In November 2016, the City of Vancouver passed its “Vacancy Tax By-law.”1 The law requires homeowners to submit a property status declaration each year to the City, revealing the uses they are making of their property.2 An owner whose property is not rented or in use for at least 6 months a year is subject to a vacancy tax.3 The stated purpose of the law is to address the affordable housing crisis in Vancouver, a city where the official rental vacancy rate is less than 1%.4 By penalizing absentee owners, the law is intended to increase supply and to deter speculative property holding.5 It effectively sets out what owners owe to their community, and so what the state, acting on behalf of that community, is entitled to demand of owners.

The Empty Homes Tax has caused quite a stir in Canada. It has its supporters, but its detractors worry that the law erodes the very idea of property.6 Gregory Alexander’s account of property and human
flourishing stands as a forceful response to this view. On Alexander’s account, a law like the Empty Homes Tax is not an external moral constraint on an otherwise unfettered property right. Social obligation norms follow the grain of property rights. When owners are required to contribute to the good of affordable housing, it is not that they are being forced to assume a role and a responsibility they did not sign up for. For Alexander, social obligations, like the obligation to advance the goal of affordable housing, fall on owners qua moral actors.

The glue holding Alexander’s account together is a principle of consistency in personal moral reasoning: each of us owes it to herself to develop her capabilities so as to lead a good life, and each person depends on others in order to do so. A simple moral consistency requires that each acknowledges that others depend on her in the very same way. It follows then that each of us owes it to others to contribute to the possibility of human flourishing by supporting the “institutions, associations, and infrastructures” of the community to which she belongs. Property figures into this account because human flourishing, and human life generally, requires some use of, and sometimes control over, aspects of our shared environment. Owners are justified in helping themselves to the autonomy-enhancing value of ownership only insofar as they are, as morally consistent agents, helping others to the same resources required for them to flourish.

The most important implications of Gregory Alexander’s work, in my view, are twofold: first, it treats owners—rather than ownership—as socially embedded, locating property’s social-obligation norm in interpersonal morality: owners as morally consistent people who realize their own agency in a community are personally obligated to support the community that enables them to realize their own capabilities as free people, and that obligations extends to their decisions as owners. And

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7 See generally Gregory S. Alexander, Property and Human Flourishing (Oxford Univ. Press 2018) (discussing a concept of property that necessarily entails social obligations).
8 Id. at 59.
9 Id. at 40–41.
10 See Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 774 (2009); see also Alexander, supra note 7, at 57–68.
11 See Alexander, supra note 7, at 60.
12 Id. at 53.
13 Id. at 59.
14 Id.
15 Alexander breaks down the idea of social obligations into general and specific norms, the latter varying with the context. Alexander, supra note 10, at 773–815. For the purposes of this Article, I would like to keep in view Alexander’s more general claim about property and its inherent commitment to human flourishing.
16 Alexander distinguishes his starting points from a contractarian like Dagan, who is committed methodologically to a separation of self from community, achieving fusion through contract. Hanoch Dagan, Takings and Distributive Justice, 85 Va. L. Rev. 741, 771–74
secondly, Alexander justifies state action that obligates owners to act in socially beneficial ways on the grounds that it requires us to do what we have moral reason to do anyway. Under Alexander’s approach, the City of Vancouver, by penalizing antisocial uses of property, merely shadows what morality already requires of us.

For Gregory Alexander, a moral commitment to human flourishing is built into property because it is built in to us as persons. This sets Alexander’s account apart from the modern view that property is just a matter of positive law and does not inherently advance any particular set of moral values. Moral and political philosophers with very different philosophical starting points, such as John Rawls, Liam Murphy, and John Gardner, tend to agree that property is a purely contingent institution—a product of positive law without any internal normative core of its own. For Rawls, private property is not necessarily a part of the “basic structure” of society; for Liam Murphy, property is whatever a principle of utility requires it to be; and for John Gardner, property is just a footnote to other morally salient institutions, like tort law. These philosophers all think that moral concerns matter in the development of law, but the precise institutional structure for realizing morality and its demands is up to us. On one hand, it may be that property ends up being an important part of the institutional mix most likely to advance the project of a just society (indeed Rawls seems to have thought so). But

(1999). But nevertheless, Alexander’s focus is on an idea of the self or the person and what she owes to others personally. See Alexander, supra note 7, at 42–46.

17 What is at stake in Alexander’s work is the normative foundation of social obligations. See generally Alexander, supra note 7. It is of course widely recognized that owners can be regulated to promote public health, safety and welfare. AJ van der Walt, Property in the Margins 225 (2009) (“[T]here are instances where the rights of landowners are subjected to sometimes significant qualifications for the sake of justice-inspired policy considerations . . . .”); AJ van der Walt, Property and Constitution 140–41 (2012) (showing the impact of constitutional objectives on private property in South-Africa). This reconciliation of public and private right is at the core of the Kantian Project. See, e.g., Arthur Ripstein, Force and Freedom (Harvard Univ. Press 2009); Larissa Katz, Ownership and Social Solidarity: A Kantian Alternative, 17 Legal Theory 119 (2011).


