

2 • Private Property and the Possibility of Consent: Kant and Social Contract Theory

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1. Introduction

In the private right section of the ‘*Doctrine of Right*’,¹ Kant argues that we must assume a permissive law of practical reason (*Erlaubnisgesetz*) authorizing us to become owners of external objects in order to avoid a contradiction of freedom with itself. However, soon after making the case for a permissive law, Kant also introduces the natural law theory notion of common possession of the earth (*Gemeinbesitz der Erde*) as the ‘legal title’ (*Rechtsgrund*) enabling the division of the earth’s land and resources. The question is thus: Why does Kant need to introduce the notion of common possession of the earth in addition to the permissive law authorizing the possibility of becoming owners of objects? Is the permissive law not sufficient for this purpose?

The notion of common possession of the earth has not received enough attention in the Kant literature. In fact, some scholars feel irritated by Kant’s introduction of this notion. Kenneth Westphal argued that common possession of the earth is used to link Kant’s views to the natural law tradition, but that he does not need it for his justification of property.²

Kant’s theory of ownership does not need that myth. All that is required to acquire a right to use something originally – that is, to claim something not previously claimed or detained by anyone else – is to recognize that things per se cannot obligate us (since they are not free rational agents), and that one’s claim to something that is not claimed or detained by another is legitimate only if one’s claim to it does not otherwise infringe their like freedom.³

In this chapter, I show why this view is not correct: common possession is not merely a 'myth' that Kant uses to show continuity with the natural law tradition, but is indeed required to account for the asymmetry between private rights to external objects (*Sachenrecht*) and other forms of private right which do not involve external objects. I will argue that understanding this asymmetry will help us understand how Immanuel Kant can be said to be a social contract theorist and the role of consent in his legal and political theory.

The chapter is structured as follows: in the next section, I will elucidate why rights to external objects are different from other forms of private right involving merely the will of the contracting parties, and require a distinctive treatment in Kant's legal theory. In section 3, I explain the role of the notion of common possession of the earth and of a 'united will of all' in solving the problem of the asymmetry between rights to external things and rights derived merely from the will of the parties. I argue that the problem of acquisition of external objects requires Kant to introduce a *genuinely contractualist element* in his legal theory. In section 4, I spell out the implications of my analysis for the role of social contract in Kant's theory.

2. What is a right to a thing? *Sachenrecht* and the problem of original acquisition

The usual exposition of a right to a thing (*ius reale, ius in re*), that 'it is a right against every possessor of it,' is a correct nominal definition. But what is it that enables me to recover an external object from anyone who is holding it and to constrain him (*per vindicationem*) to put me in possession of it again? Could this external rightful relation of my choice be a *direct* relation to a corporeal thing? (RL §10, 6:260)

In §11 of the Private Right Section of the *Doctrine of Right*, Kant asks what it is to have a right to a thing. According to a nominal definition,⁴ a right to a thing is a right against every possessor of that thing. This means that I have a claim against anyone currently holding an object that is *mine*. The problem with this definition is that it does not explain the idea that the rightful possessor would be *entitled* to claim her object back from a person who is currently holding it – that is, someone empirically possessing an object that

is rightfully hers. What distinguishes the rightful possessor from a mere empirical possessor of that same thing? What is the source of this mysterious link between the rightful possessor and the object, which persists even when it is in the hands of another? For answering this question, Kant goes on to examine the ‘real definition’ of a right to a thing:

So the real definition would have to go like this: *a right to a thing* is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others. For this possession in common is the only condition under which it is possible for me to exclude every other possessor from the private use of a thing (*ius contra quemlibet huius rei possessorem*) since, unless such a possession in common is assumed, it is inconceivable how I, who am not in possession of the thing, could still be wronged by others who are in possession of it and are using it. By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all (*vereinigte Willkür Aller*) who possess it in common. (RL §11, 6:261)

While the nominal definition determines the meaning of a word as it is conventionally understood and applied, a real definition is supposed to reveal some essential feature about the designated thing. This is why the nominal definition is not helpful in understanding *what it is* to have a right to a thing, although it is not a wrong definition. The real definition, however, is puzzling at first sight: ‘a right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others.’ Kant then adds that possession in common is the condition for the possibility of excluding every other possessor from the private use of my object. Why is ‘possession in common’ required in order to enable the rightful owner to impose an obligation on everyone else to refrain from her possession? This idea may sound strange if not contradictory to the contemporary reader.

