

THE BLOCKIAN PROVISIO AND THE RATIONALITY OF PROPERTY RIGHTS

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1. Introduction

THE PRESENT PAPER confronts the general question of the lawfulness¹ of forestalling both potential owners from originally appropriating unowned land and actual owners from exiting their property. This kind of forestalling, which poses problems for libertarian theory, consists in a pattern of appropriation that allegedly puts a given individual in such a position that it is impossible for him to appropriate an unowned tract of land or to exit his property without trespass. In the libertarian literature, forestalling has been a subject of discussion for a long time. For instance, Nozick (2014, p. 55) identified the “possibility of surrounding an individual” as “a difficulty for a libertarian theory that contemplates private ownership of all roads and streets, with no public ways of access.” For van Dun (2009), the problem of encirclement reflects a fundamental tension between freedom and property within libertarian theory, and stems from the absolute character of the latter. He proposes “the free movement proviso” as a way out of the encirclement problem, although the “provisio is a far-reaching restriction of the property right of route owners as it would be defined according to the ‘freedom as

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¹ By “lawful” I mean in accordance with the principles of justice, whether or not these principles are recognized by a given legal system.

property' conception" (p. 234). In turn, according to Rothbard, anyone who "uses violence to prevent another settler from entering upon this never-used land and transforming it into use" is a "criminal aggressor" (Rothbard, 2002, p. 64).²

As the above quotations indicate, the problem of forestalling is connected with many important social issues of interest for libertarian scholarship. For instance, it serves as one of the arguments raised against the idea of private ownership of roads, as, for example, in the case of Tullock, according to whom "if you had private and total ownership of roads, it would be possible to purchase all of the houses around a given plot of land" and then "collect the full rental value of the enclosed land" (1996, p. 590). The possibility of forestalling might even suggest that the whole project of full privatization of roads is doubtful since, as pointed out by Nozick, "anyone can be surrounded by enemies who cast their nets widely enough" and therefore there always "remains the question of 'exit to where?'" (2014, p. 55). For the same reasons, forestalling is also an important consideration in the context of migration. The answer to the question about how the movement of people would look in an anarcho-capitalist society and whether "the free movement proviso" would lead to "a far-reaching restriction of the property right" (van Dun, 2009, p. 234) or even that "no such thing as freedom of immigration would exist" (Hoppe, 2001, p. 139) partially depends on whether it is lawful or unlawful to forestall. In the case of children's rights, the thesis that it is impermissible to forestall has been proposed as an explanation for requirements placed on parents to inform potential guardians

² The present paper understands original appropriation as acquiring property rights to unowned things. Such first acquisitions happen through some investitive facts "or processes, by which unheld things may come to be held" (Nozick, 1974, p. 150) identified differently by different theories of justice in first acquisition. In the context of the present discussion one can point to two main theories of this kind: Lockean labor theory (e.g., Locke, 1980; Rothbard, 1998; Block, 2008) and Roman first possession or occupancy theory (e.g., Epstein, 1979; Kinsella, 2008). The former theory identifies mixing one's labor with a thing as the investitive fact by which property rights to unowned things may be acquired. The latter sees it as taking first possession of a thing. Mixing one's labor as the investitive fact by which original appropriation may be effectuated is in turn understood by the present paper as homesteading (Rothbard, 1998; Block, 2008). Therefore the principle of justice in first acquisition is identified here as the homestead principle. However, it is important to notice that the line of argument presented in this paper is also valid on the alternative principle of justice in first acquisition espoused for instance by Kinsella (Kinsella, 2008, p. 38), according to whom not mixing one's labor with a thing but first possession or occupancy constitutes the investitive fact.

about abandoning children without resorting to the concept of positive duty (Block, 2004).

Besides the aforementioned links between the forestalling problem and sundry issues vividly debated within libertarianism, the question of forestalling plays a fundamental role in the theory of property rights. As I will demonstrate, whether forestalling is lawful or unlawful determines one's conception of natural property rights. Since, as I will argue, allowing forestalling leads to "impossible duties and rights" (Steiner, 1994, p. 82), one's conception of natural property rights cannot accommodate the Hoppean idea of property rights as conflict-avoiding norms (Hoppe, 2010, pp. 18–19; 2006, p. 319; Kinsella, 2008, p. 29). What is more, one's conception of natural property rights cannot treat them as rationally justified norms because nothing that runs against the law of non-contradiction can be rationally justified (Łukasiewicz, 1987, p. 172; 1988, pp. 108–09). For all these reasons, the problem of forestalling is crucial for a libertarian theory of rights.