19 Alexander, Ownership and Obligations, supra note 18, at 452.


23 Later, Rawls thought that a property-owning democracy, rather than a welfare state, would best support a principle of equality. See John Rawls, A Theory of Justice 217 (Otfried Höffe ed., Joost den Haan trans., 2013) (“To see the full force of the difference principle it should be taken in the context of a property-owning democracy (or of a liberal
on the other hand, it may be that some other institution or cluster of institutions will do as well or better; from this standpoint, property is not inherently moral or even morally salient.24

Alexander insists that property has a set of internal moral commitments.25 He aims to ground this point of view in interpersonal morality and, in particular, in a fundamental moral consistency that is required in social relations with others.26 Here, I will consider an alternative approach, one that locates a social-obligation norm not in personal morality (as Alexander does), but rather in an institutional or political morality from which the social purposes of property—and the form appropriate to it—may be derived. An institutional or political morality identifies the norms that are required for an institution to play its part within a constitutional order that meets the requirements of justice and legality. This Article will explore what, if anything, progressive property theory gains or loses by building up a thick social-obligation norm in property law out of interpersonal morality rather than institutional or political morality. I will suggest that there are gains to be had from analysing property law in terms of institutional morality.

I. PROPERTY AS A SOCIAL FUNCTION

A striking early 20th century antecedent to an institutional approach is found in the work of the French legal academic Léon Duguit.27 Duguit was ahead of his time in pioneering the view that law is a matter of social fact.28 He deployed this general theory of law as social fact to explain how property in law is not—or at least is no longer—a development of the Enlightenment ideal of individual dominion.29 In a lecture in 1911 in socialist regime) and not a welfare state: it is a principle of reciprocity, or mutuality, for society seen as a fair system of cooperation between free and equal citizens . . . .”). For Rawls, “redistribution of wealth is not designed to promote individuals’ welfare; instead, it is designed to promote individuals’ independence and an environment in which citizens cooperate as equals.” SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 104 (Oxford Univ. Press 2007).

24 The positivists about property embrace its lack of a moral core precisely because that better allows for external moral, social and political agendas to be advanced through the medium of property law. See, e.g., MURPHY & NAGEL, supra note 21.
25 Alexander, Ownership and Obligations, supra note 18, at 451–52.
26 Id.
27 M. C. Mirow, The Social-Obligation Norm of Property: Duguit, Hayem, and Others, 22 FLA. J. INT’L L. 191, 191–92 (2010). Léon Duguit was best known as a professor of constitutional law in Bordeaux, where he was a close associate of the likes of Émile Durkheim. Duguit rose to prominence with the publication of his two-volume work L’ÉTAT in 1901 and 1903. From 1911 onwards he produced several major works, including his lectures in Buenos Aires and the TRAITÉ DE DROIT CONSTITUTIONNEL, a treatise on constitutional law.
29 See Mirow, supra note 27, at 193–94.
Buenos Aires, Duguit argued that property had transformed, from an individual right to exercise one’s will with respect to a thing, to a social function. In this view, property had become as a matter of social fact nothing more or less than a social role with responsibilities attached to it that particular individuals had a licence to fill. Duguit had in his sights the individualistic ideal of ownership expressed in Articles 544 and 545 of the Napoleonic Code, which stated that “Ownership is the right to enjoy and dispose of things in the most absolute manner,” and which had found its way into civilian codes the world over. Under the Napoleonic Code’s approach, property rights were extensions of the idea of the person as a free moral agent: a free person has, in virtue of her freedom, a right also to exclude others from things belonging to her. The mine/thine distinction at the heart of this idea of property follows from the Enlightenment commitment to the separateness and individuality of persons. In Duguit’s account, property law was no longer organized around this idea of the person as a bearer of rights.

Significantly, for Duguit, the transformation of the idea of property from individual right to social function tracked the transformation of the idea of the state. He argued that the modern world links legitimate state authority to its discharge of a social function, its service of the needs and purposes of the community. No longer was the sovereign to be understood as a will superior to the wills of its subjects and with no superior of its own. For Duguit, the state was bound to exercise its authority pur-

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31 Mirow, supra note 27, at 191 n.1.
32 Duguit, supra note 30, at 40–41.
34 ROBERT B. HOLTMAN, THE NAPOLEONIC REVOLUTION 94–97 (1967); see, e.g., Articles 2540 and 2542 of the Argentinian Civil Code which are even more meaningful than the articles of the Napoleonic Code that they are modelled after: “Ownership is the real right by virtue of which a thing is subject to the will and action of a person” and “Ownership is exclusive. Two persons cannot each have the full ownership of a thing; but they may be proprietors in common of the same thing, to the extent of the interest which each has.” THE ARGENTINE CIVIL CODE 389 (Phanor J. Eder, Robert J. Kerr, & Joseph Wheless eds., Frank L. Joannini trans., Boston Book Co. 1917) (1871).
35 Katz, supra note 17, at 141.
37 In LÉON DUGUIT, LES TRANSFORMATIONS DU DROIT PUBLIC (1913), Duguit aimed to strip law of any metaphysics. See W. Jethro Brown, The Jurisprudence of M. Duguit, 32 LAW Q. REV. 168, 168 (1916). He argued that the fundamental notion of modern public law is not political power but rather public service. Id. To Duguit, state action is only justified by the ends it serves, and not by any delegation of national will. Id. Moreover, the acts of government are valid only in so far as they promote the ends for which it exists. Id.
positively in accordance with social need.\textsuperscript{39} This, he thought, was the “juridical principle” that in some contexts limited and in other contexts required state action.\textsuperscript{40} In such a society, property inevitably is transformed too as a matter of social fact: owners, like the state itself, hold legitimate power only insofar as they discharge a social function.\textsuperscript{41} The transformation of the idea of authority in society necessarily triggered a parallel transformation in the idea of property. The transformation of both ideas of state and property represented a general rejection of hierarchical decision-making. Duguit wrote:

