

OWNERSHIP AND OFFICES: THE BUILDING BLOCKS OF THE LEGAL ORDER

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Ownership is not likely to stand out in most people's minds as either the most central or the most illuminating case of an office. And, yet, I will argue in this article that the idea of ownership as an office is especially revealing of a tension between the concept of an office and the normative significance of offices in a legal order, a tension that property law resolves in a particularly revealing way with respect to ownership. The tension between the concept of office and its normative significance amounts to this: whereas offices are always capable of vacancy because they are impersonal positions of authority separable from the office-holder, the law abhors vacancies in principle. In earlier articles, I have explained how *horror vacui* motivates property law's concern 'to see that the office of ownership is filled.' In this article, I will explain how and why vacancy in office amounts to a defect in the legal order itself – in brief, because vacancy undermines the effectiveness and, ultimately, the legitimacy of law as a system for allocating authority. I will argue that the potential for vacancy in offices combined with law's *horror vacui* leads to possession as a default procedure for appointment to offices, in general, and the office of ownership, in particular.

I *Introduction*

As Jean-Jacques Rousseau put it, 'the worst that can happen in the relations between one man and another is for one to find himself at the other's discretion.'¹ The nightmare of hierarchy –

¹ Jean-Jacques Rousseau, 'Discourse on the Origin and the Foundations of Inequality among Men or Second Discourse', translated and edited by Victor Gourevitch, in *Rousseau: The Discourses and Other Early Political Writings*, 2nd ed (Cambridge, UK: Cambridge University Press, 2018) 11 at para 37.

where one person has the power to decide a question concerning the lives of others – is dispelled only through law and legally constituted offices. Offices are meant to solve the problem of hierarchy not by doing away with hierarchy but, rather, by making it consistent with the project of legality.² Rousseau’s scenario raises two worries that law solves through offices. One is a worry about unilaterality: in the nightmare, there is no collective decision appointing one person the other’s superior. The other is a worry about arbitrariness: in Rousseau’s scenario, the superior’s discretion has no limits. The idea of “office” resolves the worry about unilaterality because an office exists if at all as part of a collective plan for allocating authority in society – a legal order – that defines the purposes and powers of the office and the procedures for appointment to it.³ The legal order resolves both the matter of whether anyone ought to be in charge of a question as well as the matter of who among us should decide. The idea of “office” also avoids the worry about arbitrariness in the exercise of discretion: officials are always constrained to exercise their power just for the purposes for which it is conferred.

In past work, I have argued that the idea of ownership as an office organizes what property is and what property does.⁴ The office of ownership provides an answer to the question:

² By the project of legality, I mean the formation of an association of free and equal citizens connected through law. On Michael Oakeshott’s idea of ‘civil association,’ see David Dyzenhaus, ‘Dreaming the Rule of Law’ in David Dyzenhaus & Thomas Poole, eds, *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge, UK: Cambridge University Press, 2015) 234. See Niko Kolodny, ‘Official Corruption’ [unpublished draft on file with author] (explaining corruption as the flouting of ‘a condition meant to reconcile the hierarchy of offices with the equality of persons’). See also Larissa Katz, ‘Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right’ (2013) 122 Yale LJ 1444 at 1450 (explaining a principle of abuse of right as a limit on the exercise of one person’s decision-making power over another required for it to be consistent with respect for the autonomy of others) [Katz, ‘Spite and Extortion’].

³ On the nature of offices generally, see Scott Shapiro, *Legality* (Cambridge, MA: Belknap, 2011).

⁴ Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 UTLJ 275 (arguing that ownership is an exclusive position of agenda-setting authority and explaining a number of property doctrines in terms of the idea

by what warrant do you decide how we relate with respect to this thing? It is in virtue of having satisfied the procedure for appointment to office that an owner has the warrant to set the agenda for how others relate with respect to things. The idea of office explains core conceptual and normative features of ownership, including its conferral of personal authority, its hierarchical structure,⁵ its metastatic nature,⁶ its impersonality,⁷ its potential vacancy,⁸ and its jurisdictional

of ownership as an office) [Katz, 'Exclusion and Exclusivity']. See also Larissa Katz, 'The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law' (2010) 55 McGill LJ 47 [Katz, 'Moral Paradox']; Larissa Katz, 'Governing through Owners: How and Why Formal Private Property Rights Enhance State Power' (2012) 160 U Pa L Rev 2030 [Katz, 'Governing through Owners']; Katz, 'Spite and Extortion,' supra note 2; Larissa Katz, 'Property's Sovereignty' (2017) 18 Theor Inq L 299 [Katz, 'Property's Sovereignty'].

⁵ See discussion later in this article on subordinate rights and the doctrine of merger.

⁶ Offices can split into numerous deputy offices. In the common law way of thinking about offices, the deputy offices count as 'original' offices so that deputies each claim the warrant to decide and are liable for their wrongs if they exceed their jurisdiction. To take the example of postmasters (which I will return to later), in *Rowning v Goodchild* (1773) 2 Wm Bl 906, 5 Burr 2716, deputy postmasters are 'subsisting and substantial officers, and answerable for their own misfeasances and nonfeasances, and the business of the post-office could not be executed without them; they have original offices, under the control of the Post-Master-General.' In the context of ownership, the metastatic nature of offices is evident in the creation of new positions of authority (the tenant, the bailee, the co-owner) as part of a hierarchical chain of offices.

⁷ See Shapiro, supra note 3 at 210 (pointing out the separability of office and inhabitant and suggesting that 'turnover in occupancy is not only possible but expected'). The idea of office explains the transferability of ownership from one person to the next by sale, ouster, and bequest in a way that purely rights-based accounts cannot. See Katz, 'Exclusion and Exclusivity,' supra note 4 at 307 ('[b]ecause 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'). More generally on vacancy in office and ouster, see Katz, 'Moral Paradox,' supra note 4. Chris Essert developed an in-depth conceptual account of the impersonality and transferability of ownership as an office in Christopher Essert, 'The Office of Ownership' (2013) 63 UTLJ 418. As Lisa Austin has suggested, there is not much gained analytically by using the idea of office to mark just the transferability of the right. Lisa Austin, 'Possession and the Distractions of Philosophy' in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 182 at 195. As I say here, however, there is much more to the idea of office than the notion of transferability.

⁸ Katz, 'Moral Paradox,' supra note 4.

limits in terms of reasons for deciding.⁹ The idea of ownership as an office also accounts for how ownership functions and for how owners relate to other officials within a constitutional order.¹⁰

Ownership is not likely to stand out in most people's minds as either the most central or the most illuminating case of an office. And, yet, I will argue, that the idea of ownership as an office is especially revealing of a tension between the concept of an office and the normative significance of offices in a legal order, a tension that property law resolves in a particularly revealing way with respect to ownership. The tension between the concept of office and its normative significance amounts to this: whereas offices are always capable of vacancy because they are impersonal positions of authority separable from the office-holder, the law abhors vacancies in principle. In earlier work, I have explained how *horror vacui* motivates property law's concern 'to see that the office of ownership is filled.'¹¹ In this article, I will explain how and why vacancy in office amounts to a defect in the legal order itself – in brief, because vacancy undermines the effectiveness and, ultimately, the legitimacy of law as a system for allocating authority. I will argue that the potential for vacancy in offices combined with law's

⁹ Offices – and ownership is no exception – warrant the exercise of powers only for office-based reasons. See Katz, 'Spite and Extortion,' *supra* note 2 (arguing that an owner abuses her right where she exercises her powers for reasons ulterior to the purposes for which the power is conferred).