Block (1977; 1978; 1998; 2001; 2003; 2004; 2005a; 2005b; 2008; 2010a; 2010b; 2011; 2016) proposed a solution to the forestalling problem that points out that the impermissibility of forestalling stems from the logic of the homestead principle. He claims this impermissibility "is an implication of the logic of homesteading. Part and parcel of this doctrine is the notion that it is illicit to control land that was *not* homesteaded" (2010b; emphasis in original). Allowing for forestalling would then be "anathema to the libertarian ideal that all of the earth's surface should come under private ownership" (Block, 2016, p. 29). This idea that forestalling violates the homestead principle and therefore that it is impossible to appropriate land in such a way as to forestall others from appropriating an unowned land or from exiting already appropriated land has been called by Kinsella the "Blockian Proviso" (Kinsella, 2007; Block, 2010b). Block (2010b) explained this idea as follows:

Picture a bagel (or donut) with a hole in it. Label the hole in the center as 'A,' the bagel itself as 'B' and the surrounding territory, lying outside of the bagel, as 'C.' Suppose that someone, call him Mr. B, homesteads the land depicted by B. Assume away any possibility of tunneling under, or bridging or flying a helicopter over this terrain, B. Mr. B, then, controls area A, without ever having lifted a finger in the direction of homesteading this land, A. Yes, as of now, Mr. B does not own A. But, under our assumptions, he can homestead this territory whenever he wants to do so. Mr. B and [*sic*] gained an untoward advantage, *vis-à-vis* all other potential homesteaders of A, who are now residing in territory C, and cannot reach A, without trespassing on B, Mr. B's property. This, I claim, is incompatible with the logic of homesteading.

The main purpose of this paper is to provide an original justification for the Blockian Proviso and to defend it against its critics, particularly Kinsella (2007; 2009). Instead of drawing directly on Block's idea that "libertarianism abhors a property vacuum" (Long, 2007), I argue that the Blockian Proviso is in fact a rationality requirement placed on any system of property rights that aspires to be a justified system of rights, and if Kinsella and other critics of the Blockian Proviso want to abandon it, they will end up with a system of contradictory and therefore irrational rights. In the process of supporting the Blockian Proviso against its critics, I deliver my interpretation of this powerful logical device, viewing it as an indispensable part of the homestead principle of justice in first acquisition and as equivalent to the law of non-contradiction in the theory of just property rights.

2. Setting the Stage for the Blockian Proviso

I will commence by articulating two important introductory points so that we may proceed more smoothly later on. First, according to Hoppe, libertarianism endorses a "theory of property as a set of rulings applicable to all goods, with the goal of helping to avoid all possible conflicts by means of uniform principles" (Hoppe, 2006, p. 319). Natural property rights, which are understood as "those claims a person has to legal enforcement that are *justified*, on balance, by the full constellation of relevant reasons, whether or not they are actually recognized and enforced by a legal system" (Barnett, 2004, p. 16), and which hold the latter "up to the unsparing and unyielding light of reason" (Rothbard, 2002, p. 17), must avoid conflicts or they will not be natural property rights—rationally justified claims—since consistency is the necessary condition for any rational justification.

Regardless of what the other characteristics of natural property rights are and which rights are actually rational and just, one thing is beyond doubt: no system of rights that runs against the law of non-contradiction can fit the bill. From the purely conceptual point of view, rationally justified rights cannot be contradictory. It is exactly this necessary condition that the Blockian Proviso imposes on a system of rights in order to filter out irrational and unjust rights. As Steiner emphasizes, "mutual consistency—or *compossibility*—of all the rights in a proposed set of rights is at least a necessary condition of that set being a possible one... Any justice principle that delivers a set of rights yielding contradictory judgements about permissibility of a particular action is unrealizable" (1994, pp. 2–3). For all these reasons, Hoppe points out that "the 'natural law' character" of the libertarian theory of property rights consists in "the avoidance of conflict regarding the use of scarce physical things" and that therefore "conflict-generating norms contradict the very purpose of norms" (2012, p. 15). What is particularly

important from the point of view of this paper is that Kinsella, who criticizes the Blockian Proviso, espouses the above theory of property rights and successfully uses it in his critique of intellectual property. As he explicitly states, “the fundamental social and ethical function of property rights is to prevent interpersonal conflict over scarce resources” (2008, p. 29). Yet, as I will demonstrate below, one cannot consistently endorse this theory of property rights and at the same time reject the Blockian Proviso, which serves the law of non-contradiction in the theory of property rights.³

