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CAN RIGHTS MOVE LEFT?

*Jeremy Paul**

THE RIGHT TO PRIVATE PROPERTY. By *Jeremy Waldron*. New York: Oxford University Press. 1988. Pp. x, 470. \$59.

No one doubts that America's wealth is unevenly distributed. Figures from the most recent *Statistical Abstract* indicate that while roughly six percent of the country's households had a 1984 net worth of more than \$250,000, a whopping twenty-six percent held \$5000 or less.¹ In the world's richest nation, over 32 million people live below the governmentally defined poverty level.²

Although these economic disparities would seem enough to provoke immediate outrage, progressive critics face a familiar political roadblock. Economic inequality often appears to be a logical outgrowth of America's historic commitment to private property. After all, if vast resources are in private hands, how can we blame the state for private transactions that result in some hands holding more than others? And, if private property renders the State relatively powerless, how can citizens expect greater distributional equity than what has been or could reasonably be achieved through redistributive taxation? Such questions suggest a choice between private property on the one hand, and greater equality on the other.

Moreover, this choice is more rhetorical than real. Given the other alternatives, it seems safe to say that most Americans want a private property system. Accordingly, politically meaningful debate now focuses more on narrow questions of taxation policy than on first principles of ownership. Does all this mean that people committed to greater economic equality are doomed to a ceaseless and futile assault on the nation's most cherished economic principle?

The short answer is no. Indeed, several strategies are available to confront the seeming conflict between private property and distributional equity. As a tactical matter, one approach is to concede the

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1. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 459 (109th ed. 1989).

2. Barringer, *Number of Nation's Poor Remains at 32 Million for a Second Year*, N.Y. Times, Oct. 19, 1989, at A24, col. 1 (reporting 1988 figures released by the federal census bureau).

competing tensions between property and equality and simply push hard on the equality side of the scale. One might note, for example, that since our system already includes redistributive taxation, it is implausible to claim that redistribution is inconsistent with a private property regime. Moreover, since the correct level of taxation cannot possibly flow logically from the mere concept of property, the line separating permissible redistribution from impermissible confiscation will inevitably be the outcome of political debate. Accordingly, egalitarians might engage in disputes over types and levels of taxation as a means of battling inequality without challenging the private property system or its seemingly unavoidable conflict with egalitarian aspirations.

Two related difficulties, however, confront efforts to make redistributive taxation the conceptual foundation of claims for more equal distributions of wealth. Initially, the mere presence of any redistributive taxation must itself be justified. Thus, to argue that there is no logical stopping point between some redistributive taxation and massive redistribution is to risk provoking a conservative backlash that concedes the point and demands an end to all redistribution.³ More fundamentally, calls for a broadly redistributive tax may give away the game at the outset. Citizens may come to see the tax as an after-the-fact exaction imposed on otherwise legitimate distributions of wealth and income. In other words, taxes will seem *redistributive* as opposed to part of the initial distribution of the nation's resources. In this context, although there may be no logical brake on egalitarian claims, powerful political coalitions will feel perfectly justified in fighting redistribution that threatens to "take" their "legitimately" held property and give it to those who may need but do not deserve it.

An alternative response to the claim that private property entails inequality might focus on the enormous ambiguity in the property concept. After all, property rights prototypically contain the right to exclude, the right to transfer, the right to bequeath, and even the right to destroy. Because it is difficult, if not impossible, to describe exactly when alteration or circumscription of these rights will destroy the essence of a private property system, tremendous opportunities exist for government action that embraces broad notions of private property while simultaneously reflecting distributional concerns.⁴ Proponents

3. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 283-305 (1985) (arguing that the Constitution's protection of private property bars all redistributive taxes); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 168-70 (1974) (criticizing redistributive taxation as forced labor). But see Paul, *Searching for the Status Quo*, 7 *CARDOZO L. REV.* 743 (1986) (criticizing Epstein's argument).

4. Nor must the legal system limit itself to distributional considerations *after* establishing a generalized property system. As Professor Singer has argued powerfully, distributional concerns, such as a desire to protect the more vulnerable party, are often built into the rules that establish property rights in the first instance. Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611, 663-701 (1988).

of rent control, for example, frequently contend that, although the landlord as owner has the right to lease her property and receive a reasonable return, she may not claim a property right to charge any rent she pleases. Indeed, the plausibility (if not the success) of institutions like rent control may suggest that prerogatives of the wealthy are more vulnerable to contextual attack than to bold conceptual challenges to the hegemony of private property.⁵

A bold challenge, however, is precisely what Professor Jeremy Waldron appears to have in mind. In his thoughtful, tightly reasoned book *The Right to Private Property*, Professor Waldron develops perhaps the most powerful response to the claim that private property entails unlimited inequality. He denies it. Indeed, he goes further. Waldron argues that the strongest rights-based arguments supporting a private property system make sense only if every citizen is assured a certain amount of property. Thus, Waldron concludes, private property's most coherent supporters are those who take distributional considerations deeply to heart.

Waldron begins by locating his work within the rights tradition and explicitly disavowing any analysis of utilitarian claims that private property spurs economic growth (pp. 5-12). Thus, Waldron seeks to demonstrate that "there is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none" (p. 5). Accordingly, the most interesting questions raised by *The Right to Private Property* involve Waldron's effort to reinvigorate the rights tradition as an ally of egalitarian goals.

This task involves several intellectual hurdles. Most fundamentally, Waldron must convince us of both the coherence and usefulness of the concept of rights and of the meaningful possibility of speaking of one right to private property as opposed to many different individual rights over resources, such as the right to use, the right to exclude, the right to transfer, and the like. From there, Waldron must proceed to persuade us of the deep-seated errors in conservative theories of property rights that base ownership on principles of acquisition and ignore distributional concerns. Finally, Waldron must demonstrate that his preferred rights-based approaches to property demand egalitarian conclusions and that a workable property system could in fact afford sufficient private control over resources to be called private while simultaneously containing the necessary limits on private transactions to ensure relative distributional equity.

5. Even Chief Justice Rehnquist seems persuaded that government has the power to regulate rents. See *Pennell v. City of San Jose*, 485 U.S. 1, 13-15 (1988). In his words, the rent-control scheme upheld in *Pennell* "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." 485 U.S. at 13.

Wonderfully, Waldron forthrightly recognizes each of these challenges and explicitly confronts the difficult issues they raise. Better still, Waldron's arguments are everywhere intelligent and often highly persuasive. Indeed, nowhere is Waldron more convincing than in his critique of rights-based theories, such as Robert Nozick's, that profess to defend private property as a moral and ethical bar to governmental efforts to achieve even minimal distributional equity.⁶ As a result, critics of rights-based theories have as much reason to study Waldron's particular arguments as do those who are sympathetic to a rights approach.

At root, however, Waldron seeks to do more than refute certain defenses of private property. Although he does not explicitly argue for private property (p. 443), Waldron offers the hope that rights-based property theory, rather than more skeptical or more radical traditions, holds the most promise for moving Western societies toward more equal distributions of wealth. Because Waldron so skillfully argues that a rights-based approach demands redress for the propertyless, his work poses a cogent challenge to those who would abandon the entire property rights tradition as inevitably linked to intellectual efforts to placate the powerful.⁷ If Waldron is correct, progressive scholars might wish to soften their traditional hostility toward invocation of property rights. Accordingly, after canvassing Waldron's arguments,⁸ this review will focus on Waldron's efforts to resuscitate rights-based theories of property. The review's conclusion is that although Waldron presents a very clear and extraordinarily sophisticated analysis of property rights,⁹ he fails to persuade progressive readers that his brand

6. For Nozick's views, see R. NOZICK, *supra* note 3.

7. See, e.g., Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1384-94 (1984) (arguing that rights talk may be harmful to "the party of humanity"); Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417, 1422 (1984) (suggesting that the Left can resuscitate rights talk provided that rights are reconceptualized as something other than individual property).

8. Because Waldron's arguments are so well done and because the book itself is lengthy and technical, considerable attention will be devoted here to sketching Waldron's views. This project necessarily involves a certain amount of oversimplification, but one glaring omission in this review demands comment. A great deal of Waldron's book consists of painstakingly close textual analyses of Locke and Hegel as exemplars of contrasting property rights theories. These chapters alone constitute a considerable intellectual achievement, and a complete analysis of *The Right to Private Property* would contain some assessment of Waldron's success at capturing the essence of these theorists. Many readers, including this one, however, will accept Waldron's implicit invitation to view the discussions of Locke and Hegel chiefly as building blocks in Waldron's more universal claim that rights-based arguments for private property produce relatively egalitarian conclusions.

9. Despite its outstanding clarity, Waldron's book will not appeal to a wide audience of lawyers or scholars. His approach is exhaustive and he tackles too many arcane points to maintain the interest of less than a devoted reader. Indeed, one noteworthy point in this regard is the book's lack of substantive footnotes. Although legal writing is often criticized for being footnote heavy, this reader found the requirement that every argument appear in text made it difficult to separate main points from minor ones.

of rights theory provides enough answers for those whose primary goal is redressing economic inequality.

One additional point must be noted at the outset. For many readers of *The Right to Private Property*, Professor Waldron's failure to consider utilitarian defenses of private property will constitute a fatal flaw. It is surprising, for example, that Waldron provides no response to the common view that private property is necessary to encourage talented individuals to work hard and thereby produce a larger social pie.¹⁰ For if this common view is correct, a governmental focus on the distribution of wealth risks so undermining private initiative as to diminish the absolute shares of those at the bottom, even as the government seeks to help them. Thus, a complete case against the inequalities within our private property system would have to include some analysis of the overall resource levels likely to be obtained under different property systems. Nor will it do simply to highlight the massive difficulties that proponents of trickle-down economics will face in demonstrating empirically how private property yields a larger social pie or why efforts to divide the pie more fairly will significantly diminish total resources. For precisely the same empirical difficulties will confront efforts to demonstrate that relatively egalitarian systems won't severely shrink total output.