To say that the individual holder of capital has a right to this capital, is to say that he has in this thing a relative will in itself superior and imposing itself as such when compared to that of other individuals. The \textit{dominium} of the individual is no more understandable as rightful than the \textit{imperium} of government as the holder of force.\textsuperscript{42}

Duguit’s account of the social obligation of owners is not, then, the familiar story about the increasing strength of a Behemoth welfare state diminishing individual property rights, a theme in contemporary worries about increasing property regulation.\textsuperscript{43} Instead, it is a story about the corresponding weakening of both sovereign and owner: society’s rejection of an absolute sovereign carries over to its rejection of absolute owners.\textsuperscript{44} The fortunes of both rise and fall together because they are of a piece, on Duguit’s view, in that they rest on the same idea of legitimate authority.

Duguit, like Alexander, intended his theory of property to explain the legitimacy of public interventions that required owners to fulfil their social function.\textsuperscript{45} Once we properly understand the nature of property, he thought, we can explain legislative initiatives that require owners to make productive uses of property, and we can explain too private law constraints on abuse of right.\textsuperscript{46} Both are prohibitions on anti-social uses.\textsuperscript{47}

\begin{itemize}
  \item \textsuperscript{39} \textit{Id.} at 2–3.
  \item \textsuperscript{40} \textit{Id.} at 3–4.
  \item \textsuperscript{41} \textit{See id.} at 34, 72.
  \item \textsuperscript{42} Duguit, \textit{supra} note 30, at 43.
  \item \textsuperscript{43} \textit{See generally} Mirow, \textit{supra} note 27.
  \item \textsuperscript{44} \textit{Id.} at 192.
  \item \textsuperscript{45} \textit{Id.} at 192, 194.
  \item \textsuperscript{46} \textit{Id.} at 208.
  \item \textsuperscript{47} Following Duguit, legal scholars have argued that regulation is justified as a way to build social solidarity among owners charged with fulfilling a social function. \textit{See}, \textit{e.g.}, Tony Prosser, \textit{Regulation and Social Solidarity}, 33 J.L. & Soc’y 364 (2006).
\end{itemize}
Now, like Alexander, Duguit accepted that property sometimes invited self-regarding decisions. But unlike Alexander, Duguit refused to find in this feature of property any evidence of property’s commitment to autonomy or the centrality of the person to the idea of property. For Duguit, the licence to make self-regarding decisions was simply a matter of a convenient division of labour: there is social value in everyone’s flourishing and it just so happens that the burden of making sure that I too flourish is delegated from society to me. I have a duty and an associated power to see to my own flourishing. Insofar as private uses of property are sanctioned, it is because private uses are themselves sometimes socially valuable. Duguit was very clear that even in its most self-serving guises, property is not a personal but rather a social right.

Thus, he wrote: “Thus the positive right does not protect the so-called subjective right of the owner; but it guarantees the liberty of the holder of wealth to fulfil the social function incumbent upon him by the fact of this holding, and it is thus that I can say that propriété socialises itself.”

Duguit insists that property reflects how we have constructed political community in the modern world. At the beginning of the 20th century in France, Duguit saw all around him changes in the way that people related to each other and the state. It was manifestly the case, he thought, that society had evolved to the point that claims of authority were made and accepted only insofar as they were justified in terms of the social good. In his sixth lecture, Duguit pointed to evidence of this evolution in the proliferation of laws regulating the private power of owners and requiring the uses of ownership for the public good. His posture was that of the social scientist, observing that the obsolescence of old Enlightenment ideas about property was in fact the case. One implication of Duguit’s analysis in the context of the United States of America in the early twenty-first century is less comforting: If a community accepts as legitimate only those claims of authority that serve social purposes (as Duguit thought was becoming the case in early 20th century France), that community will end up with progressive property rights also bound to advance the social good. But if it accepts an authoritarian sovereign, whose command is law, it ends up with a parallel idea of property that is similarly authoritarian same.

48 Duguit, supra note 30, at 51.
49 Id.
50 Mirow, supra note 27, at 191.
51 Duguit, supra note 30, at 45.
52 See Mirow, supra note 27, at 197–200.
53 See id.
54 Id. at 199.
55 Id. at 200–01.
56 See id. at 201–02.
grounded his institutional account of property on the empirical fact of the
matter about the accepted foundations of authority in society. One rather
grim lesson suggested by Duguit’s work is that a society tends to get the
property rights it deserves.