¹⁰ See Katz, 'Governing through Owners,' *supra* note 4 (showing how and why a network of offices of ownership attracts other affirmative duties on top of the core agenda-setting function). Katz, 'Property's Sovereignty,' *supra* note 4.

¹¹ Katz, 'Moral Paradox,' *supra* note 4 at 51: 'A squatter's inconsistent use exposes a vacancy in the property system – an object of property over which the original owner no longer has effective authority. The squatter justifiably succeeds insofar as he fills that vacancy.' See also Katz, 'Exclusion and Exclusivity,' *supra* note 4 at 306 (explaining the rule against perpetuities as a rule concerned to avoid a vacancy and so as a rule 'concerned not with the officeholder but, rather, with the office itself').

horror vacui leads to possession as a default procedure for appointment to offices, in general, and the office of ownership, in particular.¹²

This article has three parts. Part II sets out the conceptual and normative markers of ‘office’ as a jural category. Part III explains why ownership is best understood as a kind of office and responds to some worries about thinking of ownership as an office. Part IV explains why the idea of an office in law leads to possession as a default procedure for appointment and responds to some worries about unilaterality that possession as a procedure might raise.

II Offices in brief

The juridical idea of an office permits one person to subject others to her decisions about a question in a way that is consistent with a project of legality.¹³ Stripped down, the idea of office is the warrant to make decisions that change the normative situations of others on behalf of others. The mandate and associated powers of an office together establish the scope of the warrant.¹⁴ Office as a jural category is distinct from duty and entitlement, although both duties and entitlements are commonly attached to offices (so much so that in some contexts they obscure the core decision-making function of the office). Neither duties nor entitlements require

¹² *Horror vacui* also undergirds the bedrock common law principles that a state has a right to the service of its citizens – a right that justifies conscription to office. See Sir Matthew Hale, *The Prerogatives of the King* (London: Selden Society, 1986), 268 (writing that the sovereign has a right to exercise ‘compulsion of men to do those things that are in order and subservient to the dispensation of justice’). In the *Case of Non Obstante*, Sir Edward Coke observed that a sovereign holds a ‘power to command any of his Subjects to serve him for the publick Weal’: Steve Sheppard, ed, *The Selected Writings of Sir Edward Coke* (Indianapolis, Ind: Liberty Fund, 2003) I, 423..

¹³ See note 2 above.

¹⁴ Judith Jarvis Thomson noticed that owners are like officials because they too have their meta-powers. See Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 58.

the same attention to reasons as offices do. The discharge of a duty to perform some action can be evaluated solely in terms of outcomes – the performance of the action – without regard to reasons. A claim right is entirely passive – a right to another’s performance – and so does not involve decision making, as offices do.¹⁵

An office creates a superior-subordinate relationship with respect to the question tasked to it, but just that question: the office does not shape generally the jural and moral relations that obtain between one who holds office and others who are subject to her decisions qua office-holder. A person can be another’s superior in one respect and her subordinate in another. Thus, an office-holder can (and usually does) have other interpersonal relationships, roles, and even offices, including those she holds *ex officio*, which operate independently. For example, the Queen acts *ex officio* as the Visitor to a large number of English Universities, an office tasked with hearing grievances and resolving disputes internal to the university.¹⁶ In the absence of a validly appointed private visitor, judges *ex officio* have visitatorial jurisdiction over corporations, an office distinct from their judicial office.¹⁷

¹⁵ Thorburn in his article for this symposium explains the important difference between consent and office-based or public powers. I adopt this distinction here to account for the distinction between the power to waive or release a right and the power to make larger scale alterations to another’s normative situation. Malcolm Thorburn, ‘Policing and Public Office,’ in this issue Judith Jarvis Thomson contrasts large-scale powers of officials with normative powers to bring about small-scale changes in claims and privileges achieved through accepting an offer or releasing someone from a debt. Thompson, *supra* note 14 at 58-59.

¹⁶ The queen delegates this authority to the Privy Council. See *Privy Council Office*, online: <<https://privycouncil.independent.gov.uk/work-of-the-privy-council-office/higher-education/petitioning-the-visitor/>>.

¹⁷ Judges also are trustees of last resort, stepping in to execute the trust in the absence of a private trustee. See Roscoe Pound, ‘Visitatorial Jurisdiction over Corporations in Equity’ (1936) 49 Harv L Rev 369 at 374ff.

The relation of superior and subordinate contained in the idea of office is an artificial relation: the authority of any one of us over any one else is a matter of the legal rules that constitute offices and the legal procedures for appointment that establish the right of this person to hold a particular office.¹⁸ Law defines the office, the procedures for entering it, and also the place of that office within the constitutional order allocating authority in society more generally. There are no natural offices because there is no natural authority for any one of us to determine with finality the aspects of our lives that we share with others.

Offices, as artificial creations, presuppose procedures for appointment. It is in virtue of having been appointed to an office that a person is an official with a valid answer to the challenge of *quo warranto*: ‘by what warrant do you have authority to hold land, to hold court’ or generally to make decisions that change the rights, privileges or powers of the rest of us?¹⁹

¹⁸ Arthur Ripstein suggests that there are no constraints on owners’ discretion on whom to pass their property to. The lack of constraints shows that it is not an office. He says: “‘Choose whomever you want!’ is not a procedure.” Arthur Ripstein, ‘Property and Sovereignty: How To Tell the Difference’ (2017) 18 *Theor Inq L* 243 at 254. But that is to mischaracterize the power owners have to appoint their own successor. The owner’s power to select a successor is not quite so unfettered a discretion: it is subject to constraints. The procedure for appointment has restrictions on whom owners can select (for example, only people with legal capacity) and what is required of appointees to satisfy the appointment procedure (for example, accept delivery of a deed, take possession, and so on). In some jurisdictions, the procedure is even more restrictive (a) allowing owners only to transfer to fellow citizens (for example, *Ho Young and Another v Bess*, [1995] 1 WLR 350, [1995] 2 LRC 439 (discussing law in St Vincent and the Grenadines allows the Crown to take land from non-citizen owners in some cases and considering whether a joint tenant who dies passes the land to the non-citizen survivor or whether it goes by way of intestacy); (b) requiring new owners to account for the source of wealth used to acquire land or goods through purchase and sale and holding the property forfeit if they cannot (see discussion in note 66 below); and (c) imposing registration requirements to be met by the new owner for title to pass in law.

