines people as a group that has a "common identity and a shared set of social

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28. G.A. Res. 2200 (XXI), art. 1 (Dec. 16, 1966).

29. Peri Pamir, *Nationalism, Ethnicity and Democracy: Contemporary Manifestations*, 2 INT'L J. PEACE STUDIES (1997), [http://www.gmu.edu/programs/icar/ijps/vol2\\_2/pamir.htm](http://www.gmu.edu/programs/icar/ijps/vol2_2/pamir.htm) [<https://perma.cc/K2YC-JEKG>].



rules.”<sup>30</sup> These groups have historically developed a relationship with the territory and its resources.<sup>31</sup> On Miller’s account, they have settled the territory and improved it in ways that establish the group’s title over it, to the exclusion of outsiders.<sup>32</sup> These special communal acts in the territory can be of various kinds. They can be actual improvements, based on which groups would establish a title over the resources in a Lockean fashion. They could also be symbolic acts that express the importance of the territory and its resources to the group’s identity.<sup>33</sup>

A number of writers have effectively challenged this view. Anna Stilz points out three flaws with the nationalist account. The first is that it does not explain why the *group* should have title over the territory—and its resources—and not the individuals who actually made these improvements. Second, the nationalist account cannot explain why these improvements grant title over the whole territory. Third, the nationalist account does not explain why immigrant communities, like Cubans in Miami, do *not* get title over the land in which they make the improvements in question.<sup>34</sup>

To these criticisms, I add a fourth. There is a fundamental indeterminacy in the notion of people. As a result, it is virtually impossible to distinguish groups that can be the rightful owners of natural resources from other groups that cannot be such rightful owners. Let us take Miller’s two definitional traits of peoplehood: to be a people, a group must have a common identity and a shared set of rules.<sup>35</sup> I take these to be jointly necessary and sufficient conditions. A group does not qualify merely by having a shared set of rules; it must also have a common identity. Common identity is a vague concept, and any attempt to make it more precise makes it morally unappealing. Authors mention things like religion, ethnicity, language, and the like.<sup>36</sup> If so, then *common identity* is a euphemism for something less lofty that I will call, for want of a better term, *ethnic status*. If this interpretation is correct, only groups having ethnic status can be owners of natural resources. But groups may exhibit other types of traits, such as allegiance to liberal values. Moreover, groups may be multi-

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30. Miller, *supra* note 12, at 258.

31. *See id.* at 254.

32. *See id.* at 264.

33. *See id.* at 259, 261–62.

34. Stilz, *supra* note 25, at 575–78.

35. *See* Miller, *supra* note 12, at 258.

36. *See* John M. Owen IV, *Pieces of Maximal Peace: Common Identities, Common Enemies*, in *STABLE PEACE AMONG NATIONS* 75, 76–79 (Arie M. Kacowicz et al. eds., 2000).

cultural, that is, they may be composed of many different groups, each with its own ethnic characteristics. It is arbitrary, I think, to say that these groups do not have title over the natural resources in the territories they inhabit. The examples Miller gives conjure up the image of an aboriginal community attached to the land in more or less mystical and symbolic ways.<sup>37</sup> But few groups have that kind of cohesiveness. Think about the United States, Belgium, Canada, or Spain. These states do not have a strong common identity, but are rather made up of sub-groups with their own identities. Under the nationalist view, these states would seemingly not qualify as peoples and therefore would not own the natural resources in those territories. If, on the other hand, these multi-cultural states are deemed peoples, then the nationalist principle is empty: *any* group that succeeds in establishing a legal system in a territory is a people and owns natural resources.

An alternative view would be this: if a group has ethnic status, it owns natural resources. If the group does not have ethnic status, then the territorial *state* owns them by default. But this creates a new problem. Consider Spain. On the nationalist view, the natural resources in the Basque Country belong to the Basques and not to Spain, because the Basques have ethnic status and are thus a people for purposes of the Rule. In contrast, the Andalucians (say) do not own the natural resources in their region, because they, seemingly, do not have the ethnic status needed to be a people. The natural resources in Andalucía presumably belong to Spain, the state in which the Andalucians live. The idea that I may claim a right to X because I have an ethnic status that you do not have is, to put it mildly, unpleasant, and certainly arbitrary. The nationalist conception stems from a romantic conception of groups attached to their land, constructing churches, performing ceremonies. It is hard to see why these factors, and not others, would ground the group's title over natural resources.

For these and other reasons, recent writers have rejected the nationalist conception and offered different definitions of *people* while retaining the collectivist notion that groups, and not individuals, have ownership over natural resources. Cara Nine has argued that collective entities can appropriate resources in a Lockean fashion and manage these resources across generations.<sup>38</sup> These entities do not have to be a people in the nationalist sense. But collective entities still own resources and can expropriate them from individuals for the benefit of the group.

The collectivist version of peoplehood avoids some of the problems of the nationalist version, but it is vulnerable to different types of objection.

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37. See Miller, *supra* note 12, at 258.

