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Kant's Provisionality Thesis

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Abstract

I argue that Kant's mature political philosophy entails the provisionality thesis. The provisionality thesis asserts that in a world like ours, populated with beings sufficiently like us, acquired rights (rights to external objects of choice, including property, sovereignty and territory) are necessarily provisional. I motivate the standard view, which restricts the notion of provisional right to the state of nature and the transition from the state of nature to the civil condition. I then provide two textual arguments against it. I conclude by reflecting on the normative implications of the provisionality thesis, arguing that they are more modest than has been formerly appreciated.

Keywords: provisional right, legitimacy, global justice, Kant

1. Introduction

As Kant's political philosophy has garnered increased attention, focus has shifted away from specifying the main contours of his view and toward technical issues crucial to articulating its precise practical implications. Figuring centrally among these technical issues is the meaning and place of Kant's distinction between provisional (*provisorisch*) and peremptory (*peremptorisch*) right (*Recht*). Famously, Kant holds that persons can indeed acquire rights in the state of nature, but only provisionally, and that acquired rights hold with finality only in the civil condition. Questions about the status of provisional right, therefore, cut to the very core of how to apply Kant's theory. If provisional rights acquired through historically contingent acts of acquisition in the state of nature are to be respected by states, states are thereby limited in what (re)distributive aims they can permissibly pursue, and individuals must take care that their claims to rights are compatible with others' prior claims (Byrd and Hruschka 2006a). By contrast, if authorities are not constrained by such historically contingent claims, they may pursue their

(re)distributive goals without regard for existing or past distributions (Brudner 2011).[1] Determining the place and meaning of provisionality in Kant's system thus bears on nearly every aspect of our understanding of how to apply his political thought, from determining the proper Kantian response to unjust histories of acquisition, to understanding the boundaries of territory, to the justice of pursuing distributive ideals, and beyond.

On this general topic, we might distinguish three questions: (1) What is it to say that right, or that a right, is provisional, i.e. what does provisionality *mean* in the context of right? (2) What are the normative implications of a right's (or of right's) being provisional? (3) Under what circumstances are rights (or is right) provisional, i.e. where does the concept of provisionality find practical application? Whereas (1) and (2) have generated significant controversy in the existing literature due to their clear normative importance (see e.g. Brudner 2011, Ellis 2005, Hasan 2018, Ripstein 2009), scholars implicitly treat the answer to (3) as obvious. On the standard view, anywhere there is public, coercive law (especially when there is an institutional distinction between the legislative, judiciary and executive powers), there is a rightful condition. In such a condition, rights are peremptory, not provisional,[2] and what one has a right to coincides with what is laid down as right by the relevant public authorities (for support, see *MM*, 6: 312).[3]

This view is plausible insofar as Kant assigns to states the function of 'certifying' claims to right in the state of nature (*MM*, 6: 264; cf. Waldron 1996: 1565–6, Brudner 2011: 292). Additionally, the view neatly explains why inquiring into the history of a state with the intention to uncover its origins in injustice is wrong (6: 318). Since the state solves the problems in the state of nature, making it for the first time possible to have peremptory claims against others, such inquiries jeopardize the rights of all by destabilizing one of their necessary conditions. Of course, not all things we might be inclined to call states solve the problems that plague the state of nature. Some states are merely barbaric, and when barbarism is the rule, our political duty is to enter into a rightful (non-barbaric) condition. Still, it is widely thought that existing governments in the developed world transcend barbaric rule and are therefore sites of peremptory right.

This article challenges this view and establishes that, in a world like ours, populated with beings relevantly like us, acquired rights[4] are necessarily provisional.[5] Call this the provisionality thesis (PT). According to PT, to

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the degree that we leave the state of nature, we do not straightforwardly enter a rightful condition, but find ourselves in so many conditions of despotism (a technical term for Kant), which uphold freedom only to greater or lesser degrees. Our external relations of right (between compatriots, external nations, foreigners and the stateless) are governed by the notion of provisional right. The role of peremptory right, on this account, becomes aspirational – a regulative rather than constitutive aspect of our practical relations. Section 2 introduces the distinction between provisional and peremptory right, and the grounds for thinking that provisional right holds only in the state of nature, where there are no states. Sections 3 and 4 argue against this position on textual grounds. Section 5 describes in more detail what Kant's acceptance of PT means for his theory of right, without attempting to provide full answers to questions (1) and (2) above.

2. Provisional Right and the State: The Standard View

To begin, recall that Kant's political philosophy is organized around the Universal Principle of Right (UPR). The UPR states that it is both necessary and sufficient for the rightness of an action or a state of affairs (*Zustand*) that it be consistent with the freedom of others under universal law (*MM*, 6: 230–1). Remaining in the state of nature (*Naturzustand*) is wrong 'in the highest degree' (*im höchsten Grade*) (6: 307–8) insofar as it violates this principle. Therefore, we have an obligation to leave the state of nature and enter into a civil condition.[6] Indeed, Kant's Postulate of Public Right states precisely that, when interaction with others is unavoidable, 'you ought to leave the state of nature and proceed with them into a rightful condition' (6: 307).

For Kant, the civil condition (*der bürgerliche Zustand*) is that in which everyone is under 'a general external (i.e., public) lawgiving accompanied with power' (*MM*, 6: 256), and in which 'the will of all is actually united for giving law' (6: 264). On the standard picture, law enters to limit each person's freedom to her rightful, or compossible, freedom. Whereas exercises of freedom in the state of nature are unilateral, resulting in disagreement with respect to the distribution of rights and a lack of assurance that they will be respected, law resolves disagreement and provides assurance, instantiating an omnilateral will (compare Ripstein 2009 and Waldron 1996). By the postulate of public right, we must enter such a condition.