³ An anonymous reviewer remarks that, “The paper puts much emphasis on claiming that contradictory rights are irrational rights. It can be said that there are other paradigms in ethics, e.g. one can adhere to values as a source of ethical norms—e.g. one can argue that life is the most important value and there is no contradiction in respecting life, even if it implies situation/contextual ethics (as opposed to formalistic ethics like Kantian) derived, for example, from virtue ethics and where there would still be a place for objective and solid ethics, though norms would be based on values, and not on rights.” It is true that the present paper puts much emphasis on rejecting contradictory rights as unjustified, irrational, or impossible. This is what my interpretation of the Blockian Proviso is about and what I strongly endorse. Yet I do not deny that there can also be valid situational or other ethics based on values or virtues. To the contrary, I agree with the reviewer, and I want to explain that the position I propose actually presupposes that there are other ethical considerations such as values or virtues. Only because of this pluralism of ethical paradigms and values can rights be invoked in the first place. What I claim is this: if people disagree about their values and ends, only then are property rights needed and only then do property rights allow people to avoid transforming these ethical disagreements into conflicts by unequivocally distributing physical resources or spheres of individual jurisdictions. When rights are contradictory, they are unable to perform this function (besides the fact that they cannot then be rationally justified). If people agreed about their values and universal harmony between people existed, property rights would be redundant. On the other hand, the question of contradictory norms, so pronounced in the case of conflict-avoiding rights, is less vital in the case of other kinds of norms concerning, for example, moral values or virtues that are considered from the internal perspective rather than from the vantage point of external relations among individuals. The present paper does not deny this. It focuses on the narrow question of rights, and in any place where it refers to norms, it means only one kind of norm: rights. What is more, I am also aware of other accounts of rights that depict them as mainly conducive to happiness or virtue rather than as needed to avoid conflicts, as well as accounts for which the question of contradictions may therefore be less explicit (though it can never be completely ignored).

The second preliminary point is to make explicit what having a right means, regardless of whether this right is natural or legal (Kramer, 2002, p. 8). Following Hohfeld (1913; 1917), we can say that

- 1) person A has a right toward person B that person B not do X if and only if person B has a *duty* toward person A *not to do X*;
- 2) person A has a right toward person B that person B does X if and only if person B has a *duty* toward person A *to do X*;
- 3) person B has *no duty* toward person A *not to do X* if and only if person B has a *liberty* toward person A *to do X*; and
- 4) person B has *no duty* toward person A *to do X* if and only if person B has a *liberty* toward person A *not to do X*.⁴

3. Defending the Blockian Proviso

We are now ready to deal with the merits of the Blockian Proviso in action as well as with the critiques that have been issued against it. We know the Blockian Proviso says that one may not homestead in such a way as to forestall potential owners from appropriating unowned land. As in the above quotation, Block depicted such a pattern of homesteading for heuristic purposes as a bagel or donut, although other shapes are illustrative as well—for example, a torus. Although the Blockian Proviso excludes such bagel-shaped appropriations, I will start my argument with a false assumption. Imagine a bagel-shaped plot of appropriated land. Assume Red owns this bagel-shaped plot, called A, B is an unappropriated hole-in-the-bagel plot of land, and Blue is the owner of a plot of land C outside the bagel (Figure 1).

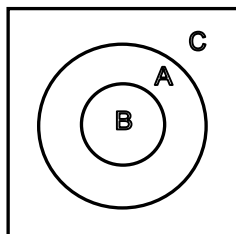


Figure 1: Hypothetical distribution of appropriated and unappropriated land.

⁴ For libertarian accounts of rights that explicitly embrace the Hohfeldian idea of “correlativity” of rights and duties, see, for instance, Rasmussen & Den Uyl, 1991, p. 81; Narveson, 2001, pp. 43–46; Steiner, 1994, p. 59.