38. NINE, *supra* note 12, at 30–31.

All the reasons that can be invoked in favor of collective ownership of resources apply with greater strength to private ownership. Property rights are beneficial because they create *individual* incentives for the creation of wealth. They allow people to internalize the costs and benefits of their decisions, a process that in turn steers individual economic decisions toward societal benefit. These advantages are not entirely applicable to collective property.<sup>39</sup> Collective property often encourages central planners to make economic decisions without incurring the costs of mistakes, thus leading to inefficiency and impoverishment. In a system of collective property, resources are not put to their best and highest-valued use. Managers do not gain when the values of the resources increase and do not lose when the values fall. Therefore, they have little incentive to heed changes in market-revealed values.<sup>40</sup> Experience confirms this theoretical prediction is confirmed by experience: history has not been kind to collective ownership. Cara Nine's defense of a perpetual collective manager flies in the face of what we know about the creation of wealth and individual and societal prosperity.

Not surprisingly, governments around the world favor the view that *states* have permanent sovereignty over natural resources, as the Charter says.<sup>41</sup> The reason why some documents mention peoples is that peoples are groups that intend to become states or have the potential to do so. Thus, the Basques are a group with irredentist claims of some sort, a kind of proto-state. But for a variety of reasons, including reasons of stability, proponents of this view think that sub-state groups should not have ownership rights over these resources until and unless they become sovereign states. After all, the Rule vests permanent *sovereignty* over natural resources. This

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39. I do not regard the work of Elinor Ostrom as denying this. She demonstrated that in many situations human beings tend to draw up sensible rules for the use of common-pool resources, thus avoiding tragedies of the commons. She insisted, however, that such solutions would come from neighbors who pull these resources together, not from government imposing those solutions on them. Her analysis does not support government appropriation of resources. See ELINOR OSTROM, GOVERNING THE COMMONS 29–57 (1990).

40. See Armen A. Alchian, *Property Rights*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/PropertyRights.html> [<https://perma.cc/M8XA-5JX9>] (last visited Dec. 20, 2015). True, at a global level state ownership is arguably superior to a global commons. See JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 10–25 (2008). A global commons would possibly be a major disaster, as it would likely unleash a tragedy of the commons of gigantic proportions. State ownership over resources is better than no ownership at all. But the same reasons to prefer state appropriation to a global commons should make us prefer private over state property.

41. See SCHRIJVER, *supra* note 4, at 7–9.

excludes entities that are not sovereign. The theory of title that underlies the Rule is that the state has, externally, a right to exclude other states or foreign persons from the use of natural resources, and, internally, the power to exclude *its own subjects* from that use and decide instead—presumably for the common good—to use the resources as the state sees fit. In the rest of the Article, I assume that the Rule vests states with ownership over natural resources.

Many of the reasons I gave against peoples apply to states. States are artificial creations of individuals, and they exist for the purposes of solving problems in pre-political social interaction. I have elsewhere stated in some length why state ownership does not fare better than ownership by some other collective entity.<sup>42</sup> The Rule sanctions an unjustified grab of resources by those in power. The purpose and effect of the Rule is to *unprotect* private property by vesting ultimate title in the state (or other collective entity). Because private property rights are essential to the pursuit of personal projects and to the achievement of societal prosperity, the Rule, under any of its forms, is unjust and ought to be rejected.<sup>43</sup> Governments use the rhetoric of development to justify nationalization of natural resources. They will say that they need to nationalize oil because of its importance for national development.<sup>44</sup> But this is an empty statement. From an economic standpoint, the society will most likely develop by leaving oil and other natural resources in private hands.

More generally, I am skeptical of views that assign moral standing to non-voluntary groups such as peoples. The only legitimate associations are voluntary associations, and the only legitimate coercion is authorized coercion. Surely, groups can have value for their members. Groups can facilitate the achievement of goals that cannot be achieved individually. But this moral value of groups holds *as long as they are voluntary*. Groups are importantly disanalogous to individuals. An individual has a mind that makes plans and weighs options, alternatives, values, and goals. Mistaken or not, an individual attempts to lead her life in her own terms. Groups, on the contrary, do not have minds. They are collections of individuals where some cooperate but others dominate, exploit, and prey on others. When individuals form a life plan, they act freely—with the usual caveats and

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42. Fernando R. Tesón, *The Mystery of Territory*, SOC. PHIL. & POL'Y, Fall 2015, at 25.

43. Chris Armstrong challenges the Rule in its own terms, but he suggests at the end of the article that the claim by states *against outsiders* is weak, and therefore that some kind of international or global control would be preferable. See Armstrong, *supra* note 20, at 144. He never mentions private property, so I infer that state ownership, for him, is deficient because it is incompatible with *global* ownership of natural resources, not because it dispossesses individuals.