¹⁹ *Quo warranto* was used to challenge the authority to hold offices in the form of land as well as ‘liberties’ from the time of King Edward I. See for example, *The King v Valentine Boyles*, (1729), 2 Stra 836 (K B), 2 LD Raym 1559 [*quo warranto* for the office of bailiff]. On the development of *quo warranto*, see generally Helen M Cam, *Law-Finders and Law-Makers in Medieval England: Collected Studies in Legal and Constitutional History*

Officials have a warrant to discharge their mandate only through the powers they have in that office and are constrained to exercise their powers just for the purposes for which they were conferred – that is, their mandate.²⁰ Where an official exercises powers ulterior to the office for an official purpose, the official cannot appeal to the office and its mandate to account for her decision and is exposed to whatever liability follows in the absence of the office. And where she also holds those other ulterior powers for some purpose, she acts *ultra vires* of those powers where she exercises them to fulfil this office's mandate. For example, a trust over Blackacre for the benefit of A does not give the trustee a warrant to use Whiteacre, held on trust for B, in order to make X turn a greater profit for A.²¹ Say that Blackacre and Whiteacre are adjacent parcels of land and that the trustee will get more rental income from Blackacre for A's benefit if he refuses to develop Whiteacre. The trustee cannot escape liability to B on the grounds that he is just fulfilling his mandate to preserve and enhance the value of Blackacre for A: he is warranted in fulfilling his mandate as trustee for A only out of the powers associated with that office. And, of course, the trustee will also be liable to B for having exercised his power over Whiteacre for a reason other than for the benefit of B – namely, for having failed to use those trust powers just for a sanctioned purpose.

When we think about the idea of office in this way – as a response to a jural challenge as to the warrant to resolve a question that concerns others – the relationship between offices and their holders comes more clearly into view: offices are not entities, acting through agents. And officials are not (just) agents, acting in the name of, and in the interests of, another. An office is

(London: Merlin Press, 1962); Donald W Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278–1294* (Oxford: Clarendon Press, 1963).

²⁰ In the context of ownership, see Katz, 'Spite and Extortion,' *supra* note 2.

²¹ See *Re Vandervell Trustees Ltd (No 2)*, [1974] EWCA Civ 7.

the warrant that a person has for making decisions on behalf of another or, in other contexts, on behalf of all of us as participants in a legal order.²² An officer who acts beyond her warrant is thus personally liable in the ordinary way for any resulting wrongdoing because her unwarranted decision fails to change the normative situation of others in the way that is required to shield her from liability. For example, a bailiff authorized to execute judgment orders changes the normative situation of the debtor/owner when he exercises his power to seize the debtors' goods. The result is that he is not liable for conversion. However, the bailiff who seizes a third party's goods rather than the debtor's is liable for conversion. The lord-mayor of London during the Great Fire was apparently well aware of how offices work when he refused to order the destruction of a number of houses belonging to lawyers away on circuit out of fear of making the wrong decision and being liable for trespass.²³

When people think of offices, they may have in mind a government bureaucrat holding an office within a complicated, centralized institutional structure, something like the Office of the Attorney-General, which in addition to the attorney-general is staffed by hundreds of lawyers, or the Office of the Postmaster General, who of course has an army of deputies

²² Participants in a legal order are connected by their allegiance to the 'plan' – that is, the constitution, allocating authority to resolve matters of shared concern. Something like this is what Michael Oakeshott describes as a civil association. See Dyzenhaus, *supra* note 2, for an interpretation of Oakeshott's idea of a civil association.

²³ *Respublica v Sparhawk*, 1 Dall 357 at 363 (Pa 1788). See discussion of case in Brian Lee, 'Emergency Takings' (2015) 114 Mich L Rev 391. Of course, this creates tremendous disincentives to take on official roles, which is precisely why in the context of many offices there are legislative provisions protecting private and public officials from liability. For example, Ontario's *Trustee Act*, RSO 1990, c T 23, which contains provisions that relieve trustees of liability for breach of trust when they have acted honestly and reasonably and relief would be fair (s 35) and that protect them from liability for investment decisions when they are acting as a prudent investor would have (s 27(8)). See Paul D Finn, 'Public Function – Private Action: A Common Law Dilemma' in Stanley I Benn & Gerald F Gaus, *The Public and Private in Social Life* (London: Croom Helm, 1983) 93.

collecting and delivering mail every day. What they probably do not have in mind are the decentralized, popularized offices that are the building blocks of a traditional common law constitutional order.²⁴ And, yet, the idea of office is no less a feature of a system of governing through popularized decentralized offices, which relies on citizens stepping into offices, than it is a feature of a system of governance through centralized, bureaucratic offices, where procedures for appointment are centrally controlled. In the common law tradition, there were a number of public service offices assumed by private individuals without centralized state coordination.²⁵ The Office of the Postmaster General, to take up that example again, is now a large bureaucratic office in a modern liberal state, with a hierarchical chain of command and tightly controlled procedures for appointment. This was not always so: before there was a postmaster general, a creature of statute, there were special offices of postmaster charged with the carriage of the royal mail along selected routes throughout the kingdom.²⁶ These special offices of postmaster were available to be filled simply by taking up the office and running horses along the specified routes.²⁷ Postmasters are much more than service providers, contractually obligated to deliver the mail. They are also more than bailees,²⁸ in possession of others' property for the limited

²⁴ Even these decentralized popularized offices are not as ragtag as this suggests. Cf Frederick Henry Lawson, *The Rational Strength of the English Law* (London: Stevens, 1951) at 79 (describing the English law of property as 'more logical and more abstract than anything that ... can be found in any other law in the world').

²⁵ Charles K Burdick, 'The Origin of the Peculiar Duties of Public Service Companies' (1911) 11 Colum L Rev 511.

²⁶ In the late sixteenth century, postmasters were usually innkeepers along the route. Mark Brayshay, a professor of historical geography, has written several good papers tracing the temporary postal routes in Tudor England. Mark Brayshay, 'Royal Post-Horse Routes in England and Wales: The Evolution of the Network in the Later-Sixteenth and Early-Seventeenth Century' (1991) 17:4 Journal of Historical Geography 373 at 380.

²⁷ See e.g. *Lane v Cotton*, (1701), 88 Eng Rep 1458 (KB 1701), [1558–1774] All ER Rep 109.

²⁸ Postmasters are also bailees: one of best-known bailment cases involves the British postmaster-general, who brought a claim for compensation in his own name for the loss of parcels and letters at sea due to the

purpose of delivering it to the addressee, with all the powers and duties that entails. Unlike a private bailment, the office of postmaster in a decentralized system of offices was not susceptible to modification by contract.²⁹ The law of finders is a modern analogue, a specific application of the law of bailments to create an office, inalterable by contract, that mobilizes private individuals to perform a public service: establishing intermediate authority over a thing with the ultimate aim of restoring it to its original owner.

Whether to consolidate and so to centralize authority or to partition and to decentralize authority is a matter of collective choice. Whether centralized or decentralized, we do this (the allocation of authority in law) through offices.