To understand this point, let us reflect about the idea of *having a right to a thing*. Conceptually, a right to an external object must involve two aspects: (1) the possibility of being *wronged* by others when they interfere with your private use of a thing and (2) the possibility of imposing an *obligation* on all others to refrain from using that thing. The two aspects are in fact different sides of the

same coin: unless my act of acquisition can impose an obligation on all others to respect my possession, I cannot be wronged by anyone who interferes with my object. The problem is that acquisition of objects is a unilateral, empirical act, and yet the empirical deed of a person is supposed to generate *necessity* – that is, to impose an obligation on everyone else to refrain from the acquired object. This is a problem for Kant because necessity can only come from universality: experience can at most give rise to generality, but not to necessity. This is why Kant very consistently notes that only an *omnilateral* act – that is, ‘the united choice (*Willkür*) of all who possess it in common’ – has the authority to impose an obligation on everyone. As opposed to Locke’s theory of acquisition, there is no *direct right to a thing*: ‘what is called a right to a thing is only that right someone has against a person who is in possession of it in common (*im gemeinsamen Besitz*) with all others (in the civil condition)’ (RL §11 6:261). Since all acquisition is based on a unilateral act of appropriation, unless the will of all other juridical persons can be conceived as somehow involved in *willing* an act of acquisition, it is not possible to derive an obligation to refrain from anyone’s acquisition. *Omnis obligatio est contracta*: all obligation must be self-imposed.⁵ This is the condition Kant’s theory of rights to external things must account for.

According to the fundamental axiom of Kant’s legal theory, innate right, we are as persons already born with something that belongs to us. This is the *original sum*: that is, that which is ours innately and is not acquired or derived from what belongs to another. From our interactions with others, however, we can *acquire* further rights. These rights cannot be original; they are derived from our deeds and interactions with others, i.e. from what is *theirs*. Acquisition is original when it is not derived from what belongs to others (*welche nicht von den Seinen eines anderen abgeleitet ist*) (RL §10, 6:258). One can acquire the choice (*Willkür*) of another person or her condition (*Zustand*), but this acquisition is always derived from the *suum* of that other person, that is, from her *will*. Only previously unowned external things (*Sachen*) can be originally acquired.⁶ More precisely, *all original acquisition will be acquisition of land*. Kant assumes that there is a metaphysical priority of acquisition of land over acquisition of objects. In this sense, control over land is the condition for the possibility of possession of movable objects on the land.

However, there is no innate right to external objects just by virtue of our juridical status as persons. External objects must be *acquired*: they need to be incorporated into our sphere of freedom. But this, in order to be compatible with the fundamental axiom of Kant's legal theory, must happen without violating the innate rights of others. How is that supposed to happen?

Consider what is going on when you marry someone: the other person must consent to the proposal in order for the agreement to be valid, that is, for it to be a *voluntary* transaction, and not some form of coercion which would violate that person's innate right. The legal title of this 'mutual acquisition' of one another, is derived from the *will* of the contracting parties to commit themselves to each other in marriage. However, this normative structure cannot be applied to external things. External objects must be acquired for the first time at some point in order to enter the sphere of the external *Mein und Dein*. But external things are not persons, they have no will. The legal relation is thus not between myself and the object but between myself and *all other persons* in regard to that thing. The problem is that, unlike bilateral legal agreements, the 'contracting parties' are not present during my act of first acquisition (all humanity, including future generations would have to be present and give their consent to my first acquisition!). The idea of an original community of land thus accounts for the possibility of original acquisition by making it possible to think of a *united will of all possible possessors* of that thing as *willing* acts of first acquisition. The reader may be asking herself: but wait, which kind of consent is that supposed to be? In the next section, I will explain how the idea of common possession of the earth is related to the idea of a united will of all possessors, and elucidate Kant's main arguments in his theory of acquisition.