44. See Cambou & Smis, *supra* note 6, at 356.

exceptions. When a ruler devises a plan for society, he coercively enrolls *others* in his projects, whether many or few share his projects. To be sure, it is *possible* to say that groups have ends, interests, or projects that are not conceptually reducible to individual ends, interests, or projects.<sup>45</sup> But it does not follow that rulers can *coercively* impose those ends on the dissenters within the group. This means that *non-voluntary* collective self-determination, that is, a collectively *coerced* decision about the political status, or the cultural identity, or the economic system of a group, is morally suspect. The realization of human ends, including those that can be realized collectively, should in the last analysis be the result of voluntary interaction among free individuals. There are no non-consensual goods for collectives, nations, or tribes—over and above the goods of persons who comprise the collectivity—that group leaders can permissibly enforce. My claim, then, is normative, not conceptual: the only morally valuable projects are (1) individual projects and (2) voluntary group projects. Even if we can meaningfully speak of a group project, my claim is that (with narrow exceptions group leaders cannot permissibly impose that project on dissenters. This general reflection on groups bears on the Rule. If the group's value is entirely dependent on the rights and interests of individuals, then the group cannot hold a property title *against* individual owners without their consent.

I turn now to my own argument in support of private ownership of natural resources.

## II. AN INDIVIDUALIST THEORY OF NATURAL RESOURCES: THE SOCIAL CONTRACT<sup>46</sup>

The Rule is unacceptable in any of its forms precisely because it vests ownership in the state and relegates private property rights to a temporary, subordinate status. The Rule institutionalizes a naked grab of resources by those in power. My argument starts with a familiar story about the contractual justification of the state.

1. In the state of nature, individuals can legitimately acquire land and resources that lay in land, whether this is from the commons, or from the unowned parts of the Earth. This is a pre-political

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45. See CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY* 42–58 (2011).

46. In what follows I draw freely from the companion article, Fernando R. Tesón, *The Mystery of Territory*, *supra* note 42.

- right to private property. This right is supported by deontological and consequentialist reasons.
2. Individuals agree in a joint act to create civil government and transfer to it the powers that it needs to help define the boundaries of their rights, enforce their rights, settle controversies, and provide genuine public goods.
  3. To this end, individuals transfer to the state their *executive* rights, that is, their self-help powers, but they retain most of their *substantive* rights in resources. They only transfer to the state such resources as required to discharge the state functions.
  4. For these reasons, and for additional empirical reasons, the state, to be just, must exercise its functions constrained by the imperative to respect private property.
  5. As a result, the Rule, which vests title in the state and not in private owners, is unjust.

On the contractarian view, individuals in the state of nature confront a number of problems in interaction. People have natural rights to life, liberty, and property, but when controversies arise among them, they must rely on self-help. Neighbors might disagree in good faith disagree about their land boundary, but if there is no umpire to settle the disagreement, they will often resort to force. For this and other reasons, individuals in the state of nature agree to curtail their unlimited liberty in order to secure their co-existence in civil society. To this end, they create civil government. In the Lockean tradition, government is limited. This means that people transfer the powers that the state needs to fulfill its delegated functions. Individuals accept some limitation to their liberty for the sake of free government, but they do not agree to a *complete* surrender of their liberty to the sovereign. Thus, the people retain their basic rights to free speech, freedom of religion, freedom against arbitrary arrest, freedom of conscience, and so on. If, as Locke believed, people have a natural right to property, then there is no reason within this logic why people would surrender their *entire* property to the state. In other words, if the social contract metaphor justifies the Bill of Rights, it also justifies private property. There is no principled reason why individuals would surrender their property to the state, any more than they would surrender their right to free expression to the state. The social contract metaphor may explain why individuals would surrender *some* property to the state, but it does not justify the surrender of the entirety of the natural resources they own as part of their land rights. Just as the traditional liberal rights are not surrendered to the state, so property is not surrendered to the state.

A Lockean contractarian view, then, fails to justify the Rule. Natural resources do not belong to the state. They belong to individuals, unless

they actually transferred them to the state or justice requires such transfer. The Rule treats the state as the original owner of resources, so it must presuppose that the nation—people, state—precedes the individual. But if the state and other collective entities are artificial human creations, then the Rule cannot be right, since individuals exist *prior* to the state. The state may end up owning those resources—in trust—only if they have been delegated in some fashion by the original parties to the social contract, the individuals. The argument requires development in several directions.

### III. WHY THE RIGHT OF PROPERTY IS A NATURAL RIGHT

Property rights are justified by both deontological and consequentialist reasons. Autonomous action has a constitutive spatial dimension. Our actions are physical actions; they necessarily take place in a certain place at a certain time.<sup>47</sup> Free persons must be entitled to make decisions within a certain sphere defined in spatial-temporal terms.<sup>48</sup> Property rights allow persons to control parcels of time and space, and as such, they offer persons the protected ability to make their own decisions and thus pursue their projects. The literature has mostly emphasized the economic advantages of property rights. However, property rights are valuable for non-economic reasons as well. They are central to the free pursuit of personal projects. The common idea that traditional liberal rights such as free speech, personal integrity, and religious freedom are inherent to human beings, while property rights are not, is mistaken. The same reasons that justify the traditional liberal Bill of Rights justifies property rights. This is because rights are tools to demarcate spheres of freedom. Persons get to exclude others from their choices with respect to that protected sphere.<sup>49</sup> Thus, the much-maligned right to exclude that characterizes property is one its virtues. It allows the owner to prevent others from setting ends to the thing owned, a privilege that should belong only to the owner.