III *Ownership as an office*

Ownership and ‘office’ are sometimes understood as concepts that are fundamentally opposed.³⁰ Ownership, it is suggested, is a domain in which I get to make self-serving decisions. And an office is a domain where I get to make decisions on behalf of others. This way of opposing ownership and offices obscures important features of both. Some offices do straightforwardly allocate authority to make decisions on behalf of others where acting on behalf of the other is achieved only by acting in the interests of others. Take the guardian of a child. The ‘on behalf of’ structure of the office is satisfied only where the decisions are made in the interests of the child.

negligence of *The Winkfield*, which had sunk the ship carrying the post. *The Winkfield*, [1900–03] All ER Rep 346, [1902] P 42, 85 LT 668. The case reminds us that postmasters are bailees with full possession during the term of the bailment and, as such, have a direct claim to be compensated for the negligent loss of the bailed good.

²⁹ For the connection between ‘common callings’ and public office, see *Ansell v Waterhouse*, [1817] 6 M & S 385, 105 Eng Rep 1286 (HeinOnline); *Lane v Cotton*, supra note 27.

³⁰ See generally Thorburn, supra note 15.

That is because, in that kind of office, the only person for whom the guardian speaks is the child herself: only the child's well-being counts as a reason for resolving questions about her care, education, and so on.³¹ Other offices, however, have the 'on behalf of' structure even where the interests of other people individually or as a group do not directly shape the decision-making process. Some think of the office of the judge this way: judges can be seen as serving on behalf of everyone by discharging a task (dispensing justice) that does not in itself require judges to decide in the interests of someone else. In this kind of office, decisions are on behalf of others in the sense that the official speaks for others just when the official is doing her part in the 'plan' or constitution by answering the question charged to her.

I want to say that ownership is an office that is 'on behalf of others generally' in a similar way. Owners, I will explain, are charged with deciding a question of shared concern – that is, what is to be done with this thing and by whom – a question that no one has standing to answer outside of the office. Owners have large-scale powers to change the normative situation of others, enabling them to set the agenda for things.³² The point of ownership as an office is to resolve a problem about standing that gets in the way of people resolving other problems in our lives together – in other words, problems concerning the usability of things without conflict that

³¹ It might be argued that even these 'on behalf of' relationships are the same as the 'on behalf of' character of officials who, in answering an assigned question, speak for other members of a plan. Parents and guardians might then be deciding a question of generally shared concern – that is, where society is taken to have a shared interest in each person's well-being and simply allocates authority to decide matters relating to the well-being of individuals or to the guardians of individuals if a child is concerned. See also Gregg Strauss, 'What Role Remains for de facto Parenthood' (2018) Fla St U L Rev 909 at 955-959.

³² See Thomson, *supra* note 14 at 55, 322–3 (recognizing that ownership is a 'cluster-right,' involving powers, privileges, and duties as well as claim rights). I go further and insist this cluster right is structured as an office.

arise in the absence of an authoritative agenda for the thing. These other problems cannot be solved without giving someone the authority to call the shots about what can be done with a thing and by whom and so to determine the normative situation of other people with respect to it.

When owners make decisions that resolve the question tasked to them, it is on behalf of everyone else as participants in the constitutional order that allocated authority to owners in the first place. Owners are not required to make decisions directly in the interest of others but, nonetheless, act on behalf of others just in virtue of doing their part in the larger plan. But what is to be made of the self-serving nature of ownership decisions? Even if we grant that some offices, like the office of judge, are to be understood as ‘on behalf of others’ because they answer the question allocated to them within the constitutional order, those offices are not generally available to be used for self-serving reasons. I have written before about the extent to which ownership is at the service of our self-regarding plans for life.³³ Even private ownership, I have argued, rules out certain self-serving reasons for exercising normative powers where those reasons make it impossible to understand the owner’s decisions as an answer to the question she is tasked with resolving. For example, where an owner’s personal plans for her life include total revenge on a neighbour, it will turn out that ownership as an office is not freely available to her as a means to that end.

However, I concede that private ownership allows for a wide range of self-serving decisions. In part, this is because the task that owners have as agenda setters is thin enough to be discharged in a self-serving way. And, in part, this is a feature of ownership within a decentralized constitutional order. Decentralized constitutional orders allocate authority to offices just as centralized, bureaucratic constitutional orders do: offices are unavoidable in both.

³³ See Katz, ‘Spite and Extortion,’ *supra* note 2 at 1460.

The former, however, relies on private actors to fill offices and operates with presumptions of valid decision making rather than of institutional mechanisms that actively oversee owners' reasons. Hence, there are no ethics commissioners for private owners as there are for legislative and executive offices, nor are there – in fact or in principle – visitors with supervisory jurisdiction over owners as there are for corporations. This does not point to a difficulty in conceiving of ownership as an office: there was a time when most offices functioned in just this way as part of a decentralized system of government. It just means that we have a system of offices that might not live up fully to modern liberal ideals where all hierarchical decision making is tightly controlled by institutional mechanisms that ensure fidelity to the 'plan' of which it is a part. We can imagine other procedures for putting in place democratically elected officials or expert commissions charged with managing or supervising the management of property relations, as we have done with public offices and some private offices too.³⁴

I have said so far that I think ownership and offices do not have to be understood as opposed concepts. I want to turn now to why I think ownership is an office. (I have already indicated why I think ownership must be structured as an office in order to be legitimate. Because ownership involves hierarchical decision-making power over a matter that concerns others, ownership raises a problem of standing that offices resolve by conferring the mandate and power on owners to decide questions about use.) The idea of office also best explains the nature of ownership as it is found in the common law tradition. Ownership is hierarchical (the entire structure of property rights is based on a chain of authority and so gives rise to the principle

³⁴ For example, through visitatorial jurisdiction, see Pound *supra* note 17. See also Larissa Katz, 'Shares as Shares' in Ben McFarlane & Sinéad Agnew, eds, *Modern Studies in Property Law*, vol 10 (Oxford: Hart Publishing, 2019) 107.

nemo dat quod non habet), positivist (ownership authority depends on law), and impersonal (no one claims authority over others with respect to things in virtue of anything particular to her).

The idea of office also captures the purposivity of ownership: property law conceives of owners as fundamentally charged with agenda setting. Owners determine the normative quality of the activity of others with respect to the thing by setting the agenda for it. The owner's agenda frames the activity of others with respect to a thing as action – that is, as of right, privileged, trespassory, or usurping.