3. Original community of the earth (*Gemeinbesitz der Erde*) in Kant's legal theory

Kant conceived common possession in a radically different way from his natural law predecessors. Grotius conceived common possession as a historical time preceding private property arrangements. It is overcome and loses its significance (re-emerging only in situations of emergency). For Kant, however, common possession

becomes an idea of reason. It accounts for the fact that if interference with one's possessions is to count as a wrong, I must stand in a relevant legal relation with all others. There is no direct legal relation to objects, only between all persons in regard to that object. The postulate of practical reason establishes only the legal *possibility* of persons becoming owners of objects. However, it does not account for the further implications of *acquisition* of objects on the freedom of other persons who are excluded from it. The postulate only establishes that our use of objects is possible, that it should be made a matter of right. Common possession of earth is the heart of Kant's theory of acquisition, and is meant to account for the compatibility of the empirical side of Kant's property theory (acquisition of objects) with the axiom of external freedom. It follows that the postulate of practical reason of §2, together with its permissive law, are by no means the whole story of Kant's property theory. Common possession of land constitutes the legal title (*Rechtsgrund, titulus possessionis*) (RL §6, 6:251) of three domains of Kant's legal theory: (1) of original acquisition of land (and consequently of external objects on the land),⁷ (2) of the territorial rights of states and peoples, and (3) of cosmopolitan right (including the 'right to visit' and the right to safe haven). Interestingly, the idea of a *Gemeinbesitz der Erde* is not only the reason why states are allowed to acquire their territory, but also the source of cosmopolitan right in Kant's theory (*Weltbürgerrecht*).⁸

In order to understand the novelty of Kant's use of the natural law idea of common possession, let us briefly compare Kant to his predecessors. For instance, first acquisition was not a problem for Achenwall, as it was for Kant. Achenwall thought that simply taking possession of a thing that had not been possessed by anyone was enough to account for original acquisition (you may have thought this too). This cannot be the case for Kant, for whom unilateral, empirical acts of appropriation are not enough to impose an obligation upon all others to respect this acquisition.⁹ The problem is thus grounding the *obligation* required for having a right to a thing. Who has the authority to bind all others? Kant somehow needs to find a way to the united will of the 'contracting parties', in this case, humanity as a whole.

§ 13. Any piece of land *can be acquired originally*, and the *possibility of such acquisition* is based on the original community of land in general.

The first proposition rests on the *postulate of practical reason* (§ 2). *The proof* of the second proposition is as follows. All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (*apart from their will*) has placed them. This kind of possession (*possessio*) – which is to be distinguished from residence (*sedes*), a chosen and therefore an acquired lasting possession – is a possession *in common* because the spherical surface of the earth unites all the places on its surface. (RL §13, 6:262, emphasis added)

While the postulate of practical reason in regard to external objects extends the scope of rights beyond the internal *meum* to include external things, original community of land accounts for the possibility of first acquisition. Since in Kant's legal theory an empirical act of *prima occupatio* cannot by itself constitute a legal deed, Kant's strategy is to establish an original community of land which *ex ante* invests us with a right to occupy space. This right to occupy a place on the earth, which is mere possession (*Besitz*), not ownership (*Eigentum*), is what provides the legal title which renders the empirical act of taking hold of a piece of land a *legal deed*, which ought to be respected as such, despite the fact that possessors are in the state of nature. Therefore, the reason why we need original community of land in addition to the postulate of practical reason of §2 is that simply expanding the scope of the original *meum* to external objects is not enough to explain how taking possession of these things for the first time can be legally binding on everyone else. The binding character of acts of acquisition is thus derived from the *will* of those who form the community of land.

All human beings are originally in *common possession* of the land of the entire earth (*communio fundi originaria*) and each has by nature the will (*Wille*) to use it (*lex iusti*) which, because the choice (*Willkür*) of one is unavoidably opposed by nature to that of another, would do away with any use of it if this will did not also contain the principle for choice by which a particular possession for each on the common land could be determined (*lex iuridica*). But the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united originally and a priori (that presupposes no rightful act for its union). Hence it proceeds only from a will in the civil condition (*lex iustitiae*)

distributivae), which alone determines what is *right* (*recht*), what is *rightful* (*rechtlich*), and what is *laid down as right* (*Rechters*). (RL §16, 6:267, emphasis added)