The consequentialist considerations that support private property rights are well known. Private property rights generate individual and societal prosperity. They enable producers to enjoy the benefits of productive effort

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47. Here I rely on Fernando R. Tesón and Bas van der Vossen, *Respecting People as Owners* (2016) (unpublished manuscript) (on file with author).

48. This formulation follows the excellent discussion in HILLEL STEINER, *AN ESSAY ON RIGHTS* 91 (1994).

49. See D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 40–41, 69 (2009).

by creating economic value in excess of the original holdings. Property rights allow persons to internalize the costs and benefits of their decisions, thus realizing the gains from trade. They convert negative-sum games to positive-sum games, thus allowing society to flourish as a cooperative venture.<sup>50</sup> This is particularly important in the context of the Rule. The empirical evidence unquestionably shows a strong correlation between market-friendly institutions and economic prosperity.<sup>51</sup> States that have abused the power vested in them by the Rule by massively appropriating means of production and the entirety of resources have been invariably unsuccessful. Of course, these matters are relative: some states that have appropriated natural resources have done relatively well by upholding robust markets elsewhere. However, the Rule gives *carte blanche* to bad, inefficient, and corrupt regimes to expropriate resources at will. Private property rights are essential for robust markets. International law, via the Rule, expressly unprotects those rights.

A consequence of these economic considerations is that a successful society must be capitalist, and that therefore global justice, to the extent that it cares about wealth creation and the alleviation of poverty, requires capitalism.<sup>52</sup> Capitalist societies, in this sense, include both *laissez-faire* societies and a number of modern redistributive states, as long as they recognize and protect strong markets. International law, to be just, must create the right incentives for prosperity. The right incentives stem from robust private property rights, themselves a precondition of markets.<sup>53</sup> For these economic reasons, justice requires a robust legal regime of private property rights, including rights over natural resources.

The Rule is objectionable, then, for these economic reasons as well. By enabling rulers to expropriate resources at will, the Rule creates bad incentives. As indicated, one reason usually given in support of the Rule

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50. See David Schmidt, *The Institution of Property*, SOC. PHIL. & POL'Y, Summer 1994, at 42, 42.

51. The correlation between robust markets and prosperity is undeniable. See JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD: 2013 ANNUAL REPORT, at v–vi (2013), <http://www.freetheworld.com/2013/EFW2013-exec.sum.pdf> [<https://perma.cc/R5P6-BCRP>]; see also DAREN ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (1st ed., Crown Bus. 2012); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 8, 9, 108 (1990). For a comprehensive discussion, see LOREN LOMASKY & FERNANDO R. TESÓN, JUSTICE AT A DISTANCE: EXPANDING GLOBAL FREEDOM (2015).

52. The full argument for national and global freedom can be found in LOMASKY & TESÓN, *supra* note 51.

53. Good institutions are *inclusive* when they provide incentives to engage in productive behavior. Bad institutions are *extractive* when they enable governmental depredation and generate societal zero-sum interactions. See ACEMOGLU & ROBINSON, *supra* note 51, at 75, 88–90.



is that international law should be agnostic with respect to different economic systems. This agnosticism is a relic from the Cold War, when the prevailing sentiment was to foster tolerance toward socialism, in part as a way to guarantee peaceful coexistence, and in part as a recognition that socialism may be an attractive mode of social and economic organization. However, we now know how *real* socialism has fared, and there is no reason to insist on the neutrality of the international system toward economic regimes. The neutrality of international law toward property rights, far from being a virtue, is a serious flaw. Political systems that suppress or seriously hamper markets are unjust.

Saying that the right to property is a natural right is merely a way of saying that such right does not depend on legal recognition. It is not a privilege granted by the state. Property rights are essential to the pursuit of personal projects, and so the denial of private property is an injustice. This is not to say that the law cannot regulate property. The state legitimate jurisdictional powers over a variety of things, including natural resources. I explain why in the next section.

#### IV. FIRST-ORDER SUBSTANTIVE RIGHTS AND SECOND-ORDER ENFORCEMENT RIGHTS

In the state of nature, persons have *two* kinds of natural rights. They have first-order *substantive* rights to life, liberty, and property, and they have second-order *executive* rights designed to protect their first-order rights.<sup>54</sup> But, as Locke points out, self-help is a major inconvenience in the state of nature. One problem is that people tend to over-punish. A second problem is that social stability requires a reasonably precise definition of the *boundaries* of our rights. Thus, it is rational for people to create an impartial authority to solve those problems. Civil government will *enforce* rights; *legislate* with the aim of making rights reasonably determinate and precise; and *adjudicate* disputes among persons who disagree about the extent of their rights or about whether or not rights violations have in fact taken place. These are executive, legislative, and judicial powers, but we can call them, for brevity, *executive* rights.