It would be unfair, however, to dismiss Waldron's work for failing to come to grips with consequentialist arguments about the role of private property in enhancing aggregate wealth. Waldron's explicit goal is to explore "whether there are any good right-based arguments for private property" (p. 3), and he means to distinguish rights-based arguments from the utilitarian tradition. Moreover, Waldron's work is more than sufficiently ambitious in its own terms. Finally, Waldron at least hints at his reasons for rejecting utilitarian theories (pp. 12-13). He suggests that utilitarian calculations too easily allow the gains of one person to compensate for the losses of another, even where the loser's suffering cannot be justified using separate criteria of justice. Moreover, he is suspicious of sophisticated forms of utilitarianism that seek to defend rule-following or individual rights on grounds of utility alone. Waldron doubts such theories can resolve the problem of unjust trade-offs without abandoning utilitarian theory altogether. Accordingly, Waldron has candidly provided a road map for utilitarians who wish to take issue with his approach. This review leaves that utilitarian challenge to others. As noted above, the concern here is whether Waldron is persuasive on his own terms. In that regard, however, Waldron's inability to keep his focus on rights theory wholly sep-

10. That this view is common does not make it true. For a convincing demonstration that efficiency claims are heavily dependent on empirical assumptions and that under some conditions rational individuals might produce more in nonprivate property regimes, see Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 717-20 (1980).

arate from utilitarian concerns will constitute a subtheme of this review.

I. MOVING RIGHTS TO THE LEFT

Professor Waldron's analysis of rights-based arguments for private property begins with the invaluable insight that private property's defenders often confuse two distinct intellectual claims. One well-recognized defense of private property, which Waldron explores through discussions of Locke and Nozick, bases the purported owner's claim on actions the owner has taken with respect to the resources over which she now claims ownership. To take the classic example, a farmer who encloses and cultivates previously unowned land may assert a right to the land as a result of the actions she has taken and the labor she has invested. Waldron refers to arguments for a right to private property based on such contingent actions taken by the claimant as special rights arguments.¹¹

A second type of argument on behalf of a right to private property focuses on the role property can play in facilitating some moral or developmental interests of the individual.¹² Thus, an advocate of private property might argue that people need property to form autonomous judgments without regard to economic dependence on others, to gain practical wisdom from bearing the consequences of choices concerning the resources under one's control, or simply to assert more fully one's will over the material world.¹³ The crucial point about

11. Pp. 115-17. For a useful analogy, Waldron asks that we consider the idea of contract rights. My right that you keep your promise to me arises only after you have engaged in the contingent event of making the promise. No promise, no contract right. Similarly, special rights arguments supporting a claim to own a specific resource arise only after the claimant has taken actions (analogous to the promise) concerning those resources. P. 109.

12. In a fine chapter (pp. 284-322), Waldron considers a wide-ranging array of arguments for why human interests would be served by private property. He notes that private property might be defended as the best way to ensure the maximum liberty for each that is consistent with equal liberty for all, and that private property might be singled out as a way of defending economic liberty as a primary liberty in accord with some hierarchical ranking. Pp. 290-98. He is most concerned, however, with arguments that private property is necessary so that an individual might develop into a truly "*free man*." P. 298. (Waldron apologizes for sexist terminology in the acknowledgements. P. viii.)

Waldron does not mean to focus here on the idea that people need material resources to survive. As he correctly notes, material resources can be provided by private, collective, or common property regimes. Pp. 351-52. Rather, Waldron is concerned with the role private property plays in moral and ethical development. Occasionally, however, he pushes this point too far and the reader wonders whether it is fair to belittle "the familiar banality that it is a mockery to offer civil and political freedom to a starving man" while embracing the assertedly more profound point "that being a free man positively requires some degree of material security, since without it one would never have the opportunity to exercise the reflection, restraint, and control that constitutes an autonomous life." P. 306.

13. Waldron's chapter canvassing these arguments and others thoroughly debunks a common misconception. He notes that people often talk as though defenders of private property are logically committed to a limited government that protects only the citizens' so-called "negative liberty" to be free from external restraints. On this misguided view, once the government acknowledges that economic dependence threatens liberty almost as severely as more traditional

these arguments is that they rely not on the already completed actions of any individual but rather on the mere status of personhood.¹⁴ Waldron refers to them as general rights arguments.

Waldron uses the distinction between special rights and general rights arguments as the fulcrum for his distributional concerns (p. 117). As an initial matter, he favors general rights arguments for private property because they suggest private property is worth defending even if no citizens have taken any specific actions, such as appropriation, that would give rise to property claims (pp. 284-90). More important, Waldron illustrates how arguments that property serves an individual's moral interest push in the direction of affording property to every individual so as to satisfy that moral interest. While special rights arguments may suggest that citizens who have not performed the required acquisitive actions (the nonindustrious?) deserve no property, general rights arguments appear coherent only as they assert why everyone needs private property. After all, if I need private property to develop into a moral being, presumably, so do you. Accordingly, Waldron's attempt to demonstrate the egalitarian component of the property right hinges on his preference for general rights arguments.

A. *The Negative Case*

Because Waldron concedes that a successful special rights argument on behalf of private property might lead to a defense of massive inequality, Waldron's first task is to explain why special rights arguments for property cannot succeed.¹⁵ What makes this portion of his book so interesting is that Waldron's own commitment to rights-based arguments prevents him from resorting to more skeptical criticisms of rights-based arguments for private property. Thus, in the absence of divine revelation, one problem with special rights arguments is that the special rights proponent appears to have invented the right and is

forms of coercion, then the government must abandon private property in favor of collective or socialist systems. As Waldron correctly notes, however, some ideas of positive liberty, such as the idea that people need private property to develop into "free" ethical beings, support private property notions. Waldron later acknowledges that it may not be possible to maintain a private property system, including free transfer of resources, that will not eventually result in some citizens being so impoverished as to be left with nothing but negative liberty. He is right, however, that liberal rights theorists are free to make the case for private property even while admitting that economic domination risks undermining the very goals private property is established to advance.

14. For the pathbreaking exploration of how current property law does and should recognize property's contribution to personhood, see Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

15. Waldron carefully distinguishes between special rights theories like Locke's, which are qualified by a more general right to material resources necessary for subsistence, and special rights theories like Nozick's, which are more weakly qualified. Waldron challenges Locke for failing to draw an adequate connection between an individual's labor and his claim to ownership, but Waldron acknowledges that some theory like Locke's might someday succeed. His true target is more Nozickian theories that have strong anti-egalitarian consequences. His critique of those theories is pursued in the text.

vulnerable to the claim that she has merely attached the rights label to her own view of political organization.¹⁶ This challenge does not capture Waldron's attention, however, for he seems quite comfortable with the idea that the proponent's arguments in favor of a special right should stand and fall on the merits. The question, in Waldron's view, is whether the rights proponent can present a cogent argument that a particular interest of an individual is sufficiently important that others are under a duty to respect it.¹⁷ Accordingly, Waldron does not criticize special rights arguments on the grounds that rights theory is unable to confront the obvious questions of where rights come from, who defines them, and how they will be enforced. Waldron is instead unhappy with the answers special rights arguments provide.

The chief weakness of special rights arguments for private property, Waldron contends, is that there is no easy way to explain why the unilateral actions of one individual should impose duties on others (pp. 253-83). Waldron correctly notes that ownership claims cannot be limited to claims about the owner's relationship to the owned object. Rather, ownership entails the further claim that other persons must not interfere with the owner's use of the object (p. 267). But how, Waldron asks, can actions I take in appropriating an object impose duties on others to refrain from using it, particularly if they need that object to fulfill their own moral duties, such as feeding their families (p. 268)? More generally, Waldron wonders, how can we justify the state coercion necessary to enforce special rights-based property rights when propertyless citizens have not actually consented to spe-

16. Similarly, special rights arguments could be criticized for granting the special rights proponent the power of defining the scope of rights she herself has invented.

17. Pp. 84-90. Waldron's view here raises a deep methodological problem. For it is fair to ask what sort of arguments could possibly justify the claim that a person has a right to anything. If, for example, one seeks to justify a right to property for appropriators of unclaimed land, one argument might be that the economy will perform better when the state recognizes and rewards individual effort. But, as Waldron acknowledges (p. 202), this sort of argument risks blurring rights-talk with utilitarianism because the rights proponent must defend private property with consequentialist arguments even as she disavows consequentialism as the root of her political theory. Alternatively, an advocate of a right to private property might assert that one who has labored on unowned land should have a right to keep the land because she deserves it. But this approach simply pushes the question back, leaving it for the rights theorist to explain *why* the laborer deserves the land or more generally to find a source for claims of moral desert that is neither religious (and thus outside the bounds of secular debate) nor consequentialist (and thus ultimately utilitarian in its outlook).