As Joachim Hruschka observes, in this passage Kant uses the famous distinction between *Wille* and *Willkür*, which is introduced in the *Einleitung* of the *Metaphysics of Morals*.¹⁰ While *Wille* is practical reason itself and the source of laws, *Willkür* is what carries out concrete actions. Only *Willkür* is free in the sense of the capacity to perform or refrain from performing an action. *Wille* thus 'gives laws' to *Willkür*. The relation between *Wille* and *Willkür* in the above passage is thus the following: each of us has 'by nature' the will (*Wille*) to use the land. 'By nature' (*von Natur*) should be understood as a form of *rational necessity*, not as natural necessity. This is confirmed by Kant's identification of this will with *lex iusti*, or the purely rational axioms of right.¹¹ Since practical reason would contradict itself if we were to deprive ourselves of objects by choice, we must assume that it is our will as rational beings to use and consequently divide the land. However, our *Willkür* as concrete individuals creates havoc: our individual choices are by nature (*natürlich*, this time in the sense of *natural necessity*) *antagonistic*. To avoid this problem, *Wille* gives the law to individual *Willkür*, namely, a distributive principle for the division of land that will avoid the conflict of wills, at least when it comes to acquisition and the determination of the extent of one's possession (*lex iuridica*). This is the principle that 'whoever is earlier in time is stronger in right' (*qui prior tempore potior iure*) (RL §10, 6:259). However, this principle of distribution can only be seen as compatible with the innate right of each individual if it proceeds (*hervorgehen*) from a will that is united originally and *a priori*. Kant thus moves from the distinction between *Wille*, as giving us the will to use the land and the principle of distribution, and individual *Willkür*, to the united will of all. This united will, Kant adds, is only realized in a civil condition.

Since first acquisition must be thought of as prior to the civil condition, that is, in the state of nature, one may ask oneself how one can regard the principle of division of land as proceeding from a united will *a priori*. This is because this united will is only possible in a condition that lies in the future, that is, that is unrealized at the time of acquisition. However, this is the very gist of Kant's

legal theory: it is *future-oriented*. This explains the obligation to leave the state of nature and enter the civil condition: by making use of land and acquiring, we are also acquiring the duty to enter lawful relations with others, since this is the condition for the compatibility of unilateral, empirical acts of first acquisition with the axiom of external freedom, the innate freedom of all. By entering a civil condition with others we are bringing about a will that is united originally and *a priori*. Until then, all original acquisition remains provisional (*provisorisch*), that is, in *expectation* (*Erwartung*) of a future civil condition, which must encompass not only some peoples, but the whole of humanity.¹² The role of the so called *lex permissiva* is to allow agents to impose an obligation on others (thereby excluding them from the use of their possessions) *before* the united will of all has been realized in a global condition of distributive justice. The permissive law can be compared to drinking a bottle of water inside the supermarket before we have reached the till and paid for it; we are too thirsty to wait and the queue is very long. We are committed to pay for the drink anyway. We drink it *before* we have satisfied the conditions necessary for being fully entitled to that bottle (so that our acquisition can be regarded as ‘rightful’). The civil condition is however much further away than the queue in the supermarket; the possessions we have now will only be fully justified after several generations, in a civil condition encompassing all nations on the globe (which perhaps will never be fully achieved).

The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve. Still, there must be some original acquisition or other of what is external, since not all acquisition can be derived. So this problem cannot be abandoned as insoluble and intrinsically impossible. But even *if it is solved through the original contract*, such acquisition will always remain only provisional unless this contract extends to the entire human race. (*RL* §15, 6:266, emphasis added)

Determining the ‘quantity and quality’ of one’s acquisition in case of disputes requires not only appropriate knowledge and capacity of judgement, but also the required *authority* to determine the solution and to bind others to one’s verdict. This is why this

problem is 'the hardest of all to solve'. However, it can be solved through the *original contract*. The idea of an *original contract* (*urspruenglicher Vertrag*), just as the idea of a united will of all, is a *rational* idea. Once we have realized the conditions enabling the compatibility of individual acquisition with the innate right of all, i.e. once we have entered a civil condition with all persons on the earth, acquisition can finally *be regarded as proceeding* from a *multilateral* contract between all persons. The rational idea of an original contract thus stands for the conditions for reconciling the *reality of acquired rights* with the pure axioms of right. The verdict of a court of justice in this case is unequivocally binding: it has the required authority to impart obligations and to coerce.