Now let us assume that individuals can legitimately acquire property. For the reasons noted, in a joint act they will delegate on government the

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54. The concept of executive rights originates in JOHN LOCKE, TWO TREATISES ON GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 102–03 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

executive rights they have in the state of nature. Those delegated rights become the *jurisdictional powers* of the state.<sup>55</sup> Jurisdictional powers are the powers *of the state* to legislate, adjudicate, and enforce that are the result of a joint *transfer* by individuals of their second-order executive powers.<sup>56</sup> These powers relate to many aspects of social life. With respect to natural resources, then, the state has *jurisdictional* rights, not ownership rights. The state does not own the resources. The state wields delegated regulatory powers over them, powers that become necessary because of the indicated difficulties of private interaction. Thus, the Rule cannot be justified as a delegation to the state by the individual owners of these resources. Property owners have not transferred resources to the state. Instead, they have delegated to the state the executive powers over resources, the power to regulate, that they cannot exercise on their own without succumbing to the inefficiencies of the state of nature.

To these traditional functions, we can add the provision of genuine public goods and the redistribution of resources required by justice.<sup>57</sup> This will require the state to control some resources. When taxes are required to implement justice, they constitute a permissible dispossession. However, the state can discharge these justice-required functions by taxing people appropriately. It does not need to *own* resources for that purpose. The Rule, therefore, is not justified by the standard liberal view of justice, even accepting that justice requires redistribution of wealth. It is hard to see a justification of the Rule other than the goal of strengthening government itself. I do not know of any plausible theory of justice that recommends strengthening government *per se*.

For the reasons indicated, a defensible conception of justice must recognize private property. The state is not entitled to enforce just any conception of justice. To the extent that the Rule vests title over resources on the state, it is an unjust rule.<sup>58</sup> The state's main job is to enforce everyone's rights, including property rights.<sup>59</sup> Only such a system allows persons to pursue their projects according to their own lights. That is, they can pursue

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55. See A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 1, 127 (1992) ("The citizens' executive rights, once entrusted to government, become the executive power of the state.").

56. For a discussion of surrendered and unsurrendered rights in the context of the Tenth Amendment of the U.S. Constitution, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 78–86 (2005).

57. I do not explore here the extent of permissible expropriation of resources required by justice. I only observe that, whatever its scope, redistribution must be consistent with upholding healthy markets, and thus respecting private property rights. For a more extended discussion, see Fernando R. Tesón, *The Mystery of Territory*, *supra* note 42.

58. See Wenar, *supra* note 11, at 12.

59. See Cambou & Smis, *supra* note 6, at 359–61.

divergent conceptions of the good—they can be free—as long as they respect the rights of others. Property rights *are* as much part of justice as free speech, religious freedom, freedom against torture, personal integrity, and nondiscrimination.<sup>60</sup> The Rule, then, endorses acts of illegitimate dispossession.

## V. THE PROBLEM OF KLEPTOCRACIES

Not all writers who defend the Rule support a right of government to seize resources at will. Leif Wenar, for example, maintains that governments may appropriate resources only if the people have transferred those resources to the government by democratic vote.<sup>61</sup> Wenar deserves credit for having flagged the problem of governmental theft. However, he does not go far enough. The reason is that a group may steal resources from the legitimate owner. If I legitimately own my tomatoes, then the group's vote to transfer my tomatoes to the government cannot morally justify such transfer, unless it is assumed that the group *already* owns those tomatoes. While a majoritarian decision to dispossess legitimate owners might be less problematic than a dictatorial decision to do so, it may still be open to question. If a right can be cancelled whenever the majority thinks doing so is a good idea, then it is not a right. Of course, property rights do not trump everything, but the state is not the owner of resources, and thus it cannot decree expropriation in a manner not licensed by the original delegation.

Put differently: Wenar assumes that the *first* part of the Rule, that the group has title over natural resources, is correct. His aim is to denounce the frequent violation of the *second* part of the Rule, that governments must exploit natural resources for the benefit of the people.<sup>62</sup> In contrast, I deny the first part of the rule. But I agree with Wenar that once the government has grabbed those resources—illegitimately, in my view—it must use them for the benefit of the subjects. In the real world, the degree of compliance with the second part of the Rule helps us distinguish good governments from bad ones.<sup>63</sup>

This problem is not merely theoretical, as shown by the proliferation of *kleptocracies*. A kleptocracy is a state that systematically steals from its

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60. See Barros, *supra* note 49, at 69.

61. See Wenar, *supra* note 11, at 19–22.

62. See *id.* at 12–13, 32.

63. See *id.* at 23–25 (discussing the Freedom House rating scale.)

citizens in order to increase its own wealth and power.<sup>64</sup> Kleptocracies block the mutual benefits that generate economic growth, and in doing so, it concentrates power in ruling elites. In a kleptocracy, the government appropriates resources, natural or not, at will. These regimes prey on those who produce and end up harming everyone except themselves and those who help them stay in power.<sup>65</sup> Interestingly, kleptocracies can be democratic and observe traditional civil rights.<sup>66</sup> This is because, as long as they can win elections, they do not need to put people in jail to enact confiscatory laws. More: their ability to confiscate resources is the reason they win elections.<sup>67</sup> It is called populism.<sup>68</sup> The global justice literature, with its almost exclusive insistence on global redistribution, has overlooked this serious problem. The Rule enables kleptocrats by expressly announcing that the state owns natural resources and that they, the government, can use and dispose of those resources at will.<sup>69</sup> I conjecture that the prospect of appropriating their society's natural resources is a major incentive for politicians seeking power.<sup>70</sup>