But we cannot discharge this requirement alone. Realizing a civil condition requires, among other things, coordination with numerous other persons

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and institutions. We must be subjected to common laws issued by a legislature, adjudicate disputes by a common arbiter (a judiciary) and ensure that its judgments are enforced by a sufficiently powerful executive. In unfortunate circumstances where we do not receive adequate cooperation from external factors, Kant views our failure to discharge the postulate of public right – our failure to enter a civil condition – as faultless. In such conditions, our acquired rights are provisional, rather than peremptory or non-existent:

> Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition is *provisionally rightful* possession, whereas possession found in an actual civil condition would be *peremptory* possession. Prior to entering such a condition, a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the will of all others except himself, which proposes to put him under an obligation is merely *unilateral*, and hence has as little lawful force in denying him possession as he has in asserting it (since this can be found only in a general will). (*MM*, 6: 256–7)

In this passage Kant makes clear, first, that possession becomes peremptory only in an 'actual civil condition'. Given what has come before, this means in a condition in which everyone's will is in fact unified for lawgiving under an adequate power. Call this the Omnilaterality Requirement. Second, in advance of securing coordination for entering a civil condition, unilateral claims to possess external objects are provisionally rightful so long as they 'accord with the possibility' of a civil condition, a condition in which the omnilaterality requirement is satisfied.[7] The introduction of the distinction between provisional and peremptory right in this context motivates the standard view that the category of provisional right loses practical relevance once states come to be. For if (1) right is peremptory (not provisional) wherever there is an actual civil condition, and (2) states are civil conditions, then (3) where there are states, there are sites of peremptory rights. But then PT is false.

This is too quick. Kant defines a civil condition in terms of its satisfaction of the omnilaterality requirement. Whether it is correct, therefore, to identify a state with a civil condition requires better understanding that requirement. We get some purchase on the issue by focusing on the contrasting case of the particular or unilateral will. To approach a more

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positive characterization, we might additionally notice that Kant uses this term interchangeably with three others: a general (*allgemein*) will (e.g. *MM*, 6: 294), a common (*gemeinsam*) will (e.g. 6: 257) and the unified (*vereinigt*) will of all (e.g. 6: 302, 314).

The first naturally recalls Rousseau's *Social Contract*, where the general will plays a central, but somewhat ambiguous, normative role. Interpreters have distinguished between at least three ways of understanding this central notion. According to the first, the content of the general will is specified in a purely proceduralist way (see e.g. Rousseau 1997: II.vi.5, II.vi.7). Once a people chooses a decision rule (e.g. majoritarian or dictatorial rule) to govern their interactions, the outcome of that rule with respect to a particular issue just is identical with the general will. The second option is a pure substantivist position, according to which the general will corresponds to an independent conception of the common good (see e.g. Rousseau 1997: II.iv.7, II.vi.2). The third option, a mixed view, becomes plausible insofar as there is textual evidence for both of the pure options. On such a mixed view, an objective common good imposes constraints on either the outcome or the inputs of the community's decision procedures to ensure that their outcomes remain within certain bounds (see Sreenivasan 2000). But procedures (or outcomes) within these permissible bounds are authoritative and express the general will. Whereas it is uncertain which of these views Rousseau accepts, Kant's own characterization of the omnilateral will seems to imply that he adopts either the second or the third understanding (compare Flikschuh 2012: 34, 38–41).[8]

Kant rules out a pure proceduralist notion when he writes that the omnilateral will is 'united not contingently but a priori and therefore necessarily' (*MM*, 6: 263) and contrasts it with other kinds of willing: unilateral, bilateral and multilateral. Any actual procedure will typically be contingently multilateral (as in majority rule). Even in the best case, procedures exhibit contingent unanimity. By contrast, Kant holds that the united will's necessary *a priori* unity makes it 'the only will that is lawgiving' (ibid.). This characterization implies that omnilateral will is given antecedent to any positive assertion of an external right or any positive institution (even if it must in the end be represented by one). More specifically, he treats it as an idea – a regulative concept that cannot be met with anywhere in experience (L-NR, 27: 1393, Drafts of DR, 23: 220, *MM*, 6: 258–74). From the perspective of Kant's omnilateral will, even overwhelming majorities ('the will of everyone but one') are merely

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unilateral with respect to the one(s) they exclude. But because a unilateral will cannot serve as a law to an autonomous agent, and because the acquisition of external rights in the state of nature must appear to give law unilaterally, the 'rational title' of these rights lies in the idea of their being united or compatible with the dictates of an omnilateral will. Such a will can be united *a priori* because it is based on principles of pure practical reason (e.g. the UPR), principles willed by each rational agent merely insofar as she is rational. The civil condition represents an external law-giving that actually realizes these principles, and it is in such a condition that possession becomes peremptory.

On the standard view, a state satisfies the omnilaterality requirement just in case (a) it allows that acquisition be permissible (does not violate the postulate of practical reason with regard to rights) and (b) it is governed by institutions that satisfy certain functional criteria (does not violate the postulate of public right).[9] On this view, we leave the state of nature insofar as we find ourselves under a government that specifies one law to govern all within a geographically bounded territory, adjudicates disputes solely on its basis and enforces decisions with irresistible force.[10] The standard view holds that there are no further substantive constraints that the state must meet in order to satisfy the omnilaterality requirement. As Japa Pallikkathayil puts it, the solution to the problems in the state of nature:

> is the establishment of an impartial decision procedure for establishing laws and adjudicating disputes over rights. An institutional apparatus embodying such a decision procedure is able to resolve the indeterminacy and adjudication problems in a way that does not reflect any unilateral will. For this very reason, this institution is also able … to solve the assurance problem. (Pallikkathayil 2017: 39)

In sum, '[p]rovisional rights can be made conclusive only through the establishment [of] an institution that defines the scope of our rights and enforces those rights, in other words, the state' (ibid.). Ripstein appears to concur. For him, we enter a civil condition 'simply by being subject to laws' (2009: 198; cf. 225). Whereas in the state of nature what is externally right is determined by each person's power, in the civil condition what is externally right is determined by public institutions. The transition from a situation of provisional to a situation of peremptory right occurs just as soon as the relevant institutions are realized. The standard view is plausible to the degree that states as we know them

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satisfy the omnilaterality requirement. So far as they do, peremptory right is widely actualized in our world. Perhaps this is why major accounts accord to the idea of provisional right little more than passing attention in their remarks on the transition between the state of nature and the civil condition.[11]

For all its intuitive plausibility, two considerations militate against this view. The first is that just *international* and *cosmopolitan* institutions are external conditions on a domestic state's capacity to render rights peremptory. Existing international bodies are inadequate and human nature and our distribution over great distances makes it impossible to reform them in a fully adequate way. Now, one might grant this, and think that it need not pose significant problems for the standard view. For the standard view can allow that any given state's territorial claims are provisional with respect to outsiders, while maintaining that, nevertheless, states render the claims of insiders peremptory. Unfortunately, the second consideration shows that this escape route is blocked. For there are internal (domestic) conditions of peremptory right that are not satisfied by existing states and that are in principle impossible to satisfy given the frailty of human nature. That Kant places these two conditions on peremptory right entails accepting PT and rejecting the mainstream view. The next two sections provide textual evidence – all of it drawn from Kant's mature political philosophy – showing that each of these requirements is a necessary condition of peremptory right.