Ownership powers set out in the common law are in service of this agenda-setting function. The creation of new rights, privileges, and powers in this way is best understood as a further specification and elaboration of the agenda that regulates our interactions with respect to that thing without threatening the integrity of the office. Thus, owners have the power temporarily (owners *pro tempore*, created through bailment or lease) or permanently (through gift, sale, or bequest) to appoint another person to the office. Owners can also create new rights that are lesser and included in their own and that then operate as rights against the office – for example, servitudes, profits, liens and mortgages, and trusts. Finally, owners can divide the office among present and future owners or concurrent owners. An owner, in appointing a successor to the office or in creating subordinate rights against the office of ownership and dividing ownership authority, cannot go beyond her office to alter the larger allocation of authority within the constitutional order of which ownership is a part.³⁵ Owners as owners can delegate aspects of their authority to others permanently or temporarily creating new subordinate rights, but they cannot create wholly independent new offices because that would amount to a

³⁵ See Henry E Smith, 'Restating the Architecture of Property' in McFarlane & Agnew, *supra* note 34, 19.

new constitutional order or social plan for the allocation of authority: the office of sovereign (constitution maker) is required for that.³⁶

Ownership powers to create subordinate rights are limited by the nature of the office of ownership itself: owners can neither exceed nor diminish the office in exercising the powers of office. This has a few implications for the ways in which owners can change the normative situations of others through the exercise of ownership powers, including the kinds and combinations of rights that are possible. It means that owners can only set out a framework of subordinate rights such that, first, taken together, all of the property rights there are with respect to a thing amount to no more and no less than the whole office. An owner cannot confer authority she did not have herself. And an owner cannot configure a new framework of rights with respect to a thing that reduces the office to less than it was (for example, a grant of a life estate without any provision for the remainder cannot amount to a destruction of the remainder). Second, the new rights she creates with respect to a thing must be consistent with the office of ownership (for example, an easement must be a precise, definable use-right that is consistent

³⁶ This idea was expressed in the common law in the idea that the king alone could create new offices, a royal prerogative constrained by common law courts in a variety of ways: the Crown could not create an office for anyone in particular. See *The Statute of Quia Emptores*, 1290 (restrictions on subinfeudation); see also *Walter Chute's Case* (in a petition to the King to create a new office and to appoint one, WC, to hold it, finding that no new offices could be created for private persons for private ends. See Steve Sheppard, ed, *The Selected Writings of Sir Edward Coke* (Indianapolis, Ind: Liberty Fund, 2003) I, 492. In *Blanchard v Hill* [1752] 26 Eng. Rep. 692 (Ch); 2 Atk 484 (Ch), a court of equity refused to uphold the right the exclusive right to use the trademark as it came from a royal charter that was not meant to create *new* rights. Nor can the state take away the right of its subjects through the exercise of its prerogative, as was held by the Supreme Court of the United Kingdom with respect to the UK government's attempt to use the Crown prerogative to affect Brexit; such an action would have to proceed through Parliament because it would have the effect of extinguishing existing legal rights: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. See also Avihay Dorfman, 'Property and Collective Undertaking: The Principle of *Numerus Clausus*' (2011) 61 UTLJ 467, on democratic limits on owners' ability to create new offices.

with another's retained ownership of the servient tenement; an owner cannot couple a grant of ownership with rights or duties that are inconsistent with it – for example, a grant of full ownership followed by provision for the appointment of successors following the grantee is invalid. Third, the rights, if inconsistent with anyone's having full ownership authority, are bound to resolve into unitary, consolidated ownership, again within a reasonable time frame (for example, future interests that are not certain to vest if at all within a defined period of time are invalid because future interests are authority-compromising threats of forfeiture, tolerated only if certain to resolve into unitary ownership in a timely fashion).

All of the various forms of subordinate rights that owners can create – easements, covenants, profits, leases, future rights, co-ownership interests – and the temporary appointments to office are subject to the too often overlooked doctrine of merger in property law: '[W]henver a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the lesser is immediately annihilated or in the law phrase is said to be merged, that is sunk or drowned in the greater.'³⁷ The doctrine of merger operates with a view of ownership as a unitary position of authority and so of the fragments delegated to others as always remaining capable of merging to form a unitary position of authority again. Contractual rights, which do not amount to delegations of authority within the hierarchical structure of an office, are not subject to the same principles about combination and merger of rights. When a person A promises to sing in B's opera house on the same day that she has promised to C to sing in C's opera house, there is no principle of contract law that avoids the creation of the second

³⁷ Sir William Blackstone, 'Of Estates in Possession, Remainder, and Reversion' in Simon Stern, ed, *The Oxford Edition of Blackstone: Commentaries on the Laws of England*, vol 2: *Of the Rights of Things* (Oxford: Oxford University Press, 2016) 110 at 119.

contract: A just has set herself up to be sure to breach one or the other contract, both of which are valid contracts.

Finally, the idea of office explains a feature of ownership and some of its implications that I will turn my attention to for the rest of this article: ownership is a position separable from its holder such that the office continues even as people come and go in it. One implication of the separability of owners from their office is that ownership as an office – unlike purely personal powers – remains available to be filled by someone else if the incumbent dies,³⁸ is forced to vacate the office (forfeiture),³⁹ or is ousted by a challenger.⁴⁰ An important implication of the separability of office from its holder is that ownership is capable of vacancy.⁴¹ And yet, for reasons I will now turn to, we cannot really conceive of ownership without owners or offices without office-holders.⁴²

IV Law's efficacy requirement: no vacancies

³⁸ This explains how it is possible for a will to operate posthumously to appoint someone to the position: the position remains available to be filled through an instrument that is itself effective only on the death of the testator.


³⁹ See e.g. Sir William Blackstone, 'Of Felonies, Injurious to the King's Prerogative' in Ruth Paley, ed, *The Oxford Edition of Blackstone: Commentaries on the Laws of England*, vol 4: *Of Public* (Oxford: Oxford University Press, 2016) 62 at 62. Forfeiture may also happen through no act of the owner's as provided in civil forfeiture laws. See e.g. *Civil Remedies Act*, SO 2001, c 28.

⁴⁰ Take the old maxim, for example: 'No trust fails for want of a trustee.' This separability of office and person explains the distinction between a purely personal power of appointment, which is extinguished with the death of the donee of the power and the powers belonging to the office of trustee.

⁴¹ See also Katz, 'Moral Paradox,' *supra* note 4; Shapiro, *supra* note 3.

⁴² See Sir Henry Maine: everything that exists and is ownable is presumed to have an owner. Henry Sumner Maine, *Ancient Law* (London: Oxford University Press, 1959) at 213.

For law to exist, it must be more than words: it must also actually be carried out: effectiveness is a requirement for law to be law (as Les Green, Arthur Ripstein, Malcolm Thorburn, and others have reminded us). Others have emphasized the importance of the enforcement of official decisions for law to be effective. I want to emphasize a different aspect of law's effectiveness: the requirement that the offices constituting the legal order be filled.⁴³

In what way does it make law effective to have office-holders in place? Avoiding vacancy is in part – but only in part – a matter of enabling the state to bring about certain ends, like peaceful uses of things (achieved, like cleared sidewalks, through the office of ownership), more ethical conduct by government officials (Office of the Integrity Commissioner), a vaccinated population (Chief Medical Officer, Ministry of Public Health), and so on. Offices, including ownership, are of course undeniably important mechanisms for government – for the state as a kind of enterprise association, as  Michael Oakeshott would describe it – to plan and bring about a variety of ends.⁴⁴ There is a kind of office (a ministerial one) that is designed primarily to bring about specific outcomes. Even offices that are not ministerial – that is, offices defined primarily in terms of their decision-making powers, as opposed to duties to bring about defined outcomes – can in themselves be useful mechanisms for the state to achieve its ends. Thus, I have argued that owners as officeholders are liable to be conscripted ‘as foot soldiers in the army of the good’ through the allocation of incidental affirmative duties to perform important

⁴³ One reason the Kantians might not emphasize this is their concern, for the most part, about justifying coercion rather than seeing to it that there is more of it in need of justification: so their account focuses on why the state intervenes to enforce the official's decisions where officials decide.