Justice, then, requires capitalism, perhaps accompanied with reasonable redistribution measures. This means that, with the few exceptions noted, resources should be privately owned. The view embodied in the Rule that resources belong to the *people* unfortunately enables predatory rulers—even democratically elected ones—who in the name of the *people* dispossess legitimate owners, suppress markets, and use the stolen wealth to consolidate their power. Legal systems where the state owns resources, such as various forms of socialism and property-owning democracy, popular as they are in academic circles and in the corridors of power, are simply unjust.

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64. See THE COMPACT OXFORD ENGLISH DICTIONARY (1971) (defining Kleptocracy as “a ruling body or order of thieves”).

65. See SEBASTIAN EDWARDS, LEFT BEHIND: LATIN AMERICA AND THE FALSE PROMISE OF POPULISM (2010). For the case of Argentina, see Roger Cohen, Opinion, *Cry for Me, Argentina*, N.Y. TIMES (Feb. 27, 2014), [http://www.nytimes.com/2014/02/28/opinion/28iht-edcohen28.html?\\_r=0](http://www.nytimes.com/2014/02/28/opinion/28iht-edcohen28.html?_r=0) [<https://perma.cc/GQ56-US5X>] and *The Tragedy of Argentina: A Century of Decline*, THE ECONOMIST (Feb. 15, 2014, 3:59 PM), <http://www.economist.com/news/briefing/21596582-one-hundred-years-ago-argentina-was-future-what-went-wrong-century-decline> [<https://perma.cc/CH74-VR2W>]. For Venezuela, see Moisés Naim, Opinion, *Chavez Will Leave Behind an Economic Crisis*, N.Y. TIMES (Jan. 8, 2013, 3:12 PM), <http://www.nytimes.com/roomfordebate/2013/01/03/venezuela-post-chavez/chavez-will-leave-behind-an-economic-crisis> [<https://perma.cc/F4YH-QFAW>].

66. LOMASKY & TESÓN, *supra* note 51.

67. *Id.*

68. *Id.*

69. *See id.*

70. This is the place to note a serious omission in the global justice literature: the failure to take into account government failure as predicted by the public choice literature.

## VI. IMPLICATIONS FOR TRADE

In previous writings, I have argued that justice requires free trade.<sup>71</sup> Trade barriers reduce national and global wealth, aggravate poverty, and reward and punish the undeserving. Here I examine the relevance of the Rule for trade. We saw that Leif Wenar thinks that governments may own resources, and therefore legitimately trade them, only if the people transferred those resources democratically. Because I do not agree with collective ownership, I do not agree either with *every* majoritarian transfer of resources.

My view is that *individuals* are the proper agents of trade. International trade should ideally take place among buyers and sellers acting across borders. This elementary fact has been obscured by the emphasis on *national* gains from trade. This nationalistic emphasis is present in classical writers such as Smith and Ricardo, as well as modern trade theorists. But there is no reason to think that the gains of trade are important for states. They are important for human beings, and only secondarily for states. On the account I favor, the government can trade resources only if their legitimate owners have individually transferred them or if justice requires the transfer—although I suggested that the state does not need to own resources to discharge its legitimate functions. Under my view, then, the Rule must be rejected: governments do not own natural resources. The outcome of a trade transaction is legitimate if the parties to the transaction legitimately own the traded goods. Because governments do not own the goods they trade, the trade is tainted. Government trades on stolen property. International trade should be among persons, among individual owners located in different parts of the globe, and it should be free. In the real world, of course, there is a constant tension between private parties who wish to trade, governments who wish a big chunk of the gains of trade, and private rent-seekers who thrive under governmental largesse that protects them against competition. To the extent that the liberalization rules promoted by the World Trade Organization tend toward long-term privatization of trade, then it is a relatively beneficial institution.

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71. See Fernando R. Tesón, *Why Free Trade Is Required by Justice*, SOC. PHIL. & POL., Jan. 2012, at 126, 126; see also Fernando R. Tesón & Jonathan Klick, *Global Justice and Trade*, in GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW 217, 232 (Chios Carmody et al. eds., 2012).

## VII. HUMANITY AS THE OWNER

A number of writers have argued that the world's resources belong in common to humanity. None other than John Locke held this view: "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience."<sup>72</sup> The idea of humanity as the owner of global resources can be interpreted in an at least two ways.