3. The Right of Nations and Cosmopolitan Right

On the standard view, the existence of the domestic state suffices to make the rights of its citizens peremptory. The first strain of argument against this view begins by recalling that rights in the state of nature are said to have provisional status owing to their unilaterality, indeterminacy and lack of assurance. It then notes that these same conditions apply to states with respect to their territory. That is: (1) a state's acquisition of territory is necessarily unilateral (at best multilateral) from an outside perspective;[12] (2) it is unclear how much territory a state can acquire and there are no rules to govern disputes between states; and (3) states are threatened by outer violence, such that they lack assurance that their claims to territory will be respected. In sum, even if actual states unite the will of all *citizens*, Kant does not restrict the principles of right to citizens. With respect to non-citizens, any one state's activity in isolation looks to fall short of the omnilaterality requirement.

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To see that Kant takes universalism seriously, note that he locates the title of anyone's acquiring an external right to a corporeal thing in the common ownership of the earth by all human beings. In Kant's words, appropriators base their acquisitions 'on an innate *possession in common* of the surface of the earth and on a general will corresponding a priori to it'; only this 'permits *private possession*' (*MM*, 6: 250).[13] Kant is quite clear that it is *human beings*, not *co-nationals*, that own the earth in common. Therefore, satisfying the omnilaterality requirement demands that our claims be consistent with the like claims of outsiders, not just the claims of compatriots. Kant himself notes that a nation's claims to territory cannot be peremptory until relations of right extend to the 'entire human race' (6: 266). If rightful relations do not extend this far, then it remains open that current claims to ownership, to governance, etc. are incompatible with a perfectly general and common will. Indeed, appropriation is *prima facie* inconsistent with the omnilaterality requirement because all are originally common owners of the earth, and so appear to have standing to reject any act of acquisition to which common owners do not unanimously consent. But since the state's territory is composed of the union of its citizens' property (plus its public property which derives from theirs), the stateless and those in other states can make claims against nations based on this title of common possession.

Now perhaps the standard view would wish to assert that the omnilaterality requirement is discharged as long as the international order allows acquisition (division of the earth) and state formation (Byrd and Hruschka 2006b). Provided this is true, the claim of each state to its territory is compatible with the like claims of other states. But this response is at odds with the way Kant explicitly argues. Consider a passage in which he lays out the structure of public right:

> [U]nder the general concept of public right we are led to think not only of the right of a state but also of *a right of nations* (*ius gentium*) or *cosmopolitan right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse. (*MM*, 6: 311)

Kant says that if the principle of outer freedom limited by law (the UPR) is lacking on any level (domestic, international, cosmopolitan), then the framework of the others is undermined. Importantly: when the

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framework is undermined in this way, our circumstances are circumstances of provisional, not peremptory right.

> Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely *provisional*. Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *peremptorily* and a true *condition of peace* come about. (*MM*, 6: 350; and again, see 6: 266)

To sum up: individuals and nations are structurally analogous, and face similar problems, to which they require similar solutions. Whereas individuals ought to enter a state, states ought to enter an association of states. Until an association of states of the right kind comes about, any rights that states might assert hold only provisionally (compare Gregor 1996: 15–16).

Might the standard view respond that existing international institutions (WTO, UN, EU, etc.) are sufficient for rendering rights peremptory? There is reason to think not. For the kind of association up to the task must be generally universal and hold throughout time. But this condition is impossible to satisfy, given the demands of global governance.

> Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *peremptorily* and a true *condition of peace* come about. But if such a state made up of nations were to extend too far over vast regions, governing it and so too protecting its members would have to become impossible, while several such corporations would again bring on a state of war … So *perpetual peace*, the ultimate goal of the whole Right of Nations is indeed an unachievable Idea. (*MM*, 6: 350)

Kant requires of satisfactory international institutions that they be (1) genuinely universal and (2) capable of governing stably across the earth. For his part, Kant doubts our prospects for realizing these conditions simultaneously. Successfully meeting the first requirement means failing to satisfy the second, and vice versa. Our current international institutions fall short, as must any human-governed institutions we can

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envision. Kant's scepticism runs so deep that he deems the end of his project, perpetual peace, an unachievable idea. In advance of such institutions – however closely we may approximate them – external rights are merely provisional. The true conditions of perpetual peace – so too of peremptory right – are *impossible* to realize.

We have thus seen that international institutions must be realized for states' claims to territory to attain peremptory status. Moreover, if the 'principle of outer freedom limited by law' remains unsatisfied at any level (domestic, international or cosmopolitan), 'the framework of all the others is unavoidably undermined and must finally collapse' (*MM*, 3: 611). Read naturally, this means that a failure to realize institutions of the right kind at the cosmopolitan level undermines rights' peremptory status at the international and domestic levels, and that an analogous failure at the international level undermines rights' peremptory status at the domestic level. But if so, it would seem that rights everywhere are unavoidably provisional. Minimally, a domestic state is insufficient for rendering claims to outer objects peremptory, *pace* the received view.