⁴⁴ See Dyzenhaus, *supra* note 2.

government functions on top of their core agenda-setting function.⁴⁵ With respect to these affirmative duties, there are sometimes good prudential reasons for states to avoid vacancies.


But offices on my account exist and need to be filled for a more basic reason than this. Offices are also intrinsic building blocks of the legal order itself. Offices need to be filled not just in order to harness human agency to achieve collective ends. Rather, offices need to be filled in order to make effective the allocation of authority as it has been set out in the constitutional order. Offices are not in themselves entities capable of holding or wielding authority independent of people. That is why, when vacant, offices represent only a theoretical allocation of authority. Offices constitute an actual allocation of authority only when there is an office-holder who can take up the authority that is conditioned on holding office. That means that a network of offices tasked with making authoritative decisions represents an actual allocation of authority only if there is someone in office who has the warrant to resolve the question tasked to the office. Insofar as an office forms a part of a rational plan for allocating authority, then unchecked vacancy leaves a hole in the legal system that not only leads to a morally less desirable state of affairs (less coordination, no herd immunity, and so on) but also represents a defect in the legal order itself.⁴⁶

The law abhors a vacancy for reasons to do with its own existence conditions. Offices – although capable of vacancy – are thus designed through law to avoid it. *Horror vacui* is clearly expressed in property law with respect to the office of ownership. What Oliver Wendell Holmes

⁴⁵ Katz, ‘Governing through Owners,’ *supra* note 4; Robert C Ellickson, ‘The Affirmative Duties of Property Owners: An Essay for Tom Merrill’ (2014) 3 Brigham-Kanner Property Rights Conference Journal 43.

⁴⁶ If the authority allocated through office is authority no one needs exercised in order to coordinate and interact rightfully, then there is a different legitimacy question: why trump up some way in which some of us are subject to other people’s being in charge if that is not required for the project of legality – the plan – to proceed?

calls ‘the general tendency of our law ... to favor appropriation’⁴⁷ and ‘to abhor the absence of proprietary or possessory rights as a kind of vacuum’⁴⁸ reflects a concern with vacancy in the office of ownership.⁴⁹ The worry is not about the absence of rights – why worry about rights if there is no one claiming them? – but, rather, the absence of full ownership authority vested either in a person or in a set of people who together account for all of the authority of office. This worry is manifest in the common law presumption that there is an owner for every ownable thing⁵⁰ and in the common law doctrines that avoid vacancy across a range of circumstances. Holmes himself raised the problem of vacancy in the context of explaining a bailee’s rights to possess good against the whole world but the true owner.⁵¹ The doctrine of relativity of title seeks to assign property to someone in the absence of a true owner, turning the possessor into an owner *pro tempore* who avoids a vacancy in office until the true owner can be identified.

Vacancy avoidance also explains the law of abandonment. In the common law tradition, abandonment operates only as a defence by a possessor against a prior owner’s reassertion of title, not as unilateral power to divest oneself of ownership. As  Sir Edward Coke put it, ‘[a] man


⁴⁷ Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications, 1991) at 237.

⁴⁸ *Ibid.*

⁴⁹ Holmes himself thought that ownership was a persona, that people assumed and relinquished as they assume and relinquish offices. But see Sir Frederick Pollock in a case note on *Arrow Shipping Company v Tyne Improvement Commission*. Sir Frederick Pollock, ‘Case Note on *Arrow Shipping Company v Tyne Improvement Commission*’ (1894) 10 Law Q Rev at 293 (‘the possession of goods is never absolutely vacant in law, and that express abandonment is, in point of law, merely a licence to the first man who will to take the goods for his own’). This idea is, I think, a modern descendant of what Maitland called the ancient common law doctrine entitling the Crown to the service of its subjects: Frederic William Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1920), 504 (‘a person is bound to serve the crown in all manner of offices’).

⁵⁰ See Maine, *supra* note 42.

⁵¹ See *Clark v Maloney*, (1840), 3 Del 68, 3 Harr 68 (no *jus tertii* defence against possessor of logs).

cannot relinquish his property in goods, unless they be vested in another.’⁵² *Horror vacui* is also reflected in intestacy laws: as one judge put it in a late nineteenth-century case from the Supreme Court of Missouri,  ‘as nature abhors a vacuum, so the common law abhors the absence of an absolute ownership, somewhere, in property of whatever description. Hence, by a sort of general intent, the administrator must stand in the shoes of his intestate for almost every purpose affecting the personality.’⁵³ In a system designed to avoid vacancy, the state must ultimately stand as the office-holder of last resort. In the context of property, this means that the state serves as the owner in the absence of an identifiable private owner. Thus, in *Ho Young and Another v Bess*, a 1995 case from St Vincent and the Grenadines that went to the Privy Council, the Court insisted that ‘[t]itle to the land in question had to vest in someone following forfeiture since the law abhorred a vacuum.’⁵⁴ The state’s role as ultimate owner is expressed in the law of

⁵² *Haynes’s Case*, (1614), 12 Co Rep 113; 77 ER 1389. See also Cheng Lim Saw, ‘Abandonment and Passing of Property in Trash’ (2011) 23 Sing Ac LJ 145, referring to *Williams v Phillips*, (1957), 41 Cr App Rep 5, 121 JP 163 (for the assertion that trash left on the curb side belongs to the homeowner until collected). See further Eduardo M Peñalver, ‘The Illusory Right to Abandon’ (2010) 109 Mich L Rev 191; Konstanze von Schütz, ‘Keeping It Private: The Impossibility to Abandon Ownership and the *Horror Vacui* of the Common Law of Property’ [unpublished manuscript, on file with author] (arguing that the common law, in contrast to civil law, aims to keep ownable objects in the hands of private owners as long as possible). This line of doctrine is difficult to reconcile with purely right-based analyses of property. See e.g. James E Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 2000) at 79 (‘[o]ne ought not to be saddled with a relationship to a thing that one does not want, and an unbreakable relationship to a thing would condemn the owner to having to deal with it’).

⁵³ *Cape Girardeau County v Harbinson*, [1874] 58 Mo 90 at 94.

⁵⁴ *Ho Young*, supra note 18 at 440. The case dealt with a law in St Vincent and the Grenadines that allows the Crown to take land from non-citizen owners in some cases. The court considers whether land held in a joint tenancy was forfeited this way when one of the joint tenants died intestate or whether ownership passed to the other joint tenant (a Jamaican citizen).

escheat⁵⁵ and *bona vacantia*, through which title to land and goods vests in the state to avoid a vacancy.