II. INSTITUTIONS AND MEDIATED LEGAL RELATIONS

The most significant implication of Duguit’s work for my purposes
is the idea that property does not have a “sujet de droit”—it is not an
entitlement of any individual: it is rather a role abstracted from any one
person in particular, that people are then licenced to assume. Duguit’s
theory of property resurrected one aspect of pre-Revolutionary legal or-
dering that the French Enlightenment had so forcefully rejected: roles
(and role-responsibility) as an organizing idea in law. One implication
of organizing areas of law around roles or social functions—e.g., prop-
erty as a social function abstracted from individuals and their direct inter-
personal relations of right—is that a special role-morality comes into
view. We can start to evaluate how well or poorly a person performs in
her role or discharged her function. This evaluative stance finds expres-
sion in rules that regulate roles and social functions, ensuring fidelity to
the role and responding to misuses of authority, such as abdication, usur-
pation, etc. It is possible to distinguish norms that constitute and regulate
a position, such as a role or social function, from the norms that regulate
our direct interpersonal relations with others. Morality is compartmental-
ized: some of the relationships we have with other people are direct and
unmediated by institutions and others are mediated through institutions.
There are different “oughts” that apply to a person depending on whether
she is acting in or outside of a role or social function, leading at the very
least to compartmentalization of moral reasoning.

This institutional morality, and relations mediated through roles and
offices, has not had a deep foothold in Anglo-American legal theory.
Anglo-American legal philosophy has been dominated by the view that
there is a single domain of morality that concerns how we relate to
others. This view was accompanied by a denial of any distinctively
legal mode of reasoning or abstract legal concepts. Bentham passed
down the thought that all law concerned direct relations between natural
persons through Salmond to Hohfeld and on to H.L.A. Hart and Anglo-
American analytic legal philosophy. This suspicion of abstract legal

57 See Rafe Blaufarb, The Great Demarcation: The French Revolution and the In-
58 Mirow, supra note 27, at 193.
60 See generally Larissa Katz, Legal Forms in Property Law Theory, in Property Theory: Legal and Political Perspectives 23 (James Penner & Michael Otsuka eds., 2018)
describing this intellectual heritage).
forms and mediating institutions is manifest in Bentham’s famous attack on legal fictions within the common law. It is felt in Hohfeld’s insistence that all legal concepts reduce to relations between natural persons. As Hohfeld put it, “[t]he only conduct of which the state can take notice by its laws must spring from natural persons—it cannot be derived from any abstraction . . . .” Finally, it is behind the modern analytic philosopher’s view of the law as an extension of ordinary personal or moral. Of course, the Enlightenment’s view of legal rights as an extension of the moral rights of the natural person changed almost beyond recognition in the hands of H.L.A. Hart and those who have followed him. What remains is a deep distrust of any domain of law or “juridical institutions” separable from morality generally, as well as a rejection of fictions that are meant to mediate relations between persons. Duguit’s view of property as a social function locates the constraints on property in the institutional nature of the role rather than in the individual as a moral actor.

III. FROM SOCIAL FUNCTION TO SOCIAL OBLIGATION

Gregory Alexander’s work reflects a deep orientation toward social obligation that is the hallmark of Duguit’s work. Alexander, however, grounds his theory of social obligations in the interpersonal morality of natural persons, something that seems to bring him closer to a tradition of thinking in which there just is a single, unified domain of morality that structures reasoning about relationships inside of law and out.

For Alexander, property remains a subjective right that derives its moral limits from the moral limits of its subject (the holder of the right).

61 See generally C. K. Ogden, BENTHAM’S THEORY OF FICTIONS (1932).
65 Mirow, supra note 27, at 200–01.
66 See id. at 194.
67 See Alexander, Ownership and Obligations, supra note 18, at 453.
Alexander works out the social obligations of owners from their nature as moral agents operating in different contexts rather than the nature of ownership as in itself a social function. One weakness of Alexander’s account is that it leads to the conclusion that the person behind the property right—the sujet de droit—has social obligations rather than the institution itself: it is the owner’s moral consistency as a person that drives the whole account. Alexander writes that property is inherently limited by social obligations but the foundations of his view on interpersonal morality support a narrower subjective responsibility. That is an attractive enough claim but it is not fully supported by the underlying account. If the social obligations of owners are generated by the subject’s nature as moral agents generally, it is not at all clear why owners, in order to live up to the demands of moral agency, must fulfill those obligations through their use of their property. It is not obvious, in other words, why an individual must advance human flourishing or contribute to others’ access to resources through the exercise of her property rights rather than through other means she has available to her to achieve human flourishing. An individual acting as a consistent moral agent might contribute to others’ human flourishing or the development of resource-based capabilities while devoting her particular property rights and capabilities to different purposes. Imagine a person who contributes her time, expertise, and energy to the betterment of her community while using her property in purely efficiency-maximizing ways to generate income that then frees up her time for community outreach. Or imagine a person that uses Blackacre to promote the flourishing of animals at the expense of affordable housing and food for people in the region, but sets off the costs to humans of her agenda for Blackacre by making Whiteacre available to anyone who needs to live there or grow her own food. A person may, in other words, engage in a kind of division of labour in the deployment of her own rights and capabilities, in service of a unified coherent moral stance towards her community. That would suggest that consistent moral reasoning does not require of property rights that they be consistently exercised in a way that advances human flourishing. All we should require in the name of rationality is for a person to act as a consistent moral agent overall. From that perspective, property rights in themselves do not come with any particular constraints; people do. We then lose sight of how human flourishing animates the very idea of property rather than acting as a very loose and general aim for human activity overall. This