In spite of the strong textual evidence for these conclusions, one might think that there is an easy reply. The reply admits that states' rights with respect to one another and the stateless must be provisional, but holds that nevertheless individuals' rights under one state are made peremptory by its giving of law.[14] Put differently, a state's rights with respect to outsiders might be provisional due to inadequate international and cosmopolitan institutions, at the same time that individuals' rights under it are peremptory. Although this flies in the face of the natural reading of Kant's claims that inadequacy at one level infects all the rest, perhaps these passages can be given a different reading. I do not wish to deny this possibility. Still, in the next section, I argue that *domestic* conditions on peremptory right are more demanding than is typically thought. For there are substantive norms of freedom that constrain a state's lawgiving activity, as commentators have tended to appreciate. What commentators have missed is that failure to satisfy these norms also prevents states from realizing peremptory right. Thus, even if the argument in this section fails to establish PT (because it fails to rule out the possibility that states are internal but not external sites of peremptory right), the next section establishes that domestic states that fall short of the true republic are not themselves sites of peremptory right. Together with the results of this section, this entails that all claims to acquired rights are provisional.

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4. The True Republic and the Right of States

This section argues for two conclusions, both of which point in the direction of PT. The first is that, even on the standard view, a state's capacity to render rights peremptory depends upon its formal lack of private purposes. But any actual state is governed by human beings, and actual state agents use their offices to pursue private purposes with depressing regularity. For Kant, this fact makes the problem of instituting a rightful condition the most difficult to solve. But if a rightful condition is necessary for peremptory right, then this difficulty makes hard walking for the standard view. The second is that, contrary to the standard view, a state's commitment to pursue only public purposes by means of its coercive apparatus is a mere necessary condition for converting provisional into peremptory rights. In addition, Kant holds that states must make *freedom* the basis of their deployment of coercion. So far as states coerce subjects for reasons other than freedom, the distribution of rights they recognize is merely provisional.

Recall that, on the received view, states that meet the formal conditions of minimal legality are civil conditions, i.e. they satisfy the omnilaterality requirement. Since meeting this requirement suffices for peremptory right, PT is false. We might note that this is a curious position, given that on the Kantian account the state necessarily comes into being through force. What distinguishes the state from other merely powerful agents? Certainly, if I were to approach everyone in my geographical region with my lackeys, and demand to receive a substantial portion of the existing claimed property for the protection of the rest (and this in the name of all), my actions do not appear to obligate you (compare Huemer 2013). What is distinctive about states?

One plausible answer is that states are *essentially* public entities (TPP, 8: 352). As Ripstein puts it:

> The public nature of the state limits the purposes for which it can act to those that are properly public, that is, sustaining its character as a rightful condition. (2009: 228; cf. 29–31, 193, 208)
>
> [Public officials] are also constrained in distinctive ways: they can only act within their offices, which are in turn specified by law … These familiar powers and restrictions reflect the ways in which properly constituted powers are able to act on behalf of

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> everyone, making their actions exercises of the citizens as a collective body rather than as their own private acts. (2012: 59)

Whereas individuals have private ends, states and public officials constitutively lack private ends. Their constitutive lack of private ends means that states and their agents can act in the name of everyone, even when they are exercising coercion against the express consent of some. Publicity sustains a state's 'character as a rightful condition' and distinguishes it from other powerful but unilateral agents.

It is reasonable to object that the historical record is replete with abuses of power, where public offices are exploited to pursue private purposes. Why should the fact that an ideal state acts publicly permit actual states (that do not so act) to lay down peremptory rights and duties? Kant shares the worry. In his 'Idea for a Universal History' (as well as in the later *Anthropology*), he observes that, if human beings are not subject to a master laying down law for all backed with sanctions (i.e. a sovereign), they tend to abuse and dominate others (IUH, 8: 23, *Anth*, 7: 327). But all eligible masters are imperfect humans, likely to abuse their power unless constrained by another master. But that master must also be a human being, and so on.[15] Though public offices might be theoretically constrained to pursue public purposes, this does not ensure that the individuals occupying those offices will act accordingly.

These considerations suggest that, concerning actual states' capacity to satisfy the constraint of publicity, Kant rejects the mainstream view that most minimally decent states satisfy it as a matter of course. Structural problems (e.g. the fact that we can only ever imperfectly constrain public officials to comply with their duty to pursue by means of their coercive power only public purposes) make it unlikely that most state actors act purely in pursuit of public goods, even when they are constrained by a constitution, and even when they are subject to sanctions for noncompliance. If publicity is required to secure peremptory rights, and publicity is no necessary part of statehood, then the standard view is false.

A defender of the standard view might argue that this misses the point. The point is not that state agents invariably act publicly in the common interest, but that to have a state is in the common interest (e.g. Flikschuh 2012 *passim*). We can flesh out the idea as follows. For Kant, the UPR is a law of reason and generates the postulate of public right. These principles issue infallibly from each individual's capacity for practical reason (alternatively, rational will). Since all human beings have a will that legislates

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the UPR, and since the UPR requires a state (by way of the postulate), any actual state can be identified as the object of omnilateral agreement. There may be obligations to bring the laws closer to what justice requires, but that is no argument against thinking that states make rights peremptory. So understood, the view is not that the state is bound always to act publicly in accordance with an omnilateral will (though this an ideal against which states can be evaluated), but that it is always in line with the omnilateral will to have a state. Moreover, part of what it is to have a state is to treat the distributions of rights under it as peremptory (compare Ripstein 2012: 65, *MM*, 6: 371–2).