As noted in the text, Waldron seeks to buttress his rights analysis against this collapse into other forms of reasoning by asking the reader to consider only whether the asserted right corresponds to an interest of the individual strong enough that others should be under a duty to respect it. P. 87. One problem here is that there is no ready scale on which to measure the strength of interests, thus there is always the danger of sliding into consequentialist phrases like "his interest is strong enough to be a right because everyone would be better off if we treated it that way." Ultimately, however, the real question for Waldron's rights approach is whether he can explain what it means for an individual's interest to become strong enough to earn the designation of individual right. In other words, when will my needing something like free speech become an obligation upon others to either provide me a chance to speak or at least not obstruct my efforts? See *infra* Section II.A.

cial rights property rules and hypothetical citizens forming a state would be reluctant to agree to rules that could result in their being morally and legally bound to starve rather than take what their neighbors have appropriated?¹⁸

Waldron's points here are well taken. As he correctly maintains, special rights arguments for private property differ from a special rights approach to contract law (p. 267). In contracts, a person can arguably become obligated to perform a promise as a result of the contingent action of promising. But, in contracts, the act of promising binds the promisor so that she arguably created her own obligation. In contrast, the special rights approach demands that the contingent actions of the appropriator or creator alone prohibit others from using the claimed resource. Waldron is right that such a result confounds our typical moral notions of individual obligation.¹⁹

18. Waldron's question here builds on John Rawls' classic work *A Theory of Justice*, J. RAWLS, *A THEORY OF JUSTICE* (1971). See pp. 271-78 (explicitly relying on Rawls). Like Rawls, Waldron argues that one crucial component in assessing the validity of a political theory (here a theory of property rights) is the extent to which those who might agree to the theory without regard to its impact on their particular circumstances will be able to adhere to the theory once faced with its adverse effects. This is certainly a legitimate question.

Waldron's resort to the contractarian tradition, however, raises doubts about the nature of his commitment to the rights approach endorsed throughout the book. Since Waldron stresses that every theory has foundational aspects from which its other conclusions may be derived (p. 64), the reader wonders whether Waldron's arguments for rights are indeed foundational or whether Waldron's real test for validity is whether a particular notion of property can be justified within the Rawlsian framework of hypothetical social contract. See generally R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 13 (1986) (noting ways in which rights theorists often vacillate between rights-based and consensus-based justifications).

Waldron may believe that such a substantial overlap exists here as to create few problems. After all, Rawls argues strenuously for a theory of justice that recognizes the primacy of individual political rights. J. RAWLS, *supra*, 228-34, 541-48. But as Waldron recognizes later in the book (pp. 398-408), rights theorists like Nozick fear that Rawlsian analysis may eviscerate rights by failing to recognize that certain rights, such as the right to one's body, should be outside collective debate. Waldron skillfully demonstrates that the specter of forced kidney transplants (from old to young?) does nothing to support a property right to external resources. Establishing a cooperative regime that limits one's ability to exercise talents so as to garner personal wealth hardly amounts to coercive dissection. But Nozick's deeper point involves the difficulty of holding on to the primacy of individual concerns when the evaluative standard is the hypothetical agreement of every member of the collective. Cf. Stick, *Turning Rawls Into Nozick and Back Again*, 81 NW. U. L. REV. 363, 377 (1987) (wondering why hypothetical citizens discussing property rights in a Rawlsian original position couldn't read Nozick's book and appreciate its merits). Why, in other words, doesn't contractarian analysis offer the supposed contracting parties the possibility of agreeing to measure gains to some against losses to others in ways similar to those that lead Waldron to reject utilitarianism?

19. The case of the father's care and concern creating a duty on his child to honor him perhaps suggests we have some familiarity with obligations not engendered by individual action. Waldron rightly assumes, however, that traditional rights theory contemplates application to a broad array of arms-length transactions outside the familial context. But cf. R. DWORKIN, *LAW'S EMPIRE* 195-202 (1986) (discussing ways in which people might acquire obligations because of their role as members in a community rather than as a result of individual actions on their part). Moreover, special rights arguments for property unqualified by more general rules guaranteeing minimal income appear to allow property-holding members of the community to exclude the propertyless from crucial material resources. It is difficult to imagine why the propertyless would wish to enter into such a community much less how community obligations could

Moreover, Waldron also correctly highlights problems with contractarian justifications of special rights arguments based on principles of acquisition. One familiar condition of a political theory based on a hypothetical social contract is that the parties who supposedly enter into this contract care deeply about their ability to comply with it for reasons other than fear of being caught cheating. But a social contract that incorporates special rights-based property rules may demand that the parties who fail to engage in the actions necessary to acquire property respect the property rights of others even if this means starving to death. Since people might never reasonably be expected to comply with a property system that compels their extinction, Waldron concludes, there is no basis to accept any special rights property system that puts rights gained through actions like appropriation or labor ahead of material need.²⁰ We might still wish to consider a theory of special rights property rights qualified by a more general right to material resources necessary for a minimal existence, but such theories would support rather than refute Waldron's underlying claims.²¹ Rights-based arguments for private property, he argues, cannot support property as a bar to more basic goals of distributive justice. Those who believe otherwise will have no choice but to confront Waldron's well-reasoned views.

somehow give rise to a duty to respect property acquired by the unilateral actions specified in the special rights theory.

20. Perhaps because of his hostility to utilitarianism, Waldron never convincingly explains why parties to his hypothetical contract might not find the total economic gains from a private property system so great as to warrant adopting a system that risks placing a few propertyless citizens in a position where they could not reasonably be expected to obey the law. The contracting parties might then assume that the state's coercive sanctions will fill the role left open by the more desirable voluntary compliance. There would, of course, be costs to abandoning the moral clarity of a system where no one is purposefully relegated to the role of outlaw. But Waldron's own commitment to measuring costs and benefits only when assessing the justification of a particular individual right renders it virtually impossible to compare the costs of a less elegant political system against the costs of a property system that might produce a smaller pie.

21. The possibility of qualifications to the special rights-based theory that would permit exceptions for those in need greatly complicates the topic here. As Waldron recognizes, a special rights theory might escape his criticism if it refused to permit acquisition of unowned resources in ways that would bind the propertyless to respect others property rights at the expense of their own survival. But Waldron insists that the exception here must be a strong one that "never" authorizes property rights to bar the claims of those in need. P. 281. A more absolute special rights theory must fail, Waldron contends, because it could not command the allegiance of those expected to obey it. Accordingly, Waldron concludes that a special rights theory might satisfy his concerns if it contained the proviso traditionally (although Waldron believes incorrectly) attributed to Locke that would prohibit appropriation of unowned resources unless there were "enough and as good" resources left over. So too would a special rights theory made subservient to a general right to material resources necessary for subsistence. In contrast, Waldron rejects Nozick's more limited conception in which acquisition would be forbidden only when the appropriation left others in a *worsened* condition as a result of losing the chance to use the appropriated resources and only after taking into account indirect benefits of an appropriative system. Pp. 280-81.

B. *The Affirmative Case*

Having completed his case against special rights arguments, Waldron turns to the considerably more difficult tasks of exploring general rights-based arguments for private property, suggesting how they might succeed, and illustrating their substantially egalitarian components. He suggests, for example, that people might be more independent with private property and that private property might encourage people to develop the prudence necessary to care for their own resources. Although it would be difficult wholly to refute these possible advantages, the important question is whether the obvious gains from individualized control over certain parts of the material world justify adopting a political system in which individuals have a *right* to something called *private property*.

1. *Defining Private Property*

Waldron deserves significant credit for taking very seriously the burden of justifying his preference for rights-talk and his defense of private property. More important, he offers intriguing suggestions around conventional objections. Consider first the familiar possibility that private property is too ambiguous a concept upon which to build a political theory. Suppose, for example, that the legal system gives me the right to ride a particular horse and to exclude you from doing so, but does not permit me to transfer that right to anyone else. Do I *own* the horse? If the answer is an unqualified yes, then the right to transfer has been disaggregated from the traditional bundle of property rights, and even the successful defense of this disaggregated private property system would fail to justify the majority of our current practices involving private control over material resources.²²

There are problems too, however, with an unqualified no. Waldron and many serious thinkers wish to avoid the sort of conceptualism that would link private ownership to a single list of designated attributes.²³ After all, can we really say, for example, that an allocation system that permits unlimited bequests differs so greatly from one that forbids bequests above a certain amount that only the former deserves to be called a private property system? If not, and if the unlimited right to bequeath is not essential to private property, what is? Indeed, perhaps it makes no sense to talk about private property at all. Maybe greater understanding would be achieved if lawyers concentrated only on the different rights often associated with private prop-

22. For an explanation of how proliferating definitions of property challenge property's role as an ideological linchpin in defenses of and attacks on contemporary capitalism, see Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69-82 (J. Pennock & J. Chapman eds. 1980).

23. P. 30. See generally Radin, *The Consequences of Conceptualism*, 41 U. MIAAMI L. REV. 239 (1986) (exploring weaknesses of conceptualism within Richard Epstein's property theory).

erty, e.g., the right to exclude, the right to transfer, and so on, without attempting to combine them into a single "private property" package.²⁴

The trick then for proponents of private property is to explain how the various rights private property might be thought to entail can be accumulated into a meaningful concept of property without having to defend the idea that there is only one bundle of rights consistent with a private property system. Waldron does this rather nicely. He argues first that people need the broad contrast between private property, collective property, and common property as a method for organizing their understanding of day-to-day life. It is unrealistic, he suggests, to expect ordinary citizens to master a whole set of detailed rules concerning control over resources without reference to a single "organizing idea" such as private property.²⁵ Moreover, "organizing ideas" are more likely to be a focal point for the societal consensus necessary to legitimate the legal system (p. 43). On this view, it is plausible to describe citizens as endorsing private property as a general idea, but implausible to expect agreement on each of its constituent parts. Accordingly, Waldron sees a vital role for the idea of private property in political discussion.