The state's role to step in as the owner in the absence of a private actor backstops the whole system of ownership as an office, and its abdication of that role threatens to undermine the efficacy and, ultimately, the legitimacy of the system as a whole. Where private owners abdicate their responsibilities and forfeit the position, the state has the power to step in to avoid a vacancy but is not always motivated to exercise it. In New York City, in the 1970s, many private owners of housing geared to lower-income renters took steps to induce forfeiture (cheaper than maintenance or the cost of demolition) by not paying property taxes or maintaining the property. As the owner of last resort, New York City took over a large number of these properties (over eleven thousand at one point) but at great cost. Eventually, New York City adopted a policy of restricting the number of new properties that it would acquire through foreclosure mechanisms, even as the private owners abdicated all of the responsibilities associated with ownership in order to trigger a forfeiture. The result was an effective vacancy in office. Without the state willing to recognize the circumstances triggering a forfeiture of office, and in the absence of any conscription mechanism that could require private owners to fill in, the resulting vacancies threatened the effectiveness of the system as a whole.⁵⁶

Horror vacui not only explains the doctrine property law uses to avoid vacancies. It also explains one of the challenges that an account of ownership as an office needs to consider: the role of possession as the default procedure.

⁵⁵ *Quadracolour Inc v Crown Estate Commissioners*, [2013] EWHC 4842 (Ch).

⁵⁶ See e.g. David Reiss, 'Housing Abandonment and New York City's Response' (1997) 22:4 NYU Rev L & Soc Change 783.

v Procedures for appointment: possession as a default

The law's efficacy problem is solved by having validly appointed officials in place. Some offices are self-filling: there is no procedure for appointing the sovereign, for instance, because there is no legal system of which that procedure might be a part without the office of the sovereign already there.⁵⁷ The Office of Sovereign holds the legal system together from beginning to end: it is not only the first office, but it is also the last office: this office is the residual holder of all power, and so all other offices are liable to collapse into it. But where the legal system and the provisions it has made for the allocation of authority is ineffective because the offices it has set out are unfillable (because there is no procedure), and everything results to the office of the sovereign, that plan/legal system has failed on its own terms. That means that the law requires for its own efficacy at minimum procedures for appointing office-holders and that no legal system can be read as having omitted to set out these procedures. That would be a reading inconsistent with its nature as law and so only a reading of last resort if there are no other reasonable interpretations available.

Where there is no other procedure for appointment, through, for example, conscription, election, lottery, and so on, the legal system must be taken to have answered the question of who holds office on the basis of possession: possession is a procedure for appointment in default of any other. The whole point of a legal system is that it has resolved the question of who decides through offices, but it cannot be said to have done so with minimum efficacy where it has not also settled on a procedure for appointment. To insist that there be an office and then to deny that

⁵⁷ Offices held by someone *ex officio* are not self-filling: they do not require separate procedures for appointment, but they are filled only once the other office is filled and so indirectly require a procedure.

there is a procedure – that is, to choose vacancy over appointment by possession – is incoherent; it is an insistence on law and no law at the same time. Possession as a procedure raises a presumption of validity attaching to anyone in possession, carrying out the business of that office.⁵⁸ The presumption is defeated only by showing that the possessor has violated a procedure for appointment that would require, of course, that the challenger point to a procedure that applies, such that possession does not. (It is never open to a challenger to resist the possessor's authority on the grounds that there is no procedure for appointment and so none through which the possessor could have come into office because this would be to deny the existence of the office and the law of which it is a part.) Is that ever possible? Well, it might of course be possible to establish that there is no law around here, but not where there is a set of institutional arrangements, complete with an available procedure for appointment, that makes it possible to understand our interactions as governed by law. In the absence of a different procedure for appointment, there is no basis to rebut the presumption of validity that a person raises through possession. Nor can a person simply take possession from the incumbent: once a person has filled an office, any subsequent dispossession counts as a usurpation of office for the reason that it is inconsistent with the undefeated title of the first to possess.

Possession is the default procedure, but there are some contexts where it will remain the procedure of choice for filling offices. Possession, it turns out, is an appealing way of filling offices where there is no more cost-effective centralized mechanism available for doing so: it is the procedure for appointment that we should expect from a popularized decentralized system for decision making, so long as people are willing to slot themselves in and so long as we are not terribly concerned about who in particular holds office.

⁵⁸ Possession means, literally, 'sitting in power.'

This is a feature of offices generally, and it is true of the office of trustee. A person can slot herself into the office of trustee simply by taking up the powers of ownership of the thing subject to the trust. Possession works for offices with a more conventionally public flavour: the office of police can be assumed by someone simply by taking up and discharging the function within the limits of the office.⁵⁹ It works for other forms of office too. In *Lane v Cotton*, a case from the thirteenth year of King William III (1701 or 1702), the plaintiff's lawyer describes a postmaster as 'an antient common-law office' that was originally 'exercisable by any, and as many as would take it upon themselves' and as a 'prior private [office]' that had by that time been converted by statute to 'one public office' – that of Postmaster General.⁶⁰ Chief Justice John Holt, in dissent, asserted that, prior to the Parliament Act 1660, 'the subject had liberty to send his packet by any other post-master he pleased, of which there were many in those days; it being then lawful for any man to set up such an office.'⁶¹

VI *Worries about unilateralism*

One possible objection is that possession cannot count as a procedure because it is just so much unilateralism, which is exactly what offices are designed to avoid. According to Thorburn, the only legitimate default procedure – much closer to conscription than to unilateral choice – is necessity: a person whom circumstances have forced into a role cannot be said to have acted unilaterally in a way that sees her operating outside of the legal system.⁶² His paradigmatic

⁵⁹ As Malcolm Thorburn has instructively explains in his contribution to this issue, Thorburn, *supra* note 15.

⁶⁰ *Lane v Cotton*, *supra* note 27.

⁶¹ *Ibid.* *Parliament Act 1660*, 12 Car II, c 1.

⁶² Thorburn, *supra* note 15.

example – self-defence – explains why persons using reasonable force on others do so qua official. They do not select themselves but are identified in a way that is entirely non-unilateral, forced into service by the circumstance of another’s imminent threat of bodily harm to them or someone in proximity to them. In situations of necessity, it would not be possible for a legal system to opt for a different procedure for appointment into the role of defender: *ex ante* allocations of authority on some other basis are not feasible because of the very nature of emergencies and necessities: they are sudden and unexpected, leaving no opportunity for other arrangements).