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68 See Alexander, supra note 7, at 59–60.
69 See id. at 59.
70 See id.
71 Alexander acknowledges this when he writes: “the social obligation may require the owner to provide resources, in ways that are appropriate to that owner . . . .” Id. at 60 (emphasis added).
objection is possible because Alexander takes the natural person as moral agent, and the kind of moral reasoning appropriate for her, to be the foundation of his view of social obligations in property.72 Would it be otherwise if he had an institutional account of ownership as something abstracted from persons—an office, say—that had its own demands of internal moral consistency? If owners qua owners had to live up to moral ideals rather than owners qua moral persons, would this make a difference?

In the space I have left I want to consider an alternative to both Duguit and Alexander that might combine some of the strengths of each: one that does not ground roles and functions and other legal “abstractions” in pure social fact, but rather in a political morality that resists certain formulations of property as illegitimate. This is the idea of ownership as an office: a legal concept that has no analogue in a pre-political interpersonal morality, but has nonetheless an internal normativity as a part of a justified legal-political order.

IV. THE IDEA OF OFFICE IN PROPERTY LAW

In past work, I have developed the idea of ownership as an office that puts owners in charge of setting the agenda for things.73 The idea of an office in the context of ownership primarily draws attention to ownership’s impersonality;74 its existence as a part of a larger set of institutional arrangements for allocating authority in society; and its inherently constrained, purposive nature. It is tempting to dismiss the idea of “of-

72 See Alexander, Ownership and Obligations, supra note 18, at 457–58.
74 The idea of ownership as an impersonal right avoids puzzles about transferability that plague rights-based theories, such as that expressed in James Penner, The Idea of Property in Law (1992). See Katz, Exclusion and Exclusivity in Property Law, supra note 73, at 307 n.94 (“Penner sees ownership not as a kind of authority-wielding office but, rather, as a space for expressing one’s will, his theory has difficulty explaining how ownership is and ought to be transferred from one person to the next.”). Essert provided an in-depth development of the usefulness of office in explaining transferability in his paper Chris Essert, The Office of Ownership, 63 U. Toronto L.J. 418, 418–33 (2013). The idea of ownership as an office also explains the possibility of vacancy in office and the role of adverse possession as a basis upon which the law avoids vacancies. See Katz, The Moral Paradox of Adverse Possession, supra note 73, at 77–78 (“The law of adverse possession is just one way of ensuring that there is always someone in charge in the eyes of the law, and thus no destabilizing vacancies. . . . Ultimately, the law’s most pressing concern is not who is owner but rather that the office of owner is filled.”).
office” (and role-responsibilities generally) as a holdover from a feudal past and therefore ignore it as a jural category. But dismissing the idea of “office” would be a mistake: it is difficult to imagine a liberal constitutional order that functions without the allocation of authority to offices. Why is this so? Offices reconcile the possibility of authoritative decision-making—the exercise of discretion to decide a question of shared concern—with the project of legality, in which no one is subject to another’s arbitrary discretion. Through offices, all hierarchical decision-making is bounded and constrained to be exercised just for the purposes for which it was conferred within that larger social plan. The only legitimate way for someone to assume a superior decision-making power over a question of shared concern is through a properly (i.e. legally) constituted office with bounded jurisdiction.

Ownership as an office resolves the problem of standing to make authoritative decisions that are required to coordinate human activity with respect to things. Absent methods of resolving conflicting agendas regarding how things ought best to be used, the objects of property would be of little use to anyone. And yet no one naturally has the standing to assert her own view on how best things can be used: there is no natural hierarchy that favors one person’s view about how to manage an aspect of our shared environment over anyone else’s. A unilateral assertion of power (through taking possession) cannot justify hierarchical decision-making that binds others. Ownership has to be constituted as an office because no one could otherwise legitimately assert her own subjective judgment about the agenda for a thing in a way that changes the normative situation of others. Through the office of ownership, owners have a mandate (to set the agenda for things) and associated power (to change the normative situation of others) within the social order. Because ownership has a social function that represents a part of a larger plan for allocating authority in society, it matters that owners actually be in place fulfilling their mandate. Vacancies in the office of ownership are

75 We can see offices and officeholding as a holdover from a medieval and early modern past. Paul Finn, Public Function–Private Action: A Common Law Dilemma, in PUBLIC AND PRIVATE IN SOCIAL LIFE 93, 93–109 (Stanley I. Benn & Gerald F. Gaus eds., 1983).