The way Kant conceives the role of consent in his legal theory is unique in the natural law and social contract tradition: while the theory seems to aim at some form of actual consent (a *realized* civil condition under which the united will of all is possible), because this condition is still outstanding we must use the idea of a united will of all as a regulative ideal for political decision-making (as an 'as if'). Paradoxically, Kant sometimes says that the idea of a united will of all is *original*, even though the united will is only possible in a civil condition (that is, once it has been realized!).

4. Kant and social contract theory

This leads us to the question of Kant's place in the social contract tradition.¹³ Kant certainly uses the terminology of the social contract. However, how far can he be said to be a social contract theorist? A closer look at his theory reveals that he has reinterpreted the main tenets of social contract theory in order to make them compatible with his own theory.

For Kant, the original contract is the idea of the act by which a people forms itself into a state (*RL* § 46, 6:315).¹⁴ This idea can help us test the permissibility of political principles, policies and constitutions themselves, for it is only in accordance with the idea of the original contract (the *rationale* of the unification of individuals into a political society) that one can establish the lawfulness (*Rechtmäßigkeit*) of a state (*RL* §47, 6:316). As the basic law that can only be derived from the general (united) will of the people, the original contract arises from 'the pure source of the concept of

right' (PP 8:351). The only constitution that issues from the idea of the original contract is what Kant calls a republican constitution (RL §52, 6:340). Existing constitutions must be guided by the idea of the original contract, i.e. they should attempt to come closer to a republican constitution, through gradual constitutional reforms (RL §52, 6:340). Further, by virtue of the original contract at domestic level, states can be seen as *moral persons* in the international domain and not merely as a belonging (*patrimonium*) that can be acquired by other states (PP 8:344). The original contract at internal level thus imposes constraints on how states can be treated by each other.

If a public law is so constituted that a whole people *could not possibly* give its consent to it (as e.g. that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* (*nur möglich*) that a people could agree to it, it is a duty to consider the law just (*für gerecht zu halten*), even if the people is at present in such a situation or frame of mind (*Denkungsart*) that, if consulted about it, it would probably refuse its consent (*seine Beistimmung verweigern würde*). (TP 8:287)¹⁵

Kant has traditionally been understood as defending some version of hypothetical consent as the source of political justification. Onora O'Neill has recently argued that this is a mistaken interpretation of Kant. She notes that the kind of consent Kant is appealing to in the passage quoted above is in fact *possible* consent and that it differs both from hypothetical consent theories (based on idealized conceptions of rational beings) and from actual consent theories. Possible universal consent is a *modal* criterion as opposed to hypothetical consent.¹⁶ Further, she argues that only a republican constitution that guarantees freedom within the law can be the object of possible consent, but no constitutions which lack that structure. A republican constitution is one that is based on the principles of freedom of the members of society, dependence of all under common legislation and equality of all before the law.

If the idea of a social contract is that of a constitution that *could* secure universal consent, then any constitution that exemplifies it must require the freedom of individuals, without which the possibility of genuine consent or dissent is undermined, at least for some, and universal consent becomes impossible. Second, it

requires their *common dependence on or subordination to law*: if anyone were above or outside the law, freedom could be systematically or gratuitously undercut, and once again the possibility of genuine consent becomes impossible. Third it must endorse the *legal equality* of citizens, since the subordination of some individuals to others (rather than to the law) would once again undercut freedom, and with it the possibility of genuine consent or dissent, at least for some, and universal consent becomes impossible.¹⁷

The difference between possible consent and hypothetical consent is, if any, a subtle one. Unfortunately, O'Neill does not explain much how consent as 'modal requirement' differs from hypothetical consent. Her assumption seems to be that hypothetical consent relies on a strongly idealized conception of rational agency while the type of consent Kant actually defends does not. The argument goes like this: under certain types of constitutions subjects are not constrained in ways which would preclude the possibility of genuinely giving or withholding their consent. Because these types of constitutions enable *all* subjects to freely consent or dissent, *universal* consent is possible. In contrast, when some individuals are subordinated to others, the possibility of giving or withholding their consent is undermined. Therefore no universal consent is possible under such a constitution.