At the same time, however, Waldron carefully stresses the difficulties of identifying a single list of factors that would form necessary and sufficient conditions for private ownership (p. 30). He wants to say that systems that allow bequests and systems that don't could both be fairly characterized as private property systems. To do this, he borrows and adapts the distinction between a concept of private property and various conceptions of private property falling within the concept.²⁶ The idea here is that people can discuss questions of allocation of resources at a level of abstraction at which they all agree to be comparing private property systems with other broad general concepts such as common or collective property. This is so even if the discussion's participants cannot agree on precisely which characteristics mark out a private property system. Thus, there might be agreement about the meaningfulness of the concept of private property even if there is disagreement over the details, or as Waldron would put it,

24. See Grey, *supra* note 22, at 73 ("It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all.").

25. Pp. 42-43. Waldron builds here on Bruce Ackerman's contrast between social property — ownership claims that can be easily defended as consistent with social practice — and legal property — ownership claims whose validity frequently must be established by lawyers. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 116-18, 156-67 (1977).

26. Pp. 52-53. For earlier uses of the concept/conception distinction, see J. RAWLS, *supra* note 18, at 5-11 (competing conceptions of justice); R. DWORKIN, *supra* note 19, at 70-71 (competing conceptions of courtesy). Waldron fully acknowledges his debt to Rawls and Dworkin. P. 52.

even if there are competing conceptions of private property.²⁷ Accordingly, Waldron concludes, private property is a coherent concept that can resist efforts to break it into its component parts but is not a uniform concept that prohibits disagreement over concrete issues involving the allocation of resources.

Although Waldron's balancing act here works well as a vehicle for focusing attention away from definitional disputes and toward the reasons why individuals should or should not control material resources, the risks of relying on some collective understanding of private property should not be overlooked. Waldron is probably correct when he relies on the human psychological tendency to "organize" affairs through a few general principles rather than to memorize a set of sub-rules. Even here, though, the reader wonders whether Waldron hasn't resorted to a consequentialist point to support his conclusion. For presumably the need to respect underlying cognitive structures stems from some notion that this will improve collective organization.²⁸ But, if consequentialism runs so deep as to structure our decisions on which concepts are true (*i.e.*, those that appeal to our need for an "organizing idea"), can we really avoid consequentialist evaluations of property systems based on their effects on overall wealth?

More important, one wonders whether private property is a functioning or a desirable organizing idea.²⁹ There does seem to be some-

27. It is tricky to see how the parties might agree on the concept of private property but not be able to specify its component parts. They might instead simply agree to omit the disputed aspects, such as the right to bequeath, but coalesce around core attributes of private property like the right to exclude. But, following Wittgenstein, Waldron fairly reminds us that humans often have the ability to identify "family resemblances" without relying on a set of uniform characteristics. Waldron's colorful example points out that we might easily recognize a particular member of the Churchill family to have a Churchill face even if she lacks the Churchillian Roman nose. P. 50.

28. It would be possible for Waldron to defend his reliance upon psychological principles by claiming to be describing reality and denying the need to appeal to normative principles that transcend description. Nothing in his book, however, suggests a desire to blur the traditional distinction between descriptive and prescriptive reasoning. For recent efforts to use cognitive theory to challenge that distinction, see Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990), and works cited therein.

29. It is intriguing that Waldron's notion of an "organizing idea" turns the discussion away from the idea of justification that otherwise forms the central preoccupation of his book. Don't citizens who use private property as an "organizing idea" need to know not only who owns what but *why* they own it? If so, then the idea of private property as such may be too abstract to constitute a viable organizing idea.

Moreover, even if one accepts, as Waldron argues, that there may be a strong general rights argument on behalf of private property, that argument will say little about the content of the property rules. It may, as Waldron suggests, point away from rules that give a lot to some and virtually nothing to others. But general rights arguments do not clearly connect up specific individuals with specific goods. Rather, they support the view that once ownership rules are established, courts should protect them against neighborly and governmental intrusion. Perhaps this is why property's defenders have a tendency to adopt special rights arguments that would award first possessors an interest in what they have appropriated. See, e.g., R. EPSTEIN, *supra* note 3, at 217. Waldron is right that such arguments are different in character from the general rights arguments he wishes to defend. But maybe this means that as it now stands people really believe in conflicting justifications of private property and that the concept is in fact a poor

thing slightly patronizing about the argument that although those who have thought seriously about property see problems in rendering the concept coherent, we nonetheless need to hold on to the idea of private property to satisfy the limited conceptual abilities of the ordinary citizen. Moreover, isn't it extraordinarily likely that people permitted to fend off complexity by citing a need for an "organizing idea" will also latch on to the kind of conceptualism that Waldron's own work struggles creditably against? Indeed, those skeptical about defining private property have reason to fear that the psychological need for a simplified organizing idea will allow the idea of private property to serve precisely the ideological agenda Waldron sets out to challenge. Waldron says little about why people's cognitive need for simplifying principles won't push them toward the unjustified view that law's role is to define and defend a single set of rights constituting *the* property system. Nor does he allay our fears that the set of rights people will settle on will just happen to be that which protects the rich against government focus on fair distributions of wealth.

Waldron hopes instead to defeat conservative ideology by defining private property broadly enough to include many different views on distributional questions. But there are problems too in avoiding efforts to disaggregate the property concept through use of the concept/conception distinction. The distinction depends upon carefully separating the points of agreement (on the concept) from the points of disagreement (competing conceptions). In specifying the grounds of agreement, however, the author of the distinction risks foreclosing alternative points of view by defining them out of the game. Suppose, for example, that one person believes the right to exclude is at the core of private property so that any system that failed to include this would not really be a private property system. Another might find this view nonsense, pointing to the existence of cases in American law where owners are forced to permit others onto their land.³⁰ Do these disputants still share a concept of private property such that they are merely arguing over competing conceptions? If not, then the defender, let's say, of the right to exclude, risks using her definition of private property as a way of cutting off debate about the rules concerning exclusion.³¹

"organizing idea." See Paul, *supra* note 3. For further work on the idea that current property law in fact reflects allegiance to two different concepts of property, see J. Paul, *The Hidden Structure of Takings Law* (unpublished manuscript on file with author).

30. See, e.g., *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (finding that trespass laws do not forbid health and legal professionals from entering a private farm, over the owner's objections, to render aid to migrant workers); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting federal "takings" challenge to California court decision that its state constitution's free speech guarantees required shopping center owners to grant access to students gathering petition signatures).

31. Waldron recognizes this in a similar discussion concerning the right to bequeath. Pp. 50-51.

But if both parties do share a *concept* of property, then the *concept* must be pushed to a still more abstract level, as Waldron does when he suggests that a private property system necessarily entails little more than a scheme whereby individuals have the final say over what is done with certain material resources.³² This level of abstraction, however, contains further risks. Even when resources are collectively or commonly owned, for example, there will be designated individuals who have final say over who can use a particular resource. Consider the lifeguard who decides where beachgoers may swim. Thus, as Waldron recognizes, more communal systems will also contain subrules about who can use what resources and when (p. 41).

It is tricky, however, to distinguish these subrules from the property rules in a private property system. Waldron presumably would concede that people in a private property system have "final" say over use of resources only because the collective has adopted a private property system.³³ Thus, private property systems are faced with the inevitable task of both inventing and changing the property rules. Similarly, even collectivist regimes have no choice but to assign some decisionmaking authority to individuals (imagine a plebiscite on whether I can eat an apple for lunch today). Accordingly, the real debate might best be described as over which types of delegations are desirable rather than over which organizing principle the society adopts. Waldron is surely right that people now prefer first to settle the seemingly broader issue of the society's general orientation, but this may be a cultural artifact rather than a way of advancing

32. P. 39. Waldron states that "[i]n a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom." P. 39. This definition, of course, does not settle matters such as whether my decision to give you something on condition you use it in certain ways leaves the object with no clear individual owner and thus no longer a subject of private property. See Grey, *supra* note 22, at 70.

Waldron does address, however, the obvious problem that no system of law could ever give individuals final say over how resources are used. I might be said to own my car, for example, but no one would suggest that I can use it to run you down. Waldron contends the rules protecting pedestrians are more appropriately classed as rules of conduct rather than property rules. As he puts it, "The specific function of property rules is to determine, once we have established that bicycles may be ridden, who is entitled to ride which bicycle when." P. 33. One classic property issue, however, seems to be whether I can ride my bicycle across your land. See *Preseault v. Interstate Commerce Commn.*, 110 S. Ct. 914 (1990) (refusing to entertain claim by holders of reversionary interest that government unconstitutionally took their property by authorizing use of railroad rights of way for recreational trails). Indeed, property law has no choice but to grapple not only with who will decide how resources are used but with what decisions people may make. Moreover, the disputed issues Waldron considers, such as whether an owner may transfer a resource, appear to involve rules of conduct rather than allocational decisions. It is unclear then whether Waldron's abstract definition marks out a concept of private property with sufficient completeness for the reader to identify private property as a functioning system to contrast with other approaches.

33. Although Waldron defends individual rights, he does not describe these rights as natural or preexisting the state. Accordingly, his willingness to accept the burden of justifying rights from the perspective of winning collective agreement compels him to defend private property as a collective invention.

discussion.³⁴

At root, the combination of the "organizing idea" defense of a concept of private property with the concept/conception distinction threatens to overlook the main point of those who argue that private property tends to break down into a series of rights rather than standing as an overarching principle. Definitional skeptics contend that private property works as an "organizing idea" precisely because it relies on a particular *conception* of property. Waldron readily acknowledges, for example, that private property would not work as an "organizing idea," if ownership meant you could keep things you purchased and were given to you, unless someone else showed a greater need for them. But how can we decide whether such a system would still be a private property system (hence within the concept as a competing conception) or outside private property (perhaps because the rules concerning neediness were now the true allocational guidelines)? If such a system is a private property regime, the arguments for it might be expected to look different from those presently advanced to defend contemporary private property systems. Indeed, the instability of such a system would threaten even a general rights argument stressing a person's need for control over resources. But if such a system falls outside the *concept* of private property then certain substantive views have been smuggled into the concept in a way that risks foreclosing political debate.