Under the first interpretation, humanity has a right to *strong ownership*. All the individuals on Earth *really* own in common its resources, that is, humanity has the whole bundle of rights constitutive of property. This means that states have no sovereign rights over resources and individuals have no private property rights over resources. This approach is compatible with recognizing, *as a matter of convention*, rights of ownership or property to states or individuals. But these rights are always revocable. If world government is established, then it could, on behalf of humanity, expropriate resources and redistribute them at will. Those powers may be tempered by requirements of due process and respect for the rule of law, but neither states nor individuals have ownership claims on the resources: they have mere possession. The world government can decide to expropriate the oil in Norway and the United States, whether possessed by states or by individuals, in order to alleviate poverty elsewhere. I think this system would be worse than the one we discussed so far, which grants resource ownership to states. It is inconsistent with justice and sound economics, and it would predictably lead to widespread poverty and stagnation. However, I will not pursue it further.

The second and more plausible interpretation of humanity-as-owner regards humanity as owner in a *weak sense*. On this view, humanity owns the resources of the Earth in the sense that all individuals have a claim to satisfy their basic needs, even in the light of the legitimate claims of appropriation pressed by others. Mathias Risse has defended this view, which he calls common ownership.

According to Risse, Earth as a whole is collectively owned.<sup>73</sup> While states may adopt, internally, many different ownership systems, "humanity's collective ownership formulates a standing demand on all groups to occupy the earth in a manner that respects the equal status of all individuals with regard to original resources."<sup>74</sup> Risse lists four conceptions of ownership of the Earth's resources: no ownership, joint ownership, common ownership,

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72. LOCKE, *supra* note 54, at 100, 111. For a modern treatment, see MATHIAS RISSE, ON GLOBAL JUSTICE 108 (2012).

73. See RISSE, *supra* note 72, at 89.

74. *Id.* at 109.

and private ownership. No ownership entails that individuals may appropriate resources without limits. Under joint ownership, acquisition requires the consent of every co-owner. Common ownership—in Risse’s version—means that “all co-owners ought to have an equal right opportunity to satisfy basic needs[.]”<sup>75</sup> Everyone has an equal status with respect to resources; this translates in a claim to have their basic needs satisfied. Following Grotius, Risse accepts that states can claim portions of the Earth; as long as they comply with the proviso that these sovereignty claims must be conditioned by the requirement that other persons that inhabit the globe satisfy their basic needs.<sup>76</sup>

Risse’s attitude toward *private* property is unclear. On one hand, for Risse private property rights are mere conventions.<sup>77</sup> This is also buttressed by his assertion that different states may enforce different property systems in their territories as long as they respect the constraint imposed by common ownership—that all co-owners must have the opportunity to meet basic needs.<sup>78</sup> On the other hand, Risse says that common ownership is accompanied by a theory of privatization, that is, a theory of “how to derive *private ownership* from . . . common ownership” (my emphasis). But private individuals do not have any private property rights against the state if the state has the stronger claim on the resources. The thesis of common ownership then is mainly concerned with claims that *foreigners* may have against the resources laying within states. It is not concerned with the legitimate claims that *domestic* private owners may have against the state.

Consequently, Risse’s position, if I understand it correctly, boils down to three claims. First, resources are owned in common by humanity. Second, *either* states or individuals may stake ownership claims over those resources. Third, these claims are conditional on satisfying the requirement that co-owners must have the opportunity to satisfy their basic needs. In particular, Risse rejects the view that co-owners are entitled to an equal share of what is collectively owned.

This raises a new ambiguity, however. Risse makes inconsistent claims with respect to private property. He makes the stronger claim that states or individuals are entitled to stake property claims on resources (to take

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75. *Id.* at 111.

76. I am less confident than Risse that his view is supported by Grotius, because for Grotius appropriation creates a right of ownership unimpeded by any proviso.

77. Risse, *supra* note 72, at 112.

78. *Id.*

from the commons) *only* to extent that they need them for survival.<sup>79</sup> But he also makes the weaker claim that private appropriation is merely subject to the condition that co-owners must have the opportunity to satisfy basic needs. There is an obvious space between these two claims. The first authorizes private claims only to meet basic needs. The second authorizes *all* claims—even exceeding basic needs—as long as co-owners, outsiders, retain the opportunity to satisfy theirs. Suppose the first claim is true. It is unclear who owns the resources that are *not* necessary to satisfy the appropriator's needs. Throughout his discussion, Risse makes clear that all common ownership means is that appropriations must be constrained by the condition he stipulates. What follows from common ownership *if* appropriators are entitled to claim resources only to satisfy their needs? Is an appropriation in excess of basic needs illegitimate? If so, what are the consequences? Do these extra resources revert to the global co-owners? There might be a huge supply of resources and wealth once everyone's needs have been satisfied. It is unclear, on this account, who would have ownership of those extra resources.

Having said this, despite the foundational differences between Risse's account and the one this Article offers, there is an important point of convergence. On my view, individuals, and not states, have a right of original appropriation. They then delegate jurisdictional powers to the state. I have suggested, but not argued for, the possibility that justice may require redistribution of resources in order to allow persons to meet their basic needs. Therefore, the outcome under my approach is not very different to the outcome under Risse's approach. The states created by the social contract have the obligation to make sure everyone's needs are satisfied. This convergence is possible because on Risse's account of common ownership the humanity is not really the owner. If it were, private appropriations would be entirely provisional and precarious, and humanity—a world government—could expropriate resources at will. Common ownership is really a metaphor for private appropriation with a proviso. If I had to classify my view within Risse's categories, it would resemble no-ownership-with-proviso—a view that Risse declines to discuss, after having rejected no-ownership-without-proviso, because he thinks it collapses into common ownership.