76 See Katz, Property’s Sovereignty, supra note 73, at 300–05.

77 Why we ever need to depart from this background equality is something I talk about in Katz, Spite and Extortion, supra note 73, at 1475–76. Having someone in charge is necessary for the productive and peaceful interactions with respect to things. Things are effectively sterilized by the moral problem of standing (“Why me?”) that I take it that everyone would suffer from in the state of nature. There are plenty of illegitimate ways, notably: someone taking it upon himself to be in charge, but no legitimate ways out of a state of nature. That is because in a state of nature there is no legitimate hierarchy outside of the natural one we stand in with respect to our own bodies.

78 Elsewhere, I have argued that the brute fact of possession can generate some weaker entitlements to occupy space or to use a thing oneself but not the full-blooded authority to set the agenda that regulates human activity over time. See id. at 1476.
abhorrent: “Ultimately, the law’s most pressing concern is not who is owner but rather that the office of owner is filled.”79

The purposivity of ownership does not, on its own, deliver the thick social-obligation norm that Alexander has in mind. Ownership as an office can serve the function of agenda-setting, enabling owners to establish a sufficient framework to coordinate uses, without insisting on socially valuable agendas. However, even on this thin account of ownership, no one disputes that owners face constraints—such as those found in tort and criminal law—on socially harmful uses. And, even on this thin account, owners would be constrained not to abuse their position by using it to achieve some ulterior private purpose unrelated to agenda-setting. The law may prohibit an owner exercising her strict right to exclude others from their property when this right is exercised out of spite.80 The law may also prohibit otherwise-lawful uses of property in cases of illegitimate leverage, where an owner uses her power as owner to cause harm in order to gain leverage over someone else.81

Ownership as an office can also serve as a structure on which to fulfill other social purposes that owners are well-placed to discharge in virtue of their position as owners. Thus, ownership as an office attracts affirmative duties to provide services to the state that a person is well-placed to provide as owner. City ordinances requiring citizens to shovel the public sidewalk in front of their privately-owned property, for example, are revealing of the liability of owners to be conscripted to perform certain services and the reasons of political economy (rather than interpersonal morality) that might explain why this is so.82 As the New York Court of Appeal put it in one case, “It is not expected, and cannot be required, that the [city] shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens.”83 Duties such as this do not in themselves socialize the core agenda-setting function of ownership. One can imagine a system of property committed to a thin purposivity—a requirement that owners take charge and set agendas for things with no other constraints on the kinds of agendas owners are free to select—that also imposes

79 Katz, The Moral Paradox of Adverse Possession, supra note 73, at 78 (using the example of adverse possession).
80 See, e.g., Brownstone Condominium Ass’n v. Geller, 415 N.E.2d 20 (Ill. App. Ct. 1980) (denying an owner’s action for a de minimus trespass on the basis that it was brought out of spite).
81 See, e.g., Hollywood Silver Fox Farm v. Emmett [1936] 2 KB 468 (Eng.).
significant affirmative duties attached to the office: duties to pay property taxes; to maintain adjacent roads and sidewalks; to provide lateral support to neighbors; to maintain wildlife habitats on the land; to clean up pollution on the site, however caused, etc. In a system like this, owners are free to pursue agendas that do not directly advance values like human flourishing, but remain in office only provided they discharge these other duties that attach to it.

Where else might we locate anything like Alexander’s social obligation norm within an account of ownership as an office? An alternative route may lie in the legal specification of things themselves, which in turn shapes the law’s view of the kinds of agendas capable of organizing our interactions as members of a community with respect to that kind of thing. Owners charged with agenda-setting must, even in a thinly purposive account of the office’s function, set agendas that are, broadly speaking, capable of coordinating our uses of things—something which requires that the agenda fits however loosely with the nature of the thing itself. A system of law committed to setting up hierarchical decision-making authority to enable the uses of things without conflict ought not to be taken to be committed to enabling hierarchical decision-making that destroys the very possibility of use of the thing as that kind of thing. How the law defines the thing bears heavily on the kinds of decisions that count as consistent with the conferral of authority to set an agenda that permits people to use the thing without conflict. Take, for instance, land: in traditional common law thinking, land—really just a defined location—is an expansive category that includes farms, city houses, open-pit mines, and even lakes (understood in the common law just as submerged land).84

Now imagine that the system of law were actually to refine the idea of land as a thing by distinguishing different kinds of “things” capable of ownership: dwelling places, places of business, historical landmarks, watersheds, farmland, wasteland, wildlife habitat, etc. To put an owner in charge of land as a location would yield a much broader choice-set than to put an owner in charge of, say, a wildlife habitat and so of setting agendas that regulate human activity with respect to a wildlife habitat. The same might be said of an owner of a landmark where the idea of a historical landmark stands in law as a further refinement of the very idea of a “thing” that is the object of ownership. What it is to be the one in charge of agenda-setting of a historical building is to be constrained to set agendas that enable the usability of the thing qua landmark. The stock of things in the world is capable of addition (more things can be added to the inventory of ownable things as they are created, discovered, or so-