In sum, one strength of Waldron's book is the extent to which he tackles definitional skepticism directly. He brings a clear, fresh description to the problem, and retains confidence that we can draw strength from traditionally plain talk. At the same time, Waldron is aware of complexity and indeed contributes to our understanding of it.³⁵ *The Right to Private Property*, however, will not put an end to the debate over whether private property is an intellectually as opposed to rhetorically meaningful concept. One hopes Professor Waldron will have more to say on the subject.

2. *The General Rights Approach*

After confronting the dilemmas in defining property, Waldron's remaining task is to tame the beasts lurking in the thicket of rights analysis.³⁶ The questions are familiar. What does it mean to say a person has a right to something? How do rights-based arguments differ from other forms of political argument? Can rights conflict and what hap-

34. For the view that contemporary commitment to a general concept of private property results from private property's role in the ideological and practical escape from feudalism, see Grey, *supra* note 22, at 73-74.

35. Waldron's discussion beginning at page 26 would be a welcome addition to any set of materials introducing the idea of property to first-year law students.

36. See generally *Symposium: A Critique of Rights*, 62 TEXAS L. REV. 1363 (1984).

pens if they do? Waldron must also answer the further questions arising from his claim that a general right to private property makes sense only if everyone has some property.

Waldron tackles these questions with admirable precision. As noted above, he carefully defines a right-based argument as one that stresses why an individual's interest is strong enough that others are under a duty to respect it (p. 87). One striking feature of this definition is that Waldron eschews reliance on claims of natural or divine right. Thus, Waldron depends upon crafting arguments for individual rights that will convince the many to respect the rights of the few or the one. He does not, however, address the perplexing issues involving the ultimate grounding of an argument for individual rights that appeals — as he seems to — to collective ratification. Consider two possibilities. The rights proponent may suggest to the group that a particular right, *e.g.*, the right to liberty, should be respected either because some aspects of life would be better if it were or because recognition of the right would be consistent with the group's well-recognized allegiance to other ideals.³⁷

The first approach threatens a complex justificatory circle. An argument for a particular right that stresses gains to the right-holder remains nonconsequentialist largely because the group's focus is held to one right at a time. Thus, we are asked to consider the strength of the individual's interest and not how respecting that interest functions in maximizing the overall interests of the group. But why should we consider only one interest at a time? In other words, how can we decide whether there is a right to liberty without simultaneously considering how a society that respected liberty would also be able to guarantee security and other purported rights? One response is that the group can make better decisions by considering one right at a time. Again, though, we need to define "better." Ultimately, we need a normative standard to judge between the utilitarian and rights approaches, and we find this hard to achieve because rights-analysis and utilitarianism constitute the principal justificatory elements we have for building normative standards.

The second approach avoids the problem by appealing to an already recognized ideal whose justification must itself surmount the difficulties of the rights tradition. The interesting question here is how the proponent of the asserted right argues for "consistency" with the pre-established ideal. Ronald Dworkin has perhaps most eloquently argued that inconsistent rules often deserve harsh condemnation as

37. The chosen phrase "some aspects of life" is deliberately ambiguous between some aspects of group life and some aspects of the life of the individual who is claiming the right. The former definition would suggest that rights are being justified largely in consequentialist terms and thus run the risk of not being right-based arguments at all. The latter definition seems truer to Waldron's spirit but it raises the problem of crossing from the idea that the individual will gain from the right to the idea that the group should actually recognize the right.

"checkerboard solutions."³⁸ Consider a rule that a woman born between January and July has a right to an abortion, but one born between August and December does not. But Dworkin has also conceded that there are times when decisionmakers may rightly part from consistency. Legislatures, for example, may extend a new rule of tort liability to one industry before applying it equally to all.³⁹ The problem then is that a theory of consistency alone can't tell us when we must be consistent.

Suppose an opponent of Waldron's suggested right to private property agrees that it would be consistent with her idea of liberty to grant the property right but that society already has enough liberty and should now pursue other values. Waldron might reject her reference to the needs of society as unfairly consequentialist. This seems rather harsh, however, because consideration of which rights people have must ultimately involve reference to the needs of others. After all, Waldron's definition wants the right-holder's interest to be strong enough so that *others* are under a duty to respect it. Alternatively, Waldron might correctly insist that the property opponent have a "principled" reason for giving up on liberty short of granting the argument for property. But rights theory alone cannot tell us what standards to use to determine which arguments are principled.⁴⁰ Here again we seek a normative standard to determine when consistency is the prime value and when consistency might fairly be sacrificed in favor of other goals.⁴¹ In short, a full defense or even exploration of a *right* to private property would have to go beyond mere demonstration of private property's advantages to property holders. Readers would need some clues concerning desirable methods for weighing these advantages against other values the reader holds equally dear.

Waldron, however, fairly chooses not to write about every problem involved in achieving suitable normative standards. His immediate goal is to achieve a definition of rights that is strict enough to distinguish rights talk from less individualistic forms of moral argument, such as utilitarianism. Thus, he sees the emphasis on individual inter-

38. R. DWORKIN, *supra* note 19, at 178-84.

39. *Id.* at 217-18.

40. For a general argument that rights theory is inadequate because it depends upon unargued-for legal and social contexts to give meaning to asserted rights, see Tushnet, *supra* note 7, at 1371-80.

41. The worship of consistency pervades Waldron's entire intellectual effort. He deserves praise for demanding that defenders of private property be true to the arguments they raise. Thus, Waldron argues that if a particular justification for private property, say personal independence, points in the direction of broad equality, then "the logic of justification" (p. 417) forces the proponent of the justification either to support equality or abandon the justification. One cannot but applaud Waldron's commitment to intellectual integrity while at the same time wishing he would acknowledge the extent to which intellectual consistency is difficult to achieve and not necessarily the only test of the good faith of our intellectual opponents. See Boyle, *Legal Fiction*, 38 HASTINGS L.J. 1013, 1017-19 (1987) (reviewing R. DWORKIN, *LAW'S EMPIRE* (1986)) (criticizing Dworkin for falsely linking consistency with morality, justice and the good).

est as distinct from a consequentialist focus on improving general welfare.⁴² At the same time, Waldron wants to leave enough flexibility in the idea of rights so that rights proponents will not necessarily be tied to any particular view of political organization. Accordingly, he distinguishes the broad category of right-based arguments from more narrow claims concerning which rights people are said to have (pp. 62-63). So, for example, Waldron explains how people may disagree over whether there is a right to a minimum income while recognizing that a right-based argument for that income would stress an individual's strong interest in receiving one. With this distinction, as with the distinction between concept and conception, Waldron hopes to steer a course between skepticism (there are no rights, there is no such thing as private property) and absolutism (there is only one set of rights, there is only one true definition of property).

For many readers, Waldron's fine-tuned effort to carve a place for rights-based analysis will constitute a significant contribution. Although Waldron explicitly builds on earlier work,⁴³ his clarity and common sense present readers with an account of rights arguments that captures their individualistic spirit without embracing moral dogmatism. Waldron explicitly acknowledges, for example, that individual rights will inevitably conflict and he recognizes that resolution of such conflicts will be neither easy nor value-free (p. 77). At the same time, Waldron's book does not attempt or achieve a complete theory of rights. Readers will wish, for example, that Waldron said more about what it is that makes an interest strong enough to place duties on others. Readers would also benefit from Waldron's views on what types of analysis will resolve rights conflicts.

C. *Property and General Rights*

Ultimately, the most interesting and controversial aspects of Waldron's embrace of rights (aspects that readers may lose sight of during the somewhat tedious, early portions of the book) involve Waldron's concrete application of his ideas to the problem of private property. Waldron argues that if individuals do have a strong enough interest in private property to warrant treating private property as a right, then every individual has that interest and it cannot be satisfied by a system where some people have no property at all. This flows from the fact that most of the interests that Waldron asserts might be promoted by

42. Waldron acknowledges that utilitarianism is itself an individualistic philosophy since its goal of maximizing general happiness arises from a desire to maximize the total satisfaction of individuals. P. 73. He contends a rights-based approach is still more individualistic, however, because it places certain interests of individuals (rights) outside the ordinary calculus and generally requires some form of apology, explanation, or repayment to be made to the holder of the interest on those occasions when an interest *is* traded off against another. Pp. 78-79.

43. Waldron forthrightly acknowledges his debt to Ronald Dworkin (p. 64), Neil MacCormick (p. 79), Joseph Raz (pp. 79, 87), and H.L.A. Hart (p. 95).

private property, such as the ability to exercise control over the material world, won't be satisfied unless the individual actually acquires material resources. Moreover, in what is perhaps the book's best chapter (pp. 390-422), Waldron convincingly explains why merely granting people an opportunity to acquire property will not sufficiently answer the egalitarian implications of many right-based arguments.⁴⁴ If people need property to form independent judgments, Waldron points out, they need resources, not simply an opportunity to acquire them (pp. 414-15).

Nor does the intuitively strong idea of self-ownership readily translate into a system that protects opportunities while ignoring results. Even if one grants that a person is entitled to own herself and her talents, Waldron maintains, this says nothing about what sort of social structure should be created to govern the reaping of benefits from those talents. As Waldron colorfully puts it, self-ownership no more entitles a talented mineral prospector the opportunity to ply his trade than it would entitle a talented *apparatchik* the opportunity to continue living under socialism (p. 407). Accordingly, Waldron concludes, it may be that some arguments support merely the opportunity to acquire private property. A pseudo-Social Darwinism, for example, might rest on the benefits of stiff competition to individual growth (pp. 421-22). But the vast majority of arguments supporting private property push beyond the point of equality of opportunity to the point where the state must make some effort to ensure some equality of outcome.⁴⁵ If people have a right to private property because they need

44. One particularly nice observation at the beginning of this chapter concerns what Waldron calls the "asymmetrical" character of familiar arguments involving property claims. P. 390. On one hand, Waldron notes, many take it for granted that the expropriation of tangible resources owned by the rich constitutes a violation of the right to private property even if the aggrieved person retains the opportunity to acquire additional property. On the other hand, it is often assumed that a poor person's rights are satisfied if she retains the opportunity to acquire property even if she actually has none. Of course, many explanations may exist for this apparent anomaly. Uncompensated expropriations may be inconsistent with the idea of private property. Or, from a consequentialist perspective, expropriation may be seen to defeat the incentive-generating aspects of a private property system. But Waldron is wholly correct that the chameleon-like character of opportunity-based arguments is a problem that seldom receives the attention it deserves.