O'Neill interprets the three principles of a republican constitution as being necessary *conditions* for securing universal consent. In her reading, one would be able to consent to a republican constitution because it is the only constitution that *secures* the possibility of genuine universal consent; I am free to form my own judgement about the policies or laws of my society and therefore to accept or reject them without being constrained or coerced by state interference. O'Neill's view is thus that the *object* of possible consent is whatever arrangements *secure* universal consent, that is, enable every member of society to form their own opinions and to give or withhold their consent to public laws. As it happens, these are the principles of civil freedom, dependence of all under common legislation and equality before the law.

O'Neill makes the possibility of *realizing* the conditions of universal consent the source of political justification and treats the principles of a republican constitution as mere instruments to it. Guaranteeing freedom is a fundamental concern in O'Neill's account insofar as it is a necessary condition for enabling genuine

consent; dependence and equality before the law are only important insofar as their lack would infringe upon an individual's capacity to freely consent to a policy or legislation. In sum, the basic principles of the ideal *res publica* are reduced to the *enabling conditions* of a universal consent that is not yet but *could* become actual. The main problem with O'Neill's interpretation is that she confuses what one could in *principle* consent to with the *conditions* for enabling actual free consent. The reason for this seems to lie in her assumption that the function of the idea of social contract in Kant is to spell out what the principle of right requires 'in actual human conditions'.¹⁸

I will argue that it is in fact the other way around: because freedom, dependence on the law and equality are required by the principle of right, and consequently by pure practical reason, consent must be thought as inevitably *following* from it, as a matter of necessity. The rational idea of the *pactum unionis civilis* expresses the rationale of political association. Therefore, the idea of consent is indissolubly linked to the *end* of political association. While all contracts presuppose a common end (an end that the involved parties *share*), the contract establishing a civil constitution is distinctive in that the union in case is an *end in itself*, i.e. an end that all individuals *ought to have*. The *pactum unionis civilis* reflects a duty imposed on all persons by virtue of their external relations, since the possibility of interaction is inevitable (*TP* 8:289). Consent is therefore *secondary* to the rational requirement to enter a lawful condition with others which approaches as much as possible the ideal of how our external relations with each other ought to be. This ideal is expressed in the idea of the *social contract*. The postulate of public law, which requires us to leave the state of nature and form a civil union, already *includes* the idea of an original contract (*RL* §46, 6:315).¹⁹

Despite Kant's use of social contract terminology, there is a suspicion that his legal theory and theory of the state is in fact devoid of any genuine *contractualist* element. This is because looking closer it is possible to reach the same conclusions about the lawfulness of public policies and laws without any appeal to the idea of an original contract simply by focusing on the civil principles of freedom, dependence and equality. Further, although every sovereign is bound *a priori* to make laws *as if* they could arise from the united will of the whole people (*TP* 8:297), the original contract

seems to work only as a *negative* standard for the evaluation of statutory laws. It does not tell us which laws should be adopted in an existing political society with a specific political regimen, but only which laws are not incompatible with right. The content of the law must be formulated prior to the test, just as maxims of action are material principles formulated independently of the categorical imperative test (they are in fact the 'matter' on which the formal test is applied). Therefore, the original contract seems to offer no information that could not be obtained without it.²⁰ The idea thus seems to be a purely *heuristic principle* behind which the real requirement is in fact a requirement of *reciprocity*. The idea of a social contract therefore seems to be superfluous in Kant's theory.

It is Kant's practice to show that he can incorporate the theories he refutes. For instance, although he criticizes moral theories which do not presuppose the autonomy of the will as heteronomous, he is very keen to show, with the several formulations of the categorical imperative, that his moral theory is able to accommodate the main intuitions behind these theoretical models, even though they ultimately fail as adequate moral theories.²¹ It is possible that Kant would be adopting the terminology of social contract theory in a similar manner, after having left it behind. But I will argue that this is not the case.