cially recognized as resources) and diminution ("things" can be removed from that inventory and rendered incapable of ownership). But the stock of things in the world without being increased or decreased is also capable of being further divided into more precise categories that reflect social views about a resource’s very nature as a thing and so what could possibly count as the discharge of the agenda-setting function for that kind of thing.\footnote{This is of course the approach we see in the law of adverse possession in some jurisdictions. Adverse possessors oust the true owner from the office of ownership by engaging in acts of possession given the nature of that kind of land. There is an implicit understanding that "land" means something different in respect of farmland than it does in respect of city dwellings or wasteland such that what truly counts as agenda-setting sufficient to oust the paper title-holder is going to vary with the nature of the resource. See Katz, The Moral Paradox of Adverse Possession, supra note 73 at 50–52.} Something like this approach could be used to explain why some standard features of private ownership of most things—for instance, availability for private use—may not be baked into the nature of ownership of all things.

Consider for example, \textit{Save America’s Clocks, Inc. v. City of New York}.\footnote{See generally \textit{Save Am.’s Clocks, Inc. v. City of New York}, 124 N.E.3d 189 (N.Y. 2019).} That case concerned a historical mechanical clock inside the Clock Tower Building in Lower Manhattan.\footnote{Anthony S. Guardino, \textit{Landmarks Preservation Commission May Prevent the Privatization of Interior Landmarks}, \textit{Long Island Land Use & Zoning} (Mar. 12, 2018), https://www.lilanduseandzoning.com/2018/03/12/landmarks-preservation-commission-may-prevent-the-privatization-of-interior-landmarks/.} The clock and the clocktower had received an interior landmark designation in 1987, at a time when the building itself was owned by the City.\footnote{Id.} For several decades, a city-appointed Clock Master wound the clock and conducted weekly tours of the clock tower.\footnote{Id.} In 2013, the City sold the building to a private developer, expressly indicating in the deed that the grant was subject to the historical landmark designation.\footnote{Guardino, \textit{ supra} note 87.} The developer wanted to convert the clocktower into a private residence, and in order to eliminate any reason for public access to the tower, to alter the clock to run electrically rather than mechanically.\footnote{Id.} To that end, it applied to the Landmarks Preservation Commission (LPC) for a certificate of appropriateness, required where the owner is proposing work that would alter or demolish a landmark.\footnote{2 N.Y.C., N.Y., \textit{Admin. Code} § 25-307 (2014).} The LPC approved the developer’s proposal, allowing for the electrification of the clock and the closing off of the clocktower.\footnote{Guardino, \textit{ supra} note 87.}
challenge to the LPC’s certificate of appropriateness followed, leading to its annulment by the Superior Court, later affirmed by the Appellate Division. The challenge focused on two problems: the inconsistency of the LPC’s decision to exclude the public from the clocktower with the statutory definition of an interior landmark and an error of law at the core of the decision evidenced by the LPC’s General Counsel’s view that the LPC had no authority to require interior landmarks to remain public. The Court of Appeal reversed the lower courts, reinstating the certificate on the basis that the LPC had the discretion to authorize the alteration of a landmark to allow for exclusively private uses. The court did not resolve the claim that the decisions rested on an error of law on the basis that the court only concerned itself with the actual grounds for the decision as expressed in the certificate, which did not include any reference to the general counsel’s opinion about the scope of LPC’s power. The Court of Appeal’s decision and the General Counsel’s opinion convey a worry about construing a public power in a way that is so at odds with the very nature of private property: the power to require that private property remain open to the public permanently rules out private use of that land.

Would that worry remain if, rather than thinking of the res in this case as land, the court instead were to think of the interior landmark designation as transforming land into a new species of thing, a landmark—a legislatively created thing, not unlike a patent? The interior landmark qua thing could be then understood as itself defined in terms of its public accessibility. From this viewpoint, it would follow that a LPC’s power to insist on permanent public access would be consistent with the very nature of the statutorily defined thing and agenda-setting authority over that kind of thing.

Now, I have my own doubts about this second approach. For one thing, I see good reason to prefer what might be called an “external” approach to social obligations, such as the requirement to maintain a historical landmark for public pleasure and edification, along the lines of what I sketched above (the “governing through owners” approach: affirmative duties are not in the nature of ownership but represent a kind of accession of a burden to the office). For another thing, this approach