45. In another fine section, Waldron describes the ideal of "equality of opportunity" as unstable. Pp. 415-18. He notes that the concerns that lead one to believe people need a good in question, for example, education, are unlikely to be satisfied by a system that offers only an opportunity to acquire that good. Thus, if we believe people will be more capable citizens if they have a certain amount of wealth, we will want them to have that wealth and not merely an opportunity to acquire it.

Waldron recognizes the possibility, however, that government handouts may defeat some of the arguments on behalf of private property. If the reason for private property, for example, is to encourage a sense of prudence and responsibility, that sense may be thwarted if the government is ready to bail out those who squander material resources. P. 419. Thus, Waldron suggests, government might be sensitive in its methods of achieving relative distributional equality, eschewing handouts in favor of limits on large bequests, efforts to foster home ownership, and other alterations of the property framework. P. 420.

property to satisfy some strong individual interest, Waldron insists, everyone must have some.

One last problem, however, haunts Waldron's distributional conclusions. As he defines it, the concept of private property implies that individuals have final say over the resources they own.⁴⁶ But what happens if owners, exercising their final say, choose to transfer resources to others in transactions that result in some persons owning less than the minimal amount implied by general rights arguments for private property? More concretely, Waldron asks, suppose someone loses his shirt in a poker game (p. 423)? How will the legal system dedicated to preserving some level of economic equality prevent the disruptive transactions (bad bets, poor investments) without destroying the institution of private property that general rights arguments apparently support? Similarly, how can a true system of private property prevent accumulations of wealth that result from voluntary transactions? As Robert Nozick asks us, how can a *private property* system stop people from paying Wilt Chamberlain for his basketball talents?⁴⁷

Waldron takes this problem very seriously, noting that if the objection succeeds then the distributional implications of general rights arguments are themselves incoherent.⁴⁸ In other words, if private property necessitates a level of individual control over resources that prevents governmental efforts to ensure that everyone has property, then the familiar political roadblock to egalitarian claims returns. Does it matter that our arguments for private property demand certain levels of equality, if in practice we can have private property or equality but not both?

Waldron has no definitive answer. Not surprisingly, he invokes both of the strategies suggested at the outset of this review. He notes first that the concept of private property is one of many conceptions and thus there is no logical link between private ownership and absolute right to transfer resources (p. 432). Accordingly, powers of transfer might be qualified by a well-recognized system of taxation designed to maintain a wide distribution of property rights (p. 436). Similarly, Waldron proposes that certain kinds of transfer simply be defined out of the private property concept. Thus, he suggests that a system bar-

46. For obvious limits on the idea of "final say," see *supra* note 32.

47. R. NOZICK, *supra* note 3, at 161.

48. Pp. 431-32. Waldron discusses both a Nozickian and a Marxian version of the objection to the egalitarian implications of general rights arguments for private property. Pp. 423-31. The Marxian claim is that the historical trend toward large-scale enterprises will inevitably cause private property systems to concentrate wealth in fewer and fewer hands, leaving the great masses of people without the private property that general rights arguments suggest they deserve. Waldron correctly notes that extreme versions of this Marxian claim seem to leave no role for independent assessment of the justice of present day institutions. On this view, we need simply wait for the inevitable progress of history. P. 431. In the meantime, in case Marx was wrong, it seems worth considering whether an egalitarian system of private property is conceptually possible even if it is historically hopeless.

ring or taxing certain types of bequests might satisfy the main general rights arguments for private property yet substantially eliminate one source of inequality (pp. 435-36). Here Waldron makes explicit use of the disaggregation of the property concept to argue that the property/equality conflict is less severe than it seems.⁴⁹

But Waldron has not left us just where we started. For Waldron has made a strong case that private property cannot be well defended unless one makes a simultaneous commitment to ensuring that every person has substantial resources. Progressive taxation and regulatory schemes like rent control are not simply Waldron's idea of how to limit the domain of private property. Rather, he views them as necessary to make good on the very justifications for private property that he finds persuasive. Taken alone, reliance on progressive taxes threatens to shift the discussion to appropriate taxation levels and risks sacrificing the advantages of the frontal assault on nonegalitarian defenses of private property. But Waldron wants the focus on taxation to be part of the frontal assault. Similarly, efforts to carve up the traditional bundle of property rights appear as blatant moves to achieve political results, unless one always keeps in mind that each part of that bundle must constantly be tested and judged against the background justifications for the private property system.

At bottom, it is this insistence on questioning justifications that constitutes Waldron's most significant contribution. If it turns out that we are persuaded that people have a right to private property to facilitate their moral interests as commercial traders, Waldron agrees, then we won't want a private property system that places stringent limits on the right to transfer one's goods (p. 433). But if, as Waldron suspects, our rationales for private property stem more from our interest in allowing people the necessary material resources to develop into ethical beings, then Waldron concludes we have an obligation to shape our conception of property to ensure that our underlying justification is fulfilled. Whether or not Waldron's work is ultimately successful, he is certainly correct about that.

II. THE BURDEN OF RIGHTS-BASED THEORIES

Although *The Right to Private Property* reflects extensive knowledge of property theory, it is fair to say that Waldron has not been

49. Waldron also reminds us that general rights arguments for private property call for relative, not absolute, equality. Pp. 438-39. If people need private property to help develop moral independence, then a system that permits some to have nothing will be untrue to its goals. But the fact that some have much more than others won't necessarily defeat the system's underlying purpose as long as those at the bottom possess the necessary minimum. Although many progressives will rightly worry that this open-ended qualification may be large enough to permit all but the most extreme levels of poverty, see *infra* text accompanying notes 52-54, Waldron remains confident that continual testing of institutions against the justifications underlying the private property system will limit inequality to more acceptable bounds.

significantly influenced by the legal theorists most skeptical of the idea of property rights and rights in general.⁵⁰ As a result, Waldron fails to consider some important objections to his approach; objections that may dominate many reactions to his overall enterprise. This section will explore some of these anticipated objections. Its goal is to avoid dismissive criticism of what is a very fine book. The hope instead is that sustained investigation of some of the weaknesses within Waldron's writing will enable those inside his tradition and those outside it to work more closely together toward the paramount shared goal of redressing inequalities endemic to contemporary American life.

The most predictable objections to Waldron's book are somewhat formulaic and can be summarized briefly. It is sometimes said, for example, that talk about rights runs the risk of being so abstract as to be unable to produce specific political conclusions applicable to the real world.⁵¹ Surely this is a problem with a book exploring the right to private property that not once comments on the specific resolution of a concrete legal dispute. Indeed, Waldron's intellectual framework is so intricate that he fully recognizes that the rights of some impose duties on others (p. 87), that rights often conflict (p. 77), and that individual need must qualify claims of right (pp. 439-40). Critics may fairly wonder how emphasis on the presence or absence of a right will help adjudicate competing claims that arise from this complex framework (e.g., my need for braces against your right to keep a fixed percentage of your wages).

A substantially similar criticism of rights analysis is that its hard won conclusions are themselves too indeterminate to be worth the effort.⁵² Waldron, for example, devotes enormous energy to demonstrating that if there is a right to private property then everyone has a right to a certain minimum amount of property. But how much is the minimum? Is it defined in relative or absolute terms? Do egalitarian concerns vanish once the minimum is reached? How will a guaranteed minimum help resolve concrete disputes? To what extent, for example, does society have an obligation to provide resources above the minimum to handicapped individuals who require special medical equipment?

50. No suggestion is made here that Waldron is biased in his choice of significant authors. He devotes extensive energy to the works of Robert Nozick and Karl Marx, John Locke and G.W.F. Hegel, John Rawls and Wesley Hohfeld. Waldron chooses not to consider, however, the critical legal studies challenge to talk of property rights or certain of its realist forbearers. See, e.g., R. UNGER, *supra* note 18, at 36-38 (criticizing liberal version of rights and naming property rights as prototypical); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) (describing the apologetic role of rights discourse within liberal theory); Singer, *supra* note 4, at 632-63 (criticizing liberal vision of property rights); Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

51. See, e.g., Tushnet, *supra* note 7, at 1375.

52. *Id.* at 1371-82.

Waldron believes the trajectory of our arguments for private property can help determine the necessary minimum level. So, for example, if private property is adopted as a means of ensuring individuals a degree of independence, then each person must have enough so as to be sufficiently independent. The complexities here, however, may be overwhelming.⁵³ How much does one need to be independent? Am I more or less independent if I know that if I waste what I have I will receive new supplies? If the poorest people in well-developed nations have more than almost everyone in less-developed nations, should the focus of richer governments be on internal redistribution or foreign aid? The point is not that consensus around an idea of a minimum doesn't advance debate. Rather the fear is that it doesn't advance it far enough.⁵⁴

Still another frequent objection to rights analysis stems from its perceived over-emphasis on the individual.⁵⁵ One concern is that definitions of rights, like Waldron's, that focus on individual interests are too likely to overlook the importance of group processes in social life. This objection may take an ethical turn. Thus, the premium placed on individual values, such as the independence, prudence, and self-assertion that Waldron offers as supporting private property, may be described as obscuring other equally important values like fraternity and community. Or the objection may take a psychological turn, focusing on the extent to which individual interests cannot be separated from group acculturation. These objections remind us that Waldron should have attempted more explicitly to defend his decision to write solely about avowedly individualistic approaches to property theory.