It is certainly true that Kant thinks that something normatively important happens insofar as power is consolidated in a domestic state. But the claim in question here is that what happens in these cases is that provisional rights become peremptory. Alas, there is strong textual evidence against this claim. Consider the following passage, which directly follows Kant's claim that changes to the form of the existing constitution need to be brought about not through revolution, but rather through reform by the sovereign (*MM*, 6: 340):

> [T]he *spirit* of the original contract (*anima pacti originarii*) involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract ... so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic, in such a way that the old (empirical) statutory forms, which served merely to bring about the *submission* of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a rightful constitution of a state in the strict sense of the word. Only it will finally lead to what is literally a state ... It is the final end of all public right, the only condition in which each can be assigned *peremptorily* what is his; on the other hand, so long as those other forms of state are supposed to represent literally just so many different moral persons invested with supreme authority, no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it. (*MM*, 6: 340–1; translation modified)

Here, Kant makes clear that the idea of the original contract constrains 'the constituting authority' to gradually bring about the kind of government required by reason (compare TPP, 8: 349). For Kant, the original

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contract is the idea of a people unifying itself for the giving of law (*MM*, 6: 315). Following the contract tradition that he inherits, the original contract serves as the criterion of state legitimacy, as well as the criterion for identifying improvements for existing states (ibid.). But, unlike his predecessors, Kant does not think that this contract is an actual historical event, depending for its shape upon what actual parties agree to; his account is, as Helga Varden convincingly argues, 'non-voluntarist' in that way (Varden 2008). Instead, history gives us good reason to believe that governments as we know them originated in force 'to bring about the *submission* of the people'. Governments begin when power is concentrated in a sufficiently high degree to force coordination on one set of solutions to the problems that exist in the state of nature. So far as it is true that all existing solutions are defective, the idea of the original contract makes a stringent demand: such governments, having achieved this submission, must make '*freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a rightful constitution of a state in the strict sense of the word'. Only a rightful constitution, that is, one that limits its use of coercion to what is necessary to secure compossible freedom is literally a state. Until such a state is realized, 'no absolutely rightful condition of civil society can be acknowledged, but only *provisional* right within it'.

On its face, this conflicts with the standard view, which would have it that the mere exit from a condition of complete external lawlessness is sufficient for entering a rightful condition. Though it may be true that satisfying the omnilaterality requirement demands a state, it also demands a particular kind of state, namely a pure republic, one that conditions coercion on extending freedom and protecting rights (innate and acquired).

Attention to Kant's definition of the pure republic reinforces just how demanding this condition of peremptory right is. The republic is one of four 'conditions' or 'states' that Kant identifies in the *Anthropology* (see also Ellis 2005: 114, Ripstein 2009: 338, Wood 2014: 98), which was published for the first time the year after his Doctrine of Right:

A. Law and freedom without force (anarchy)
B. Law and force without freedom (despotism)
C. Force without freedom and law (barbarism)
D. Force with freedom and law (republic) (*Anth*, 7: 330–1)

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Having introduced these categories, Kant repeats that 'only the last combination deserves to be called a true civil constitution' (*Anth*, 7: 331). This makes sense of his claim in the Doctrine of Right that a pure republic is a necessary condition of making rights peremptory. *Only* a pure republic – not despotic and imperfect states wherever they might be – counts as a true civil condition, and Kant is quite clear in the Doctrine of Right that 'only in a civil constitution can something be acquired peremptorily' (*MM*, 6: 264).

That Kant conceives of the republic as achieving the right combination of force, freedom and law explains why he moves freely in the Doctrine of Right between the idea of a pure republic (the rational form of a state) and the idea of a state making freedom 'the condition for any exercise of *coercion*'. The true republic limits its exercises of legal coercion to those necessary for ensuring compossible freedom. This is the same notion of the idea of the republic that Kant had endorsed throughout the critical period. As early as in the *Critique of Pure Reason*, he defines the ideal state as a republic demanding the maximal extension of freedom (A316/B372–3). Somewhat later (in IUH) he writes that 'the greatest problem for the human species ... is the achievement of a civil society universally administering right' (8: 22). Such a society must realize 'the greatest freedom' for all and is the ideal of a 'perfectly *just civil constitution*'. The freedom enshrined by the just constitution makes possible 'a thoroughgoing antagonism of its members' and yet constrains such antagonism by ensuring 'the most precise determination and security of the boundaries of this freedom so that the latter can coexist with the freedom of others' (ibid.).

In the Doctrine of Right, Kant says that the absence of the pure republic implies that 'no absolutely rightful condition of civil society can be acknowledged, but only provisional right within it' (*MM*, 6: 341). Since the absence of a pure republic is (apparently) part of the human condition (it is a mere idea), it follows that so too is provisional right. Thus states (that is, states that are not 'literally state[s]' – those that we find in experience) do not suffice for the existence of a condition in which what belongs to each is peremptorily secured. Realizing the pure republic is necessary in addition. Kant was apparently serious when he spoke of crooked timber (IUH, 8: 23).

Might one argue that a state succeeds in making freedom the principle of coercion insofar as its lawgiving coheres with the idea of the original contract? If so, then the standard view has a ready reply. For in his earlier

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political writings, Kant had argued for a minimalist interpretation of this demand. On this early view, a state gives law in conformity with the idea of the original contract just in case it does not demand anything of its subjects to which they could not possibly consent, and external freedom consists in obeying just those laws that satisfy this condition (OCS, 8: 297, EW TPP, 8: 349n; cf. Kersting 2009: 251).[16] The demand to make freedom the condition of any exercise of coercion is – on this conception – satisfied by states that allow relatively little freedom, provided, for example, that they do not tax in a disproportionate manner (OCS, 8: 297n.). Attributing this view to Kant secures the desired result that PT is false (it is *possible* for actually existing states to legislate in this way – indeed, most do). But this strategy purchases the falsity of PT at the expense of depriving the Kantian theory of critical resources for reform. For the idea of the original contract is meant to serve as the criterion of right for 'every existing social and political confederation' (Kersting 2009: 250). Thus, reading the requirements of the original contract in this minimal way leaves Kant's theory without resources for evaluating satisfactory regimes as better or worse. Perhaps more significantly for our purposes: by the time he writes the Doctrine of Right, Kant seems to have abandoned the idea that giving law in line with what an entire people could consent to is a sufficient condition of legitimacy. Although he continues to treat the impossibility of consent as a sufficient condition for the illegitimacy of a law (e.g. in his treatment of the hereditary nobility, *MM*, 6: 329), the idea that the bare possibility of consent to law suffices for legitimacy is nowhere to be found.[17] Possible consent becomes, in the mature philosophy, a mere necessary condition of legitimacy. Thus this strategy is multiply unpromising.