The *pactum unionis civilis* is not a historical event. It is an ideal of reason and a regulative standard for existing states. But beyond the idea of an original contract as a regulative idea, Kant's theory of acquisition makes it necessary to introduce a consent-based element in his theory of property. Even though it is legitimate, acquisition in the state of nature is normatively incomplete until we leave the state of nature and enter a civil condition with each other.²² Kant's theory of property, and more precisely, his account of original acquisition, *genuinely requires the idea of consent* because empirical, unilateral acts of acquisition cannot by themselves generate an obligation on all others to respect these acts of acquisition. We must thus distinguish between Kant's use of the idea of an original contract and possible consent as mere heuristic tools from the *genuine* contractualist aspects in Kant's legal theory: while the idea of a united will of all and of an original contract can be used as a regulative ideal, they are not only an 'as if', as in Rawls's original position. This is because the civil condition in Kant's theory is in fact a condition that *ought to be realized*. It is

the aim of the duty to leave the state of nature (*exeundum esse e statu naturali*). The peculiarity of Kant's position is that while the civil condition is still in the future, its idea provides the guiding thread for its own implementation. Kant's notion of an original contract as realized in a civil condition is *both* regulative ideal and highest aim of political association. This is because it is only via the consent of all possible possessors of external things that necessity to respect an empirically contingent distribution can arise. Here the idea of a contract is no longer a mere heuristic device, but plays a substantive role for Kant's theory of external acquisition.²³

Notes

- 1 Parenthetical references are all to Kant; page numbers refer to the edition of the Prussian Academy. Unless otherwise stated, all translations have been taken from the Cambridge Edition of the Works of Immanuel Kant, edited by Paul Guyer and Allen W. Wood (Cambridge University Press, 1992–). Abbreviations used are
 MS RL *Die Metaphysik der Sitten I. Teil: Metaphysische Anfangsgründe der Rechtslehre* (The Metaphysics of Morals Part I, Metaphysical Foundations of the Doctrine of Right) (AA 06)
 TP *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (On the common saying: That may be correct in theory, but it is of no use in practice) (AA 08)
 VAMS *Vorarbeit zur Metaphysik der Sitten* (AA 23)
 PP *Zum ewigen Frieden* (Toward perpetual peace) (AA 08)
- 2 K. R. Westphal, 'Do Kant's Principles Justify Property or Usufruct?' *Jahrbuch für Recht und Ethik*, 5 (1997), n. 2.
- 3 Westphal, 'Do Kant's Principles Justify Property or Usufruct?', 40.
- 4 Scholastic philosophy distinguished between two types of definitions: nominal and real. A nominal definition explains simply the meaning of a word, how it is used; in contrast, a real definition explains the 'essence' or the real nature of a thing, in other words, the concept in question.
- 5 VAMS 23:219: 'Es kan aber niemandem eine Verbindlichkeit entspringen als die er sich selbst zuzieht (*omnis obligatio est contracta*).' See also Wolfgang Kersting, *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie* (Berlin: De Gruyter, 1984), p. 146.
- 6 While innate right is original, being innate, it is not acquired. This is why the only kind of objects that are fit to be originally acquired are

previously unowned things (objects deprived of a will, as opposed to *persons*). They are neither derived from what belongs to another person, nor have been previously acquired by anyone. Acquisition of land must be prior to acquisition of objects, since when acquiring a piece of land for the first time, we automatically acquire the objects on that land.