The short shrift Waldron gives to the overwhelming contemporary importance of corporate ownership perhaps best illustrates Waldron's overzealous commitment to individualistic theories. Waldron asks the reader to consider Western-style corporate ownership as an outgrowth or "mutation" of private property (p. 57) rather than a form of ownership in its own right.⁵⁶ He argues that corporate ownership often arises as a result of private initiatives undertaken to fulfill the purposes

53. I am grateful to my colleague Jim Lindgren for stressing to me the difficulties in defining a minimum level of wealth or income.

54. Nor is this purely a theoretical concern. Consider, for example, the Supreme Court's argument in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), rejecting a challenge to the funding method for Texas schools. As long as Texas provided each student the necessary *minimum* education, the Court held, there was no constitutional violation in a funding scheme that permitted the most affluent district to spend \$594 per pupil each year while the poorest had only \$356 per student.

55. See, e.g., M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 60-65, 147-52, 173-74 (1982) (criticizing deontological theories for overemphasizing justice and individual rights at the expense of a more constitutive sense of community); Lynd, *supra* note 7, at 1418-22 (attempting to rescue concept of rights from its traditionally individualistic origins).

56. Waldron recognizes that corporate ownership can also form part of a collective property system when the state assumes the corporate form for purposes of resource control. Pp. 58-59.

of private individuals. Moreover, he notes that property law analogizes the corporate owner to an individual owner for purposes of granting the corporation final say over use of the owned resource (p. 58).

The initial question here is why recognition of corporate ownership doesn't threaten the very existence of private property as an "organizing idea."⁵⁷ Why, in other words, aren't the rules regulating corporate governance more fundamental to the society than any rules of private property? Certainly, this can't be because corporations own insignificant amounts of property. More likely, it's because theories like Waldron's are reluctant to give up on the idea of the primacy of the individual.

Still more important, readers are likely to wonder why the relentless examination of justifications that characterizes Waldron's book is not also applied to the question of corporate ownership. If private property is to be justified by the individual's need for economic independence, can corporate ownership really be justified in the same way? Waldron's characterization of corporate ownership as simply part of a private property system spares him the need to address this question. But it also gives his book the appearance of taking on the abstract issue of a minimum income without confronting one real source of concentrated economic power in America. After all, the *Right to Private Property* purports to be an in-depth exploration of the strengths and weaknesses of arguments for a right to private property. It would have been better had Waldron considered all of these stock objections.⁵⁸

Above all, however, the most serious shortcomings of Waldron's book involve two additional points central to the heart of his enterprise. First, the argument Waldron uses to criticize special rights arguments for private property has considerable bite against the general rights arguments he wishes at least preliminarily to defend. Thus, Waldron needs to explain more fully his sympathy for the general rights approach. Second, Waldron's attack on special rights arguments too quickly minimizes the principal way in which special rights arguments are superior to general rights arguments. Special rights arguments not only advance the idea that individuals have a right to private property, but also offer an approach for determining who has a right to what. General rights arguments do not. Accordingly, the careless shifting back and forth between special rights arguments and general rights arguments that Waldron correctly labels a "fraudulent eclecticism" (p. 444) may also be a structural necessity. If this is so,

57. See *supra* text accompanying notes 25-35.

58. For an innovative attempt to reinvigorate rights analysis that considers and responds to these objections, see Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1224-34 (1989).

Waldron will encounter serious difficulty in rescuing the concept of private property from the force of his own critique.

A. *Can Rights Be General?*

Waldron's attack on special rights arguments for private property rests on a simple and powerful premise. The unilateral actions of one citizen should not be able to place duties upon other citizens, particularly when those duties might involve significant sacrifice. Thus, it would be all well and good if my appropriation of unowned land created a special relationship between me and the land. But for me to own the land I would need a special relationship with others who can no longer use it now that I have been designated the owner. The key to this relationship, however, cannot be based only on what I have done. In Waldron's view, it must arise either from actual or hypothetical agreements between me and my fellow citizens.

The problem is that a structurally analogous challenge applies to general rights arguments as well. After all, Waldron's definition of all rights-based arguments asks us to examine whether the strength of an individual interest warrants imposing a duty on one's neighbors to protect it. But, if the unilateral actions of one citizen cannot impose duties on others, it is fair to ask whether the unilateral interests or needs of the individual can do so. In other words, no matter how strong my interest in having private property, we can only cross the barrier that converts interest to right after saying something about the character of the interest that makes it fair to require others to respect it. But Waldron never satisfactorily explains what that is. Nor would that task be a simple one.

The underlying dilemma Waldron faces is how to give enough content to the asserted set of rights so that the theory differs markedly from utilitarian and communitarian approaches, while at the same time not building in a particular set of rights that render the theory subject to the charge that, like special rights theories, it merely protects unilateral expectations. As the phrase *general* rights implies, Waldron's answer is based on universalization. Thus, when Waldron speaks of rights, he never really means the concrete rights of an individual derived from her unique circumstances. My need for a seeing-eye dog, for example, could never place my neighbors under a duty to provide me with one. My particularized need is, after all, unilateral. I might still have a right to the dog, however, if I can redescribe my need in terms that apply *generally* to all. Thus, I can argue that everyone has an interest in unrestrained locomotion and that interest is strong enough that others should respect and defend it.⁵⁹ The crucial

59. Another familiar weakness of rights theory is that it appears to offer little guidance for identifying the proper level of generality applicable to a given dispute. How are we to know, for example, whether we should see proposals for governmentally supplied seeing-eye dogs as efforts

question is whether the resort to generalization substantially undercuts Waldron's defense of the rights approach.

Waldron argues at the outset that rights theory is preferable to utilitarianism because rights theory makes it more difficult to justify trade-offs whereby one person would suffer (perhaps unjustly or without cause) so that others might benefit (pp. 77-79). This argument works well in the case of special rights arguments. The right-holder takes unilateral actions and becomes entitled by virtue of the special rights theory to block claims of his fellows that would interfere with enjoyment of the special right. Thus, individual claims (just ones where the special rights theory succeeds) prevail over demands of the collective. The cost, however, is that those injured by invocation of a special right must respect that right even where they played no part in creating it and even when its application causes them significant harm. Waldron, perhaps wisely, is unwilling to pay this price.

Instead, Waldron wants to appeal to rights that through the force of argument will apply to and thus command the respect of everyone. It is much more difficult, however, to understand how general rights arguments operate to weaken Waldron's feared demands of the collective. For the question here is never really whether *an* individual has a right to something like property but instead whether *every* individual has that right. And, how are we to decide whether every individual has a particular right without a detailed understanding of what it would cost every individual to respect that right?⁶⁰ Waldron is correct that once the right is recognized general rights theories will function differently from straightforward utilitarian approaches.⁶¹ A right may be respected even when its invocation will obviously cause others to suffer and perhaps even when long-run overall suffering will exceed overall gains that the right generates. But the problem with general rights arguments arises before the question of application. The trick is in deciding what general rights there are.

Consider, for example, the hypothetical citizen (of whom Waldron seems so fond) sitting down to decide whether there is a *general right* to life. She would presumably agree that each individual has a very strong interest in living. But does this interest rise to the level of right? To answer this question our imagined citizen must think carefully

to afford blind people the same *right* to locomotion as sighted people or as altruistic endeavors to provide the blind, however deserving, with special privileges? See Tushnet, *supra* note 7, at 1372-73 (criticizing rights theory for permitting advocates to manipulate outcomes by focusing on the level of generality consistent with a desired result).

60. We might ask whether from a moral perspective the duty-holders are themselves obligated to respect the asserted right. In Waldron's terms, however, theories that focus on the moral situation of the duty holders are duty-based, not right-based, theories. Pp. 68-73.

61. As Waldron recognizes, it is perfectly plausible to incorporate respect for individual rights as part of a utilitarian analysis. Waldron, however, fears that such respect will never go deep enough if the existence of the right must always be justified in utilitarian terms. Pp. 12-13.

about what the duty-holders will be sacrificing in agreeing to respect the right to life. After all, it is because the sacrifice might be too great that Waldron rejects special rights arguments for private property that might leave the duty-holders without moral grounds to use resources they need to survive.

Acknowledging a right to life, however, might indeed place significant duties on everyone. We all might need to work hard to support the sophisticated medical equipment needed to save severely damaged premature infants. How are we to decide whether individuals have an obligation to take on this burden? And, if we decide against at least this conception of a right to life, won't we imagine the damaged newborn to feel as though trade-offs between the group and individuals are being made too easily?⁶²

Waldron might object that the whole point of the general rights approach is that the question of whether a general right to life exists is considered not from the standpoint of the group but from the standpoint of the representative individual. Thus, the baby's right to necessary medical care won't be denied merely because of the accumulation of small benefits to many others, but because a representative individual would conclude that the interest in medical care is not strong enough to place representative individuals under a duty to provide it. Presumably, this judgment will include imagining herself as the damaged infant as well as thinking about what it would cost the average citizen in hours spent to provide the necessary equipment.