At this point, one might press the objection that Kant's claim that the true civil constitution is an ideal (rather than something that can be instantiated in experience) is beside the point. As long as we can do a sufficiently good job of approximating it, we ought to recognize peremptory rights. But although this is a plausible philosophical worry, it does not impugn the textual evidence presented above for the claim that Kant's arguments entail PT. My reply to the worry that Kant places implausibly demanding constraints on making rights peremptory is no different. In the next section, I more fully flesh out some of the implications of PT and consider some strong textual evidence against it.[18]

5. Implications and Some Doubts

I have argued that Kant is committed to PT. Acquired rights must discharge the omnilaterality requirement, which demands that the

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principles of right are fully satisfied at all levels – domestic, international and cosmopolitan. But it is natural to wonder what precisely this means for Kant's political philosophy. Although space constraints rule out a full account here, we can get purchase on the options by noting one way of inferring *too much* from Kant's acceptance of PT.

After considering much of the textual evidence introduced above and correctly noting that, on Kant's theory of right, 'the strict dichotomy between the civil and natural conditions'[19] assumed by earlier contract theorists 'disappears', scholars Herb and Ludwig draw the following two conclusions (1993: 313, my translation). First, they correctly note that Kant's view forces us to consider mine and yours and state sovereignty alike as matters of provisional right. Second, they claim that it follows from this that each 'individual state' – and (presumably) each historical acquisition of property – 'represents now merely a transitional stage in a process of the global realization of right' (314). As merely so many 'episodes' in the process of realizing cosmopolitan institutions of right, states are granted sovereignty only to prevent a 'backslide' into the state of nature. State sovereignty qua provisional right is a necessary condition of realizing cosmopolitan institutions and moving farther away from the state of nature and closer to a genuine civil condition (315). Still, it is ultimately to give way to cosmopolitan institutions as they become available (cf. Ypi 2014).[20]

While the first conclusion follows from a natural reading of the text (as I have shown above), it is important to see that the second goes beyond PT by presupposing a particular reading of the normative status of provisional right. For taking state sovereignty to be a mere moment in a transition towards cosmopolitan right implies that, once cosmopolitan right is realized, sovereign states as they have formed are to play no governing role. But this does not follow from the claim that rights to sovereignty are provisional. For on an anticipatory account of provisionality (of the sort defended e.g. in Hasan 2018), provisional rights are held in anticipation of a rightful condition. For all that, some provisional arrangements of territory and property might survive the transition (or the closest possible approximation to the transition that we can attain). If so, they will have a permanence that goes beyond what Herb and Ludwig seem willing to countenance (compare Ellis 2005: 89–94). Perhaps it would even be wrong to eradicate them without compensation. Flikschuh, who follows Herb and Ludwig on this point, writes that as provisional gradually transforms into peremptory right, the 'coming together of peoples ... envisages a gradual dismantling of boundaries

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that hinder the development of relations of Right between subjects' (2000: 176). This allows us to put my objection in different language: different accounts of provisional right identify different boundaries for dismantling. In assuming that PT entails the dismantling of all but cosmopolitan boundaries, theorists sympathetic to it have moved too quickly.

PT does not, therefore, entail any particular account of provisional normativity, but that is a virtue, not a vice. For scholars continue to disagree sharply amongst themselves concerning just this, and we should avoid begging important questions. On the strongest view, provisional rights impose full constraints, imperfect only insofar as persons lack full assurance of their protection (Byrd and Hruschka 2006a). If this is correct, then any boundaries generated by historical acquisitions become (in the limit) permanent aspects of right, not to be transcended by, but to be encoded in, international and cosmopolitan institutions, revised only as *required* by movement towards right. On the weakest view, provisional rights impose no genuine constraints at all (Brudner 2011). All historical boundaries are eventually to be transcended, as the actually legislative general will realizes itself. The fact that provisionality can be understood in either of these ways (and in many ways in between) entails that, in terms of its normative implications, PT should be amenable to a wide array of Kantian theorists.

Still, even if provisional rights need not inevitably be transcended, to say that they are provisional must mean *something*. And on at least one plausible account, it means that they can be defended with force, but that they generate no correlative duties on the part of anyone to obey (Korsgaard 2018: 27–30; cf. *MM*, 6: 257). But if this is right, then there would appear to be strong evidence against attributing PT to Kant. Consider the following passage.

> If then a people united by laws under an authority exists, it is given as an object of experience in conformity with the idea of the unity of a people as such under a powerful supreme will, though it is indeed given only in appearance, that is, a rightful constitution in the general sense of the term exists. And even though this constitution may be afflicted with great defects and gross faults and be in need eventually of important improvements, it is still absolutely unpermitted and punishable to resist it. For if the people should hold that it is justified in opposing force to this constitution, however faulty, and to the supreme

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> authority, it would think that it had the right to put force in the place of the supreme legislation that prescribes all rights, which would result in a supreme will that destroys itself. (*MM*, 6: 371–2)

Here, Kant is explicit: The fact that there is no fully just state, the fact that the idea of the republican constitution cannot be instantiated in experience, the fact that international institutions are bound to be imperfect, these are no grounds for concluding that no rightful condition exists. Instead, if the stately forms we observe in the world of experience are approximately close to the idea of a state, then there is a civil condition. Even though a constitution 'may be afflicted with great defects and gross faults and be in need eventually of important improvements' it still holds in general as a 'rightful constitution in the general sense of the term'. And as long as there is such a rightful constitution, then there is a duty to obey it (*MM*, 6: 319). And if there is a right to enforce law,[21] as well as a correlative duty to obey, then by hypothesis the right of such a state cannot be a provisional right.

One response is to reject Korsgaard's analysis of provisionality and argue that, although it may be the correct account of the notion as it operates in the state of nature, a different analysis is required once something approximating a state exists.[22] For given strong textual evidence for PT, states simply do not make rights peremptory. But then it must be possible for persons to be obliged to obey states and to respect one another's claims, even though rights remain provisional.[23]

However, it is also possible to account for these duties of obedience more concessively by noting that acting *as if* a properly civil condition exists might be thought a necessary condition of *bringing it about* that a true civil condition exists. Understood in this way, perhaps it is true that provisionally rightful states do not generate duties to obey based on their actual and defective lawgiving activity and (partial) conformity with right. Instead, the duty to obey the 'power above you' *derives from* the duty generated by the postulate of public right to enter a civil condition. If so, the duty we violate in disobeying the state above us is not owed to that particular state. It is rather the perfectly general duty we owe to humanity to enter a rightful condition, so far it is in one's power, and to do one's part in ending conditions of war.