Now we can ask: what does all this mean for Red's and Blue's property rights? Allow me to restate what it means to have a right. Red has a right toward Blue that Blue not do X if and only if Blue has a duty toward Red *not to do X*. In the bagel case, the following conclusions must therefore be true:

- 1) because Red is not the owner of B and therefore does not have any rights to B, Blue by definition cannot have any correlative duties toward Red in connection with B;
- 2) because Blue has no correlative duties toward Red in connection with B, *Blue also has no duty toward Red not to enter B*.

But

- 3) because Red is the owner of A, Blue has all correlative duties toward Red in connection with A;
- 4) because Blue has all correlative duties toward Red in connection with A, Blue also has a duty toward Red not to enter A;
- 5) because Blue has a duty toward Red not to enter A, he therefore has a duty toward Red not to cross A;
- 6) because of the bagel-shape of the land, to cross A is to enter B;
- 7) because Blue has a duty toward Red not to cross A and to cross A is to enter B, *Blue has a duty toward Red not to enter B*, which contradicts (2).

As we can now see based on our false assumption, Blue at the same time would have no duty toward Red not to enter B *and* would have a duty toward Red not to enter B. Correlatively, Red would have no right toward Blue that Blue not enter B *and* Red would have a right toward Blue that Blue not enter B, which is plainly a logical contradiction.⁵ This is, of course, a devastating conclusion for anyone whose ambition is to identify just, rational, and conflict-avoiding rights, because here we have the very opposite. Hence, if we talk about just and rational rights, bagel-shaped appropriation is impossible, and therefore the Blockian Proviso, which negates the possibility of bagel-shaped appropriation, must be correct. One may not justly appropriate the bagel. Otherwise, contradiction- and conflict-generating norms appear, and as we know, “conflict-generating norms contradict the very purpose of norms” (Hoppe, 2012, p. 15). So, either we have the

⁵ Of course the same argument refers also to this kind of criticism issued against the Blockian Proviso, which talks about all other alleged duties and rights that could stem from the bagel-shaped appropriation as for instance rights to “collect the full rental value of the enclosed land” (Tullock, 1996, p. 590).

Blockian Proviso and just rights or we have contradiction and conflict. No third possibility is available to us.

On the basis of our main, aforementioned argument, it is immediately apparent that the Blockian Proviso is not an add-on to the homestead principle but is logically consistent with its very core. It is good to keep in mind that the homestead principle is a principle of justice in first acquisition, not a technical procedure for fencing and cultivating land. Its purpose is to generate just and justified rights, not fancy geometrical patterns of land possession. Hence, as a principle of justice it cannot generate contradictory and conflicting rights because this would run against the very purpose of a principle of justice. But the homestead principle without the Blockian Proviso would do just this: generate contradictions. The Blockian Proviso is then a logical device that lets the homestead principle of justice do what it is supposed to do: distribute just and conflict-avoiding original property titles. This point is crucial since it elucidates the situations in which the Blockian Proviso operates. The Blockian Proviso works as part of the very philosophical basis of original appropriation and determines what may and what may not be first appropriated—namely, bagel-shaped land may not be appropriated. I will now show how this argument functions in the context of Kinsella’s criticism of the Blockian Proviso.

Kinsella (2007) writes:

Let’s imagine a rectangular island with 3 people: A, B, and C. B owns the middle stripe, A and C own the pieces on the ends. Suppose A wants to visit C. He has to cross B’s property. He has a right to visit C, *if* C invites him, and *if* he has a means of getting there. But he has no means of getting there. So? I assume Block would agree with me in this above example—that A has no easement over B’s property; that he can only visit C if B permits him to. But in Block’s theory, if C dies, all of a sudden this confers to A an easement-over-B’s-land! How can this be?

The answer to this question lies in Kinsella’s own assumptions. The scenario he describes is presented in Figure 2.

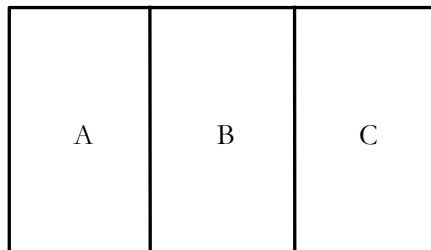


Figure 2: Kinsella’s hypothetical distribution of land shares.