Yet, the foundational differences between both approaches are important. To me, private property rights are natural. They precede the state. They can be explained either by postulating original common ownership with the possibility of individuals legitimately taking from the commons with an appropriate proviso, or by postulating no-ownership with individuals

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79. *Id.* at 111–12.



appropriating in the same way. The second difference is that, on my view, states are *not* entitled to enforce just any system of property, whereas Risse expressly allows for any system of property as long it complies with the basic-needs proviso. In my view, states must enforce justice, including perhaps, a proviso similar to the one Risse defends, in a manner consistent with the moral and empirical reasons that underlie private property rights.

The Rule is incompatible with common ownership. The Rule, as formulated in the documents quoted above, is quite clear that natural resources belong to those sitting on them.<sup>80</sup> There is no provision for what is owed to co-owners, that is, to the rest of humanity. Perhaps supporters of common ownership could read the Rule as tempered by the background idea of common ownership. On this view, the Rule would be just a legal assignment of ownership of resources done for efficiency reasons, much as the legal assignment of individual property rights are. If so, the Rule should be read in less absolute terms than it is written. We should insert a proviso, perhaps, about the duties of the resource owners to share with outsiders. Needless to say, the Rule omits any mention to any such duties. If one accepts common ownership, then the Rule occupies a subordinate place: the state does not really own the resources. International law would allow states to manage them for a variety of practical reasons, but humanity as a whole would be the ultimate owner and would be able to expropriate those resources at any time. It is unlikely that supporters of the Rule would regard this as a friendly amendment.

Of course, in this Article I have rejected the Rule. Is Risse's version of common ownership better? Yes, if interpreted as allowing private

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80. I think Risse errs when he invokes international law in support of his view. He thinks that the high seas, Antarctica, and the outer space, are the "common heritage of all mankind." RISSE, *supra* note 72, at 89. But the only area that has been declared common heritage is the ocean's deep-sea bed. U.N. Convention on the Law of the Sea art. 126, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 321. The high seas are open to all, subject to some constraints such as peaceful purposes and due regard for the interests of other states. They cannot be subject to state sovereignty. *See id.*, arts. 87–89. The status of the outer space is similar. *See Outer Space Treaty*, arts. 1–2, Jan. 27, 1967, 610 U.N.T.S. 205. Antarctica is even farther from a global commons. It is subject to a special regime governed by a treaty that "freezes" existing sovereignty claims. *See Antarctic Treaty*, Dec. 1, 1959, 402 U.N.T.S. 71. Of course, none of those areas is subject to private appropriation. So the default rule in international law is the rule of permanent *state* sovereignty over natural resources. The deep-sea bed comes close to a common with a redistributive proviso. The high seas, the outer space, and Antarctica are not common heritage but areas of common usage. All four areas are exceptions to the Rule. International law has a long way to go to come even close to surrendering states' interest to common ownership.

appropriation in the state of nature with the proviso that it should allow others to satisfy basic needs. On the other hand, if common ownership is read as indifferent between private ownership and state ownership, then it is deficient for the reasons I have given.

## VIII. CONCLUSIONS

The traditional position in international law has been, from the outset that natural resources belong to the territorial state in which those resources lay. This is reflected in the rule of permanent sovereignty over natural resources, considered, almost without dissent, as a binding international legal principle. The Rule, however, is in a collision course with global justice enthusiasts, who insist that natural resources do not belong to the territorial states but to humanity as a whole. To them, the world should resemble as much as possible the modern welfare state. While this literature is sparse on institutional proposals, the idea is that natural resources somehow should be used for the benefit of all and not just for the benefit of those who sit in them.

This Article dissents from both views. It tries to vindicate the individualist tradition in law, philosophy, and economics.<sup>81</sup> This tradition rescues private property rights as the engine of prosperity and as an important component of human freedom. It assigns natural resources, not to ruling elites or bloated international bureaucracies, but to individuals who acquire them, who alone are in a position to internalize the costs and benefits of their use. This Article coheres with sound economics and aligns itself with normative and methodological individualism. The rule of permanent sovereignty over natural resources, in contrast, was written by governments to serve their own interests, namely to be able to access the Earth's riches, often to benefit themselves rather than their subjects. From a philosophical standpoint, this Article follows in the liberal social contract tradition, where states, governments, and rulers are mere servants of the people, and not the other way around. A final comment: contrary to what is often said, I am convinced that the individualist approach is the truly humanitarian view. Strong and secure property rights are more likely to alleviate world poverty than redistributive schemes that pay no heed to the importance of wealth creation. Property rights create wealth, and only by creating wealth can a rule on natural resources serve the needs of all persons in the globe.

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81. For a comprehensive treatment, see LOMASKY & TESÓN, *supra* note 51.