I submit that, given Kant's central normative concerns, a reading of the second kind makes good sense. For recall that what is at issue is what we

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are *duty-bound* or *obligated* to do, and duties have a special character in the Kantian system. Kantian duties are famously *necessary* (*MM*, 6: 222; *G*, 4: 414), *universal* (6: 225, 4: 433), *categorical* (6: 221, 4: 414–16) and *self-legislated* (6: 227, 4: 432). On this account, the notion of adventitious political duties acquired through an act of choice appears paradoxical. For political duties of this kind (e.g. to respect historical claims to property, territory and sovereignty) have an avowed origin in *force* and another's exercise of her power of choice to *take control* (6: 224, 259). They are geographically bounded. They are enforced by *pathological sanctions* (6: 219). And the laws which ground these imperatives – at least in the case of acquired rights – are legislated by *others* (compare Hirsch 2017).

In the limit, the Doctrine of Right is supposed to demonstrate that these apparently contingent and bounded duties, enforced as they are via pathological incentives, made effective as they are through other agents' *willkürliche* choice, really must be seen as products of our own lawgiving reason (Schaefer 2017).[24] This is achieved by showing that acknowledging these very duties is the *sine qua non* of satisfying *a priori* laws of pure practical reason (e.g. the Universal Principle of Right and the postulates). But because the principles of right (postulated by practical reason) make this in the first instance possible, the omnilaterality requirement is satisfied only when institutions satisfy these principles and extend across the globe. Until then, we are bound to do what is necessary to bring this condition about. It is plausible that to bring this about requires acknowledging duties to comply with provisional authorities.

On this account, such duties derive from the general duty to enter a rightful condition. They are provisional in the sense that they are held in accord with the possibility, but not yet the actuality, of a rightful condition. Existing states are not, therefore, themselves rightful conditions. Rather, acknowledging a duty to obey leaves open the possibility that they will *become* rightful conditions. Only in this way can we progress toward peremptory right and perpetual peace in a way that does not depend upon mere chance (*MM*, 6: 372).

6. Conclusion

I have argued that, with respect to acquired rights, Kant accepts the provisionality thesis, the thesis that acquired rights are necessarily provisional. I have attempted to account for his acceptance of this striking thesis by noting that, in the Kantian system, the acquisition of rights to external objects of choice is rationally required, at the same time that it is

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normatively suspicious, involving as it does the restriction of others' freedom. Acquisition of rights looks forward to a condition under which they are and are seen to be the product of omnilateral authorization, and compatible with each person's freedom. Such omnilateral authorization is made possible by *a priori* principles of right. Only when such principles are satisfied do rights asserted by various external agents adopt the characteristics of genuine obligations. The conditions of omnilaterality are specified as Kant develops a proposal for an ideal institutional structure that ensures, at each stage, that others' wills are subject to external constraint only for the sake of rendering their freedom mutually consistent. Until then, our claims to acquire rights are, on Kant's view, provisional, not peremptory. But I have not attempted a full account of provisional normativity, nor even a complete analysis of what it is to say that a right is provisional. Since existing accounts may need to be modified in light of Kant's acceptance of PT, completing this further work is of course a matter of some importance. I look forward to taking it up.[25]

Notes

1 One way of seeing this debate is in terms of whether Nozick's historical entitlement theory (1974) or Rawls's justice as fairness (1971) in fact has a truer claim to Kantian foundations. It would, however, be a mistake to see provisional normativity as an all or nothing affair, as accounts by Stilz (2014) and Hasan (2018) demonstrate. Provisional rights might constrain absolutely, not at all, or somewhere in between.

2 For example, see Ripstein 2009: 22, 90, 165, 173, 176, 184, 190, 341. In each of these places, Ripstein ties the provisionality of right to the presence of the state of nature or the absence of a rightful condition. Moreover, because he believes (1) that provisional rights are simply unenforceable, and (2) that there are enforceable rights in the legal regime as we know it, he must take it that at least some states instantiate rightful conditions in the relevant sense. Ripstein's treatment is typical.

3 Citations of Kant's texts reflect the Academy pagination. Translations are drawn from Kant (1996), noting the original German in brackets where doing so is illuminating, with one exception. I render the German *peremptorisch* as 'peremptory' or 'peremptorily' throughout, to preserve consistency and eliminate confusion. Other texts cited have been consulted in Kant (1997, 2007 and 2016). Abbreviations of Kant's texts as follows: *Anth* = *Anthropology from a Pragmatic Point of View*; DR = Doctrine of Right; *G* = *Groundwork for the Metaphysics of Morals*; IUH = 'Idea for a Universal History with a Cosmopolitan Aim'; L-Eth-V = Lectures on Ethics (Vigilantius); L-NR = Lectures: Naturrecht Feyerabend; *MM* = *The Metaphysics of Morals*; OCS = 'On the Common Saying: That may be Correct in Theory But it is of No Use in Practice'; TPP = 'Toward Perpetual Peace'.

4 PT thus applies only to acquired rights to external objects of choice. Kant's view is that it is only acquired rights that pose problems in the state of nature and generate requirements to leave it (*MM*, 6: 313). He seems to regard internal rights (including the rights to freedom and bodily integrity) as fully peremptory in the state of nature. For an argument that this is a mistake, see Pallikkathayil (2017).

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5 Ellis (2005) endorsed this thesis without providing a well-grounded textual argument for it. She has also since (she tells me in conversation) given up the view. In her introduction to the *Metaphysics of Morals*, Gregor seems to acknowledge its motivation, although it is not clear that she attributes PT to Kant (see Gregor 1996: 15–16). Herb and Ludwig argue that this conclusion constitutes one of Kant's most significant breaks with the Hobbesian social contract tradition (Herb and Ludwig 1993: 313). But aside from a brief mention by Katrin Flikschuh (2000: 176), the point has not been taken up in the Anglophone literature. It is true that Ypi (2014) has done work to show that Kantian territory is necessarily provisional, but this is only part of the provisionality thesis, which applies to all acquired rights, without exception. Interestingly, Herb and Ludwig move directly from the provisionality thesis to the claim that the state is a mere temporary form along the way to a global order of right. As we shall see in section 5, this is too quick.