First, Kinsella assumes that, according to the Blockian Proviso (“I assume Block would agree with me”), even though A has no other means of getting onto C’s property than by crossing B’s land, “A has no easement over B’s property.” This, in turn, assumes B might have homesteaded the middle stripe in such a way as to effectively prevent A from getting into C’s land in the first place. Yet how can we know that if not by consulting our compossibility test? B might have homesteaded his stripe only if doing so would not generate contradictory and unjustified rights. Otherwise we would end up with conflicting norms, and we know that the homestead principle as a principle of justice cannot generate conflicting norms without ceasing to be a principle of justice. Hence the question is: according to the Blockian Proviso, might B have appropriated the middle stripe in the first place the way Kinsella wanted him to or not? The following reasoning provides us with the answer:

- 1) because C invites A on land that is C’s rightful property, A has no duty toward C not to enter C’s land (this duty was extinguished by the invitation); A has liberty toward C to enter C’s property;
- 2) because B is not the owner of C’s land and therefore does not have any rights to C’s land, A by definition cannot have any correlative duties toward B in connection with C’s land;
- 3) because A has no correlative duties toward B in connection with C’s land, *A also has no duty toward B not to enter C’s land.*

But

- 4) because B is the owner of the middle stripe, A has a duty toward B not to enter B’s land;
- 5) because there is no other way for A to enter C’s land than through B’s land, to enter C’s land is to enter B’s land;
- 6) because A has a duty toward B not to enter B’s land, and to enter C’s land is to enter B’s land, therefore *A has a duty toward B not to enter C’s land*, which contradicts (3).

Therefore, if there is no other way for A to enter C’s land than through B’s land, the Blockian Proviso says B may not appropriate in such a way in the first place, because it would give rise to contradictory norms (A would at the same time have liberty to enter C’s land and no liberty to enter C’s land). It is unimportant whether C’s land is C’s property or no one’s land. In both cases the same bagel problem arises. If, on the other hand, there are other means available for A to enter C’s land, the Blockian Proviso can identify no problems with conflicting rights and B might legitimately have homesteaded the middle stripe this way. This is so because point 5 in the above reasoning

would then not hold—that is, entering C’s land would not mean entering B’s land, and therefore A’s duty toward B not to enter B’s land and A’s liberty (no duty not to) toward B to enter C’s land would have different content and no conflict of norms would result.

In light of the above argument, we are able to consider Kinsella’s further question: “in Block’s theory, if C dies, all of a sudden this confers to A an easement-over-B’s-land! How can this be?” Now, it is obvious that the Blockian Proviso does not lead to any such a result. Person B might not have homesteaded in the way he did in Kinsella’s thought experiment in the first place, since it would have generated conflicting rights, regardless of whether C’s land was unowned or owned by C. If C’s land was unowned, A would at the same time have no duty toward B (as a non-owner of C’s land) not to enter C’s land *and* would have a duty toward B (as an owner of B’s land) not to enter C’s land. But exactly the same would be the case if C’s land belonged to C. Then A would have no duty toward B (as a non-owner of C’s land) not to enter C’s land *and* would have a duty toward B (as an owner of B’s land) not to enter C’s land. Nothing would change upon the death of C in this respect and no easements would “all of a sudden” originate. If, on the other hand, B might have appropriated in the way he did (because there were other means for A to enter C’s land), he might have done so whatever the status of C’s land (owned or unowned), because it would never have been part of a bagel problem. Hence, the Blockian Proviso works perfectly here as a filter for conflicting norms and introduces no paradoxes at all.

Kinsella (2007) writes, “As best I can understand it, Block’s ‘forestalling’ conclusion seems to be incorrect. It would imply a general easement right over everyone’s property on behalf of everyone else if they ‘need’ that property to ‘get to’ some other property they want to be on.” This is not the case, however. Kinsella’s point is a non sequitur. The Blockian Proviso precludes conflicting appropriation and only conflicting appropriation. Hence, no general easement right follows from the proviso. Person A is perfectly able to justly appropriate a parcel of land without granting easements to other people, provided such appropriation does not prevent other people from exercising their property rights—that is, from exercising their rights of exclusive control over their properties—because then and only then would we end up with the system of conflicting property rights. Thus, if A would like to appropriate land in such a way that would effectively prevent B from leaving B’s land and travelling to wherever B is allowed to move (unowned land, invitation to C’s property, etc.), the Blockian Proviso precludes such appropriation, and rightly so. But there is nothing whatever in the Blockian Proviso that would underwrite people’s *need* to travel. It is not about people’s needs, idiosyncrasies, or other subjective

feelings, but about the logic of the system of rights. If there is a logical contradiction among rights, duties, or liberties, the Blockian Proviso precludes appropriations that would give rise to such conflicts, even if no one on the planet would ever even think about appropriating in such a way. Some conflict-generating appropriations are logically unavailable for the homestead principle of justice, regardless of people's need to wander about, or lack thereof.