A case can be made, however, that in many respects the judgments of the representative individual will function to frustrate the real-life individual in the same way as the demands of the group. For almost by definition, the representative individual can consider only those aspects of human life that individuals have in common.⁶³ This is why, for example, success at rights rhetoric always requires translation of an individualistic claim, like an asserted right to wear a skull cap, into a universal claim, like the right to practice one's religion.⁶⁴ It is also why an asserted right unique to the experience of a particular individ-

62. The selection of a so-called positive right that would require the duty holders to affirmatively aid (as opposed to merely not hindering) the right holder may seem to stack the deck. Precisely the same analysis, however, applies to more traditional negative rights. Even if the right to life, for example, is conceived of as the right not to be killed, the imaginary citizen must still consider the costs of living a life in which he cannot murder to gain what he needs. These costs may appear trivial if the imagined society is a just one. Would economically disadvantaged parents of a severely deformed infant, however, be sure they would want to grant a right to life in a country where they were forbidden from having more than one child and the economic contributions of their child were their best hope to escape abject poverty?

63. For extended discussion of this idea focusing on the danger that abstract concepts like "the representative individual" will deny conflicting experiences, such as those between men and women, see Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

64. There is, of course, no guarantee that the minority will be able to persuade the majority that its idiosyncratic practices deserve constitutional protection. See *Goldman v. Weinberger*,

ual or group won't fit well under the rubric of general rights. Thus, general rights theories have work to do in presenting themselves as individualistic improvements to utilitarianism.

At the same time, the demand for universalism within rights theory is not necessarily mistaken. It protects against efforts to parade idiosyncratic needs under the rights banner. Thus, universalism explains the power of Waldron's critique of special rights property theories that seek to transform the unilateral actions of one into duties on others. Once one takes the demands of universalism seriously, however, it becomes increasingly difficult to draft a theory aimed at placing the rights of the individual above the interests of the collective. For nothing the individual has ever done or experienced can count in determining what her rights are. Yet if this is so, how can we really know which of her interests are strong enough that others are under a duty to respect them? In the end, the difficulty of answering that question renders the general rights approach highly problematic. If Waldron's enterprise is to succeed he needs to tell us much more about how we cross the barrier from strong interest to right. He needs to explain why strong individual interests don't have the same unilateral character as the conditional actions he forcefully argues cannot create special rights to private property.

B. *Fraudulent Eclecticism, Structural Necessity, or Both?*

Waldron's stinging criticism of special rights theories further adds to the difficulty of giving content to a so-called general right to private property. A special rights theory might tell us not only that people should own a certain amount of property to achieve economic independence but that I should own Blackacre because I have labored upon it. The best we can expect, however, from a theory that merely says it's a good idea for some people to own some things is a bit of guidance away from purely collective or common property systems. But since even the staunchest opponents of private property would probably grant that personal items (like toothbrushes) are best owned by individuals, we are eventually going to have to get past general considerations into specific debates like which goods should be privately owned and what principles should govern use, exclusion, and transfer. Many things could be said about these questions, but few will doubt that they are difficult and, more important, controversial. Any worked out system of property law will need a mechanism for addressing these problems.

The ideological goal of private property's more conservative defenders is to settle property law's difficult questions with one grand flourish. Thus, once it is decided that I own Blackacre, all the issues

475 U.S. 503 (1986) (rejecting constitutional challenge to Air Force regulation that barred Jewish serviceman from wearing a yarmulke on duty).

of use, exclusion, and transfer are said to fall into place as a result of the (usually broad) definition of ownership.⁶⁵ It is much to Waldron's credit that he thoroughly refutes any such simplistic solutions. He demonstrates how ownership can mean many different things, and in doing so, he brings again to the surface the deep-seated political controversies involved in establishing societal ground rules governing private control over resources. But how are these controversies to be resolved?

It is here that the rhetorical advantages of special rights theories to private property systems are most easily seen. For the hope of a special rights theory is that the same underlying justification that established the desirability of private ownership will also come into play in resolving concrete property law issues. Thus, if I am to be rewarded for my labor in enclosing unowned land, special rights theories will require special reasons to adopt rules that would limit my reward by restricting my ability to transfer that land.⁶⁶ More generally, special rights theories hope to reduce property law disputes to the small number of issues suggested in the work of Robert Nozick. Did the claimant acquire the resource in accord with the principles of just acquisition and just transfer set forth in the special rights theory? If so, then the claimant is the owner, and the hope is that this will settle a great number of disputes.

Waldron effectively demonstrates, however, that the grand hope of special rights theories is in fact a vain one. Beyond the obvious problems in applying even the clearest special rights theory (what, for example, counts as first possession?),⁶⁷ Waldron shows both that the justifications for special rights theories are themselves questionable and that no serious work has been done to link special rights claims to ownership with special rights claims to a power of unlimited transfer (pp. 260-61).

But without special rights theories, how can a functioning property system settle the day-to-day issues of property law? To what "organizing idea" will legal decisionmakers appeal in determining whether I may come onto your land to confer with migrant workers living there? Waldron's work suggests two answers. First, like special rights theories, general rights theories may themselves suggest underlying justifications that will point to specific resolutions of property issues. Second, the independent value of adhering to preexisting rules

65. See Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971 (1985) ("To the person who thinks of rights as being acquired by first possession, the right of alienation seems to be an inescapable element of the original bundle of property rights.")

66. *Id.* at 973-90 (suggesting that restraints on alienation are justified when necessary to prevent misuse of resources like guns or to prevent overexploitation of resources owned by common pool).

67. See Paul, *supra* note 3, at 757-65 (criticizing first possession as a useful tool for resolving property disputes).

may allow many property questions to be settled by convention. Subsequent disputes may then be settled simply by appealing to those conventions. Neither of these approaches, however, has the ideological power of special rights theories. Nor can either function effectively as the sole conceptual basis for a private property system.

The underlying justifications for a general right to property are simply too vague to provide guidance for a wholesale set of property rules. It is easy to see that a general rights-based theory might support restrictions of the right to bequeath large estates, if the rationale for private property suggests everyone should have some property and the predicted effects of large bequests is that some people will have nothing. Beyond that, however, the mere idea that everyone should have some undefined minimum amount of property will tell us almost nothing about what rules to adopt. And, so long as there is no perceived threat to the minimum, legal decision makers attempting to resolve concrete disputes (*e.g.*, what sorts of restraints on alienation should there be) will have no underlying theory of property on which to rely.

Moreover, as Waldron reminds us, these decisionmakers "need not be upset by every fluctuation in the relative wealth and fortunes of individuals. What they will be on the lookout for will be tendencies towards the accumulation of enormous holdings, particularly of capital resources, on the one hand, and the accompanying development of long-term propertylessness, on the other" (p. 439). A great deal of inequality may thus arise before decisionmakers must leave the life-guard's chair. More important, the general right to private property will so vastly underdetermine the society's rules governing control over resources that some other principles will be needed for deciding concrete cases. Waldron may be successful in confining these other principles so that they can be trumped by considerations stemming from the general right. Thus, society may decide to permit bequests to reward savings but not permit the "reward savings" rationale to apply where that would interfere with the implications of the general rights theory. But even then, progressives concerned with wealth distribution will want to know how far each principle will extend before being persuaded that Waldron has successfully broken the link between private property and inequality.

Waldron further reminds us that the day-to-day rules of the property system may initially be drafted to correspond to notions of a general right to private property but that the rules may then be appealed to on grounds relating largely to consistency and citizen expectations. In other words, if the society adopts rules largely permitting transfer of resources, Waldron suggests it may not then prohibit a particular transfer simply to reflect a changed attitude toward that transfer. Indeed, perhaps government cannot act even if it now views a ban on

transfers as a necessary implication of a general right to private property.

But the effort to rely on citizens' expectations as an organizing idea to replace special rights theories underestimates the extent to which a primary role of government is to change property rules in ways that disrupt expectations. Government, for example, may routinely change the speed limit in ways that restrict the use I can make of my resources even if I made a large investment (purchased a trucking company?) based on the old rules. Only occasionally will such disruptions of expectations be so severe as to violate constitutional protections for property. The point, however, is that something more than consistency must provide the "organizing idea" for shaping citizens' expectations. Special rights theories provide the illusion of accomplishing this task by linking the origin of the property right to its content. In short, special rights theories help specify who owns what. In contrast, general rights theories will have a difficult time serving as a guide to citizen expectations because they are simply too imprecise.

None of this is to suggest that the institution of private property absolutely requires allegiance to special rights theories. Indeed, after Waldron's work it will become increasingly difficult to defend a special rights approach to private property. Rather, the point Waldron's book fails fully to consider is that special rights theories provide much of the content for what Waldron refers to as our "organizing idea" of private property. Absent special rights theories we may still want to argue for individualized control over resources. But even the most trivial dispute between two individuals for the same resource will pose a test to our general rights theory. If I need braces and you want to take a vacation, what does a general rights theory say about whether you should be taxed to help me out? Does it say enough that it is still fair to call your ownership of your wages private property? These questions lie at the root of Waldron's imaginative effort to consider private property as one of the general rights of men and women.

III. WHERE WE STAND

In *The Right to Private Property*, Waldron has demonstrated that the rights tradition is capable of producing trenchant criticisms of conservative ideology. He has also shown that there is no necessary connection between allegiance to private property and a commitment to substantial inequality. His work thus constitutes a cogent reminder that, if pushed hard enough, the premises of individualistic theories may produce conclusions similar to those advocated by more communitarian thinkers. Waldron pushes these premises very hard indeed.

At the same time, exhaustive as it may be, Waldron's book only begins to study the hard questions remaining once special rights theories for private property have been definitively rejected. The notion of

a general right to private property is highly unstable once one abandons traditional labor theories and theories of first possession. It is not clear precisely how one determines what general rights there are, nor is it clear what rules one adopts after settling on a scheme of general rights. Waldron would be more sensitive to the instability of general rights if he gave greater credence to the well-developed criticisms of the rights tradition. Perhaps in the future he will afford these critiques the respect that he has certainly earned from all of us.