6 This is, of course, only the barest of sketches. For an illuminating account of just how the state of nature is inconsistent with freedom, see Ebbels-Duggan 2012.

7 It is thus important to ask: What sort of possession is possession that 'accords with the possibility of a civil condition'? I take it that Kant lays out the answer in chapter 2 of the Doctrine of Right. Such possession occurs insofar as one has (i) taken something useable under her control, with (ii) the intent to exclude others from its nonconsensual use, and (iii) is prepared to test her claim against (iv) consistency with a possible united will. In Kant's words, 'That is mine which I bring under my *control* (in accordance with the law of outer *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason; and which, finally, I *will* to be mine (in conformity with the Idea of a possible united *will*)' (*MM*, 6: 258). Kant goes on to make this general schema more specific in each of the three cases of external objects of choice. For property right, see 6: 260–70, for contract right, 6: 271–6, and for status right, 6: 276–84.

8 Byrd and Hruschka (2006b: 143–4) argue that Kant's notion of the *a priori* united will shares with Rousseau's notion of the general will nothing more than a name: 'Außer einem vergleichbaren Namen haben der usrprünglich vereinigte Wille der *Rechtslehre* und Rousseaus volonté générale deshalb wenig mit einander zu tun.' Whereas Rousseau's general will is supposed to serve as a governing notion of legitimacy, Kant's united *a priori* will is tasked with the specific job of accounting for the permissibility of original acquisition (145–8), and ultimately the division of the earth (156).

9 Note that it is precisely this functionalist feature of the standard view that motivates John Simmons' boundary problem. For discussion, see Simmons 2013, 2016.

10 Byrd and Hruschka (2006a) are major defenders of this view, despite their substantive disagreements with others who hold the view, e.g. concerning the status of property rights in the state of nature.

11 See e.g. Ripstein 2009: 173–4, Byrd and Hruschka 2006a: 280–2, Varden 2008: 14–18, Hodgson 2010: 74–8, Kersting 1993: 263–4.

12 As Peter Niesen eloquently puts the point: 'Both cosmopolitan right and unilateral acquisition thus go back to the same root: the conditioning of all annexation to its compatibility with a general will. Cosmopolitan right just serves to remind us that it is not only compatriots to whom the generality of the general will needs to extend' (Niesen 2017: 102).

13 The idea of common possession of the earth is an old one. Aristotle held that property, 'in the sense of a bare livelihood, seems to be given by nature herself to all, both when they are first born, and when they are grown up', and the notion of common ownership is central to the natural law tradition before Kant (Aristotle 1984: 1256b5–20). For some

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differences between Kant's notion and that found in the natural law tradition preceding him, see Walla 2016 and Huber 2017.

14 Thanks to an anonymous reviewer for pressing me on this point. For support, see L-Eth.-V, 27: 590–1.

15 According to Kleingeld (2011: 66), Kant's later work solves this problem by introducing checks and balances via the republican constitution. There are three things to say here. First, as we have seen in the previous section, even if achieving perfect domestic governance is possible (only very difficult), other structural issues preclude our entering a condition of peremptory right, including matters of international and cosmopolitan right. Second, whatever Kant himself thought, H. L. A Hart points out that even institutional restraints on the exercise of power rely on 'rules of recognition' for their efficacy, and these must be acknowledged by those over whom they claim authority (Hart 1961: 106–46). Thus a system of republican checks and balances is likely to be insufficient in solving the problem Kant astutely identifies, depending at some level upon respect for right, even if such a structure might go some way towards providing the kind of external constraint Kant thought necessary. Third, Kant was already committed to republicanism as an institutional ideal when he composed the *Critique of Pure Reason*.

16 Note, however, that on many accounts (including the influential account developed by O'Neill 2012: 30–6), the idea of possible consent demands far more than any existing state currently offers.

17 For one account of how precisely Kant's thought developed in this direction, see Kleingeld 2018.

18 I do this without attempting to give a full account of PT's normative implications – a task that requires another paper, perhaps a book.

19 Note that Kant does in fact hold that the state of nature, like the pure republic, is a mere idea: 'In itself, the *status naturalis* does not exist at all, and never has; it is a mere Idea of reason, containing judgement of the private relationship of men to one another' (L-Eth.-V, 27: 589).

20 Thanks to Richard Aquila for drawing my attention to this discussion.

21 This passage thus makes trouble for PT also assuming Ripstein's influential analysis according to which provisional rights are 'titles to coerce that no one is permitted to enforce coercively' (Ripstein 2009: 165).

22 In an unpublished essay, I argue for a different analysis (following Ralf Bader). I hold that provisional rights correlate with the *formal* obligation to establish a rightful condition, whereas peremptory rights correlate with the material obligation to respect an acquired right as *mine or yours* once such a condition comes about.

23 On the other hand, Kant does seem to regard the possibility that acquired rights are provisional 'even to the present' as a *reductio* against the view that acquisition by prolonged possession is impossible (see *MM*, 6: 292). One line of reply (which I cannot develop here) is that the refusal to acknowledge the possibility of acquiring by prolonged possession makes it the case that possession in good faith is – given an uncertain history – simply impossible. But if there is no possibility of reconciling present with past claims, then peremptory right cannot even attain practical reality as a regulative ideal.

24 Kant alludes to this progression from the possibility, through the actuality and finally to the necessity of rights-claims at *MM*, 6: 306.

25 Thanks to Lucy Allais, Donald Rutherford, David Wiens, Clinton Tolley, Rainer Forst, Rafeeq Hasan, Marcus Willaschek, Arthur Ripstein and Jakob Huber for stimulating conversations on these topics. Thanks especially to Richard Arneson and Eric Watkins for extensive written feedback and many years of encouragement and support, and to Ralf Bader for consistently providing insight into some of the deepest challenges

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