Possession, more than necessity, has a feel of unilateralism to it. A person who takes her time eyeing Blackacre and plotting her next move is not compelled by the circumstances to slot herself in – she chooses to. How does possession as a procedure for appointment escape this worry about unilateralism? There are two worries about unilateralism that we can distinguish and treat separately, and, as it turns out, possession as a procedure avoids both. One is the unilateralism of deciding that others will be subject to a decision that is not of their making. This kind of unilateralism is properly regarded as a form of vigilantism because it is a return to natural hierarchies established by force and so an attack on legality itself. Possession as a procedure for appointment does not raise this first worry because, when a person takes possession of an already existing office, she is not making the decision to subject people to authoritative decisions by another on that matter. That decision has already been made at the constitutional level by allocating that kind of authority to an office. Possessors, on my account, do not decide on the creation of offices. They take up offices that already exist.⁶³

⁶³ See e.g. *Baltimore Building & Loan Ass'n v Alderson*, 99 F 489, 39 CCA 609 (4th Cir 1900) (distinguishing a case (*Norton v Shelby Co*, 118 US 441, 442, 6 Sup Ct 1121 (1886)) that holds ‘where there is no

There is a second worry about unilateralism which is a worry about subjecting others to your decision as the official. Those worried that possession is close to vigilantism may think this is the kind of unilateralism to watch out for. A possessor is a vigilante, so the worry goes, because he or she unilaterally decides that others are subject to her decisions as office-holder. There are two situations where I readily concede that possessors are like vigilantes but that nevertheless leave room enough for possession to operate as a procedure for appointment in other situations where the worry is not engaged. One instance of this form of unilateralism is the case of the ‘possessor’ who has slotted herself into an existing office in a legal system where that office is open to being filled by possession but has already been filled (say by the sheriff) and where ‘possession’ must then count as a unilateral usurpation of office. (This is more complicated than vigilantism without offices because there is a way to get back to legality from an illegal starting point like this, as we see in the case of adverse possession or the legitimizing of a government that takes power through a coup.) The second case where possessors are like vigilantes is where there is an office, which is vacant, but there exists a different procedure for appointment – for example, the governor names someone to the office, that is violated where the vigilante unilaterally slots herself in. Granting that these are cases of improper unilateralism, there remains the core case which I think does not run afoul of any procedure for appointment, possession, or other that would render taking office through possession illegitimate. This is the


office in existence which the law will recognize, there can be no office de facto.’ And continuing: ‘But the office of receiver (if we may call it an office) has a recognized existence. ... This being the case when Sommerville was appointed receiver, he was appointed to a place which had a recognized existence in the law; and when he was required to give, and did give, surety, this was in the orderly course of proceeding. Even were this receiver in de facto, ‘the acts of an officer de facto, although his title be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done.’ *County of Ralls v Douglass*, 105 US 730, 26 L Ed 958 (1881).

case of the possessor who slots herself into an empty office simply by taking up the powers and duties of that office in the absence of any other public procedure for appointment. There are no procedural grounds for invalidating her claim to office and so no form of unilateralism that is going to count as an attack on legality.

Is there a rule-of-law concern that possession as a procedure fails to concern itself with the fairness or lawfulness of the appointee's coming into office? This worry in the context of possession as a procedure is that possession does not address the basis upon which someone comes to be the possessor and so the presumptively valid owner of something. Possession as a procedure seems very unselective.⁶⁴ In one case, a man was found to have a suspiciously large amount of cash in the boot of his car. The police arrested the man and took the money on suspicion that it was the proceeds of a crime, but, for complicated reasons, they could not establish any criminality and let the man go. When the police refused to return the money, the man sued the police in conversion and won: as the possessor of unclaimed money, he had good title to it, defeated only by someone else's showing that he had a better title (by having been appointed first or by someone with a prior, and therefore better, power to appoint). The worry here is that possession is not a sufficiently discriminating procedure: it protects someone who, although plainly in possession prior to the police, quite plainly did not come into possession in any legally sanctioned way. This worry that possession does not care enough about how someone comes to satisfy the procedure is not baseless. In fact, I think there are rule-of-law grounds (or, in private law, equitable grounds) for caring a lot more about the *causa possessionis* or the basis upon which a person has come to be the one in possession. If she achieved that through force or fraud, or if she otherwise acted in some reprehensible way in becoming the first

⁶⁴ *Canada (Attorney General) v Brock*, [1993] 82 BCLR (2d) 1, 83 CCC (3d) 200.

to possess, it might be justifiable for a legal system to treat the office as forfeited even if she had satisfied the procedure by taking possession.

This same kind of worry can be made out in relation to other procedures too. If the relevant procedure is a simple election through a showing of hands, there are reasons of equity to look behind that procedure based upon which a person was able to secure more votes than her rival. Did she pay off voters, intimidate them, or so on? Or did she manage to get votes in a way that is in some other way not in keeping with its spirit either – for example, arranging to hold the vote on a day when all of her competitors’ supporters were sick. In the context of property law, the same worry and the same need for equitable correction accompanies other procedures for appointment to ownership – for example, sale and registration.⁶⁵ In Canada today, a person can acquire ownership by entering into an agreement for purchase and sale, paying the purchase price, and registering ownership in the land titles system. The basis upon which she was able to complete this procedure might also be corrupt in ways that the procedure itself does not respond to: the money she uses might not really be hers (equity can intervene in the form of a  resulting trust for the benefit of the true originator of the value) or may have been acquired through criminal activity in circumstances where it likely was. Just as we might want to inquire into the *causa possessionis*, there is a reason in a legal system that relies on markets to allocate ownership authority or to inquire into the basis of the wealth used in the completion of the agreement for purchase and sale. I take it that that is what is going in the United Kingdom’s

⁶⁵ In pure ‘race’ recording systems, equity does sometimes look to how the race is won and intervenes if the race was somehow in itself unfair even though in law only the result counts. See also Laskin J in *United Trust Co v Dominion Stores Ltd*, [1977] 2 SCR 915, 71 DLR (3d) 72.

unexplained wealth orders,⁶⁶ where certain owners ('politically exposed persons' that is, foreign people in positions of political power⁶⁷) can be demanded to establish the *bona fides* of the wealth used in the acquisition of property in England or, failing to do so, forfeit their property. The basis of the individuals subject to the orders' ownership is clear: they met the requirements of the relevant procedures for becoming owners of the goods or the land in question. It is the basis of their ability to complete that procedure – their access to sufficient wealth to close the sale – that is unclear. It is not a defect of any of these procedures for appointment that they do not, at the same time, establish the basis upon which someone is in a position to satisfy them. That is what equity is for.

VII Conclusion

Offices, by their very nature, have the potential for vacancy. And, yet, the law abhors vacancy: vacancy in office represents a defect in the legal order. Ownership serves as a model for the kinds of default rules and procedures for appointment that the law must presuppose in light of its *horror vacui*. Possession as a juridical procedure for appointment to office is not the required procedure for offices, but it is the default one. It remains the procedure of choice for a network of

⁶⁶ Added as sections 362A and on to *Proceeds of Crime Act 2002* (UK), c 28, by the *Criminal Finances Act 2017* (UK), c 22. For similar concerns in British Columbia, see Maureen Maloney, Tsur Somerville & Brigitte Unger, *Combating Money Laundering in BC Real Estate: Report by Expert Panel on Money Laundering in BC Real Estate* (2019) at 81, online: *Government of British Columbia* <https://news.gov.bc.ca/files/Combating_Money_Laundering_Report.pdf> (suggesting the introduction of unexplained wealth orders).

⁶⁷ See definition of 'politically exposed person' in section 362B(7) of *Proceeds of Crime Act 2002*, *supra* note: 'An individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State.'

decentralized, popularized forms of administration that rely on private actors to slot themselves into the various offices through which decisions are made in a constitutional order that is built of such networks.