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94 Id.
95 An interior landmark is “[a]n interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value.” N.Y.C., N.Y., Admin. Code § 25-302 (2014).
96 Guardino, supra note 87.
98 See id. at 197–98.
99 See id. at 196–97.
would mean there is quite a lot at stake in figuring out when a legislative intervention counts as defining a new thing or simply regulating an existing thing. When ought we view a regulatory intervention that dramatically alters the set of choices available to owners as reflecting a fundamental change to the nature of the thing itself? And finally, this approach introduces a host of new questions about what happened to the “thing” that previously was the object of ownership (land simpliciter in the case of the Clock Tower Building, transformed into this legislatively constituted thing, a landmark)? Legislation that so alters a thing as to create a different species of thing necessarily destroys the property rights in the original thing, which no longer exists.\footnote{100} That is simply because property rights do not exist in the air but always attach to particular, identifiable things. The destruction of the thing, through transformation, is at the same time the destruction of any rights that might have exist with respect to it. Think of this as a legislative “alteration” akin to the traditional private law doctrine of alteration, defined by Blackstone as follows: “if the thing itself, by such operation, was changed into a different species as by making wine, oil or bread from another’s grapes, olives or wheat, it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted.”\footnote{101} (Blackstone meant to contrast transformation of a thing with the improvement of a thing, which left property rights of the improved thing in the hands of its original owner.).\footnote{102} This approach must imply the destruction of the original thing through the process of defining a new species of thing, viz., the legislative process of transforming mere land into a historical landmark. This approach may also suggest a problem worse than that which it might be thought to cure, i.e., that the transformation of one thing to another kind of thing—and the destruction of property rights in the original thing that this entails—is in and of itself a regulatory taking requiring compensation.

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Alexander emphasizes the internal consistency of persons as moral agents. Because an owner, qua moral actor, has inter-personal moral du-

\footnote{100} \textit{The Lawyers Reports Annotated: All Current Cases of General Value and Importance, With Full Annotation} bk. XXXI 431 (Henry P. Farnham & Burdett A. Rich eds., 1896).

\footnote{101} \textit{2 William Blackstone, Commentaries}, *404–05. Many jurisdictions now recognize a number of exceptions to the operation of this rule precisely because alteration to the thing itself works the destruction of the property rights of the original owner of the thing transformed. \textit{See} Silsbury \textit{v.} McCoon, 3 N.Y. 379 (N.Y. 1850) (ruling that plaintiffs with knowledge that the raw materials belonged to another do not acquire title to the new thing by operation of the law of alteration.)

\footnote{102} \textit{The Lawyers Reports Annotated}, supra note 100.
ties, her exercise of property rights must be consistent with Alexander’s social obligation norm of property: human flourishing. Yet, as argued above, because the dictates of morally consistent reasoning underpinning the social obligation could plausibly be fulfilled through means other than the exercise of her property rights, it is not clear that this norm is a feature of property per se. By contrast, if property is organized not as a collection (or bundle) of individual rights and obligations but rather as an institution, bestowing authority upon an impersonal office which performs a social function, Alexander’s social obligation norm might be tied more closely to the institution of property and not personal morality writ-large. On my account, public institutional morality demands at least that the office-holder exercise her authority in a manner consistent with the reasons the institution granted her that authority in the first place.

The purposivity of property is not restricted to a thin jurisdictional limit on the exercise of authority within its proper bounds. Property, as Duguit realized in the early twentieth century, ultimately serves an institutional morality that requires property authority to be exercised in a manner faithful to the broader constitutional order. The demands of institutional morality may be “thick” and explicit, taking the form of specific affirmative duties to the state or perhaps the form of a definition of the very nature of the resource itself that better reflects its social value. On this approach, the internal consistency of the office of ownership—a constitutional position of authority, with bounded jurisdiction to determine the use of a thing—as a social institution could both explain private-law constraints on the abuse of property rights (as inconsistent with the purposes of ownership) and justify public-law restraints on private uses of things (as consistent with property’s place in the broader constitutional order of which it is a part).

Returning to Vancouver’s “Empty Homes Tax,” an institutional approach has two ways of addressing the legitimacy of such state interventions. The first is simply to acknowledge that there are some objectives, including ensuring adequate housing that is core to the “office of sovereign” charged with safeguarding the integrity of the legal order of the whole: a legal order that failed to provide for the basic needs of some of its members is defective as a legal order. And owners, in doing their job within that legal order, must also allow other offices, charged with fulfilling the Sovereign’s mandate to provide adequate housing, to do theirs. The second way open to the institutionalist is to conceive of this legislation as working out the very nature of the thing that owners of residential property in cities actually are in charge of: dwelling places. Legislation that prompts owners to exercise their authority to set the agenda for their land in a manner consistent with its nature as a dwelling place is just tracking the function of the office responsible for that thing. An institu-
tional account of ownership as an office can accommodate similar social-obligations without the interpersonal moral approach advocated by Alexander. It has no trouble recognizing the “Empty Homes Tax” as compatible with the idea of ownership-as-an-office. But whereas Alexander might emphasize the embeddedness of the owners of vacant residential property in the wider community and those owners’ consequential social obligation to ensure the human flourishing of that community, the institutional approach emphasizes the embeddedness of the office of ownership over residential property in the larger constitutional order of which those offices are a part. Property, in other words, involves a social obligation-norm tied to the purposiveness of ownership as a social institution. Everyone has an interest in others’ exercising the powers they have been conferred for the purposes they were conferred. The basis of this interest is not reciprocity, tout court. Rather, owners and non-owners share a commitment to the same social plan, the same constitutional order that allocates authority to members of that political association. We all stand on the same foundation of right—the constitution—and each of us has a stake in the integrity of that foundation, which is shaken when anyone of us unilaterally asserts powers, exercises powers abusively or denies others their part within that constitutional order. To be clear, equality is not as much the point as solidarity is: Offices form part of a network that connects us directly and indirectly to others.