By the same token, Kinsella (2007) writes, "Block also seems to believe that if you own a circle of property and some people live in the territory inside the circle, you are 'trapping' them if you don't let them use your property to 'leave' the circle. This comment seems to confirm my concerns about his view and how it could be generalized to some kind of 'necessity-easement' not limited to the homesteading case." But according to my interpretation of the Blockian Proviso, the problematic nature of owning such a circle of property does not depend on any further question about whether you happen to allow or deny people the only possibility of leaving the "trap." You may not own bagel-shaped property, period. Why not? Because appropriating this way generates contradictory rights, regardless of how the putative rights-holders would like to exercise these apparent rights.

We can now consider yet another interesting argument proposed by Kinsella, this time not so much to undermine it as to improve the Blockian Proviso itself. Kinsella (Long, 2007) asks, "Imagine the donut is owned by 100 people. Cross [*sic*] any of their tracts gets him in or out. Which one does he have an easement over?" Setting aside again Kinsella's assumption that the donut is lawfully owned, this is a good test of our interpretation of the Blockian Proviso. Block (2016, p. 34) answers, in my opinion, unsatisfactorily: "Our response: The same answer applies to the running back in football. He is faced with an entire defensive line; all of them are preventing him from reaching his goal, the end zone. Which of them shall he run through, over, between or around? The reply: anyone he chooses." Yet why anyone he chooses? The first person among the hundred does not appropriate in a way that would generate any conflicting rights or prevent anyone from appropriating the hole in the donut-to-be—nor the second, third, fourth, and so on. Up to the hundredth person no conflict-generating appropriation takes place. On this assumption, the donut's hole is still up for nonconflicting homesteading. Not allowing these ninety-nine persons to fully appropriate their parcels would indeed look like imposing on them a general positive duty to give an easement to others on demand. There is no principled reason to do so. Quite the contrary. Only the hundredth person appropriates in a way that would generate conflicting rights (for example, the same person has at the same time a duty not to enter the hole *and* no duty not

to enter the hole) and only this person may not therefore homestead in such a way. The Blockian Proviso would then prevent only the hundredth person from appropriating the donut-closing parcel. What might the hundredth person then do according to the Blockian Proviso? One of three things (although only the first one is available based on our assumption that it is the last parcel left and that the hundredth person wants to appropriate). First, he might appropriate the donut-closing parcel *and* the hole. Second, he might appropriate less than the donut-closing parcel. Third, he might desist.

What if all one hundred persons appropriated their parcels simultaneously?⁶ Which one of these persons would then violate the Blockian Proviso? I would be inclined to answer: all of them. They would simultaneously generate conflicting duties on the part of a potential owner who would like to appropriate the hole in the center. Since according to the Blockian Proviso no one may appropriate in a way that generates conflicting duties, and because in the simultaneous appropriation all one hundred persons together generate conflicting duties, one must conclude that nobody successfully appropriates his parcel. In this scenario Block's original answer seems valid: a potential owner may access the hole in the center by crossing any parcel he chooses since no parcel has been lawfully appropriated.

4. Conclusions

In this paper I defended the Blockian Proviso against its critics and in the process interpreted it as a law of non-contradiction in the theory of property rights. My point is that the Blockian Proviso operates as a part of the homestead principle and therefore determines what may and what may not be originally appropriated. Being a part of the homestead principle, the purpose of the Blockian Proviso is to generate just, conflict-avoiding, consistent, rationally justified original property rights. It works well in this respect. If libertarians reject it, there is a risk they will no longer be able to talk about the homestead principle as the principle of justice. Without the Blockian Proviso, we would have to allow bagel-shaped appropriations, and we would end up with a system of norms that contradict the very purpose of norms: the avoidance of conflict.

⁶ An anonymous reviewer suggests this scenario is worth considering.

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