- ⁷ That is not to say that territorial rights in Kant's account amount to property rights to land. It is the other way around: private property presupposes possession of land. The rights of states and groups to control territory are treated in an analogous way to property rights only at international level (in the relation between states in the 'international state of nature'), but not in the relation of states in regard to their own subjects at domestic level. In this case, the state is only the symbolic proprietor of land; property rights to land are actually held by individuals (see *RL* 6:323). I explain this relation in Pinheiro Walla, 'Kant's Legal Theory and Territorial Rights' (unpublished manuscript). Cosmopolitan right, on the other hand, imposes under certain conditions a limitation on the rights of states and groups to control territory to the exclusion of others, namely, when outsiders' need for admission into one's territory is involuntary, and declining them would mean their destruction. This right to be admitted in case of need follows from common possession of the earth. See Pinheiro Walla, 'Common Possession of the Earth and Cosmopolitan Right' *Kant-Studien*, 107/1 (2016), 160–78.
- ⁸ I develop this idea in Pinheiro Walla, 'Common Possession of the Earth and Cosmopolitan Right'.
- ⁹ See Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kant's Rechtslehre und Ethik* (Freiburg: Verlag Karl Alber, 2015), p. 64.
- ¹⁰ Hruschka, *Kant und der Rechtsstaat*, p. 71.
- ¹¹ I am following here Byrd and Hruschka's interpretation of the three *leges* in the *Doctrine of Right*. See *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010).
- ¹² The recent literature seems to endorse the view that provisional acquisition means something merely 'temporary' (subject to change) and weaker than a peremptory right (see for instance Lea Ypi, 'A Permissive Theory of Territorial Rights', *European Journal of Philosophy*, 22/2 (2012), 288–312, who says that 'any existing partition of the territory is only provisional and conditional at best'). Although Kant certainly gives this impression in the text and the term 'provisional' also suggests it, his point is rather the *modality* of the claim in question: in the civil condition my property claim moves from being merely *facto* (unilateral, real) to *lege* (omnilateral, necessary), that is, from something that is merely the case to something that has a necessary

legal status. Again, necessity in Kant cannot be derived from empirical deeds, but only from the universality of reason. This is achieved by the united will of all in a civil condition. Cf. Rainer Friedrich, *Eigentum und Staatsbegründung in Kant's Metaphysik der Sitten* (Berlin: De Gruyter, 2004), p. 140. It follows that provisional does not mean a claim that may be removed at a later time and for this reason may be considered less strong or less authoritative. Provisional acquisition ought to be treated as true acquisition (*RL* §15, 6:264). Provisional is acquisition in *expectation* of the conditions of its full justification. The distribution however, would remain the same should this future condition be realized.

- ¹³ For a statement of this view, see for instance, John Rawls in *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999), p. 10.
- ¹⁴ As Byrd and Hruschka pointed out, Kant does not distinguish between the original contract and the social contract. This is confirmed by the passage in *TP* 8:297: '*contractus originarius* or *pactum sociale*'. Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*, p. 170, n. 9.
- ¹⁵ Although public law focuses on the possibility of consent, it does not mean that legislators should attempt to reform the constitution without taking into account the *actual* will of the members of the society in question. While legislators should attempt to approach the ideal constitution, they are permitted to postpone political reforms when dissatisfaction and resistance would be so great as to undermine the very end of political progress. See *PP* 8:347.
- ¹⁶ Onora O'Neill, 'Kant and the Social Contract Tradition', in E. Ellis (ed.), *Kant's Political Theory: Interpretations and Applications* (University Park: Penn State University Press, 2012), p. 32.
- ¹⁷ O'Neill, 'Kant and the Social Contract Tradition', p. 33
- ¹⁸ O'Neill, 'Kant and the Social Contract Tradition', p. 33.
- ¹⁹ See Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*, p. 170.
- ²⁰ Wolfgang Kersting, *Wohlgeordnete Freiheit*, p. 276.
- ²¹ Interestingly, all rejected heteronomous principles are reintegrated into Kant's system after the purity of the moral principle has been established. External subjective grounds reappear as the duty of decorum and obedience to authority (*Anthr.* §14 7:151–3), there is an indirect duty to cultivate moral feeling (*TL* 6:399–400; *KpV* 5:38, ll. 33–8) and one's own happiness (*GMS* 4:399; *KpV* 5:93, ll. 15–19), as well as a duty to the self to develop one's own perfection (*TL* 6:385). The will of God also reappears as an ideal of the holiness of the will (*KpV* 5:158, ll. 25–6).
- ²² Wolfgang Kersting, *Kant über Recht* (Paderborn: Mentis Verlag, 2004), p. 77.

- ²³ The initial work on this chapter was enabled by the ERC Advanced Research Project *Distortions of Normativity* at the University of Vienna. I would like to thank Paula Satne, David Miller, Alice Baderin, Anthony Taylor and the participants of the Nuffield College Workshop at the University of Oxford for their invaluable comments on previous versions of this chapter.