Congress to prevent state interference with constitutional rights, not to restrict the Supreme Court's interpretation of section 1.

Keynes and Miller submit that under section 5 Congress can only expand, never contract, fourteenth amendment rights. They repeatedly cite Justice Brennan's suggestion to that effect for the Court in *Katzenbach v. Morgan*.[16] They neglect to note, however, that Brennan's *Katzenbach* suggestion was only a dictum.[17] (Miller simply acknowledges in a footnote: "Some antibusing proponents have questioned the binding authority of this limitation.") Why do the authors treat dicta that favor the Court as binding, while dismissing dicta that favor Congress? Here again, the inconsistency tends to favor the side of the Supreme Court in the debate over the Congress-Supreme Court power relationship.

THE RIGHT TO PRIVATE PROPERTY. By Jeremy Waldron.[1] New York: Oxford University Press. 1989. Pp. viii, 469. $59.00.

Robert E. Rodes, Jr.[2]

Some years ago, when there was a plan in the works for tearing down a nice old church and replacing it with one of the undistinguished structures, part barn and part motel, that were the mainstay of ecclesiastical architecture at the time, I got together with a colleague from the Architecture School to try to put a Historic Preservation Ordinance through our City Council. At the time, the vicissitudes of local politics had put a Republican in the mayor's office and a majority of Republicans on the Council—something that had not happened before in my time, and was not to happen again. Our ordinance was working its way through the legislative process, slowed mainly by the natural *méfiance* between politicians and academics, when the mayor took a good look at it and decided that it interfered with rights of property. That was the end of it. The conservatism prevailing in city government at the time was not for conserving buildings, but for conserving property rights. The church came down and was replaced according to plan.

It is with the right that so concerned the city fathers that Professor Jeremy Waldron deals in this lucid and authoritative book.

16. 384 U.S. 641, 651-52 n.10 (1966).
17. Rossum, *supra* note 8, at 32.

1. Professor of Law, University of California at Berkeley.
2. Professor of Law, University of Notre Dame.

What is property? What is a right? What arguments have been offered for connecting one with the other, and how persuasive are they? Waldron answers each question carefully, with full attention to the complexity of the subject and the need for a nuanced approach. In the process, he digests an enormous amount of literature, giving credit where credit is due, criticizing what needs to be criticized, and at the same time maintaining full control of his subject and his own opinions regarding it.

His definition of property is in terms of will. An object belongs to you if you are the one who gets to decide which of the things that may lawfully be done with objects of that kind is to be done with that particular object. By stating the definition in terms of what may be lawfully done, he effectively disarms the various polemicists (including the mayor with whom I began this review) who equate the right of property with the absence of social restraints on its exercise.

I have some misgivings about defining property in this way. It seems to me that the question of what is to be done with a dentist's chair, a set of golf clubs, or the back volumes of the Indiana Reports is less important than the question of who is to do it. The difference between the two questions played a large part in the transition from medieval to modern land law. In a medieval village, whether a strip of land belonged to Hodge the cotter or to the local squire, or to the vicar, everyone knew when it was to be plowed, what was to be planted in it, when the grain was to be cut, and when the cattle were to be let in to eat the stubble. You took responsibility for your own land in that if you worked it well you got a better harvest, but that was as much power of decision as you had. The redistribution of land under the Enclosure Acts had for its purpose putting the fields into the hands of people who could decide what to do with them—shifting from grain to sheep in the fifteenth century, introducing new crops and new forms of tillage in the eighteenth and nineteenth. But nobody thought of this process as the adoption of a system of private property to replace a different system formerly in effect.

I am not sure what effect his limited definition of private property has on the general tenor of Professor Waldron's argument. Not a lot, as far as I can see. However, as I shall indicate later, there are a couple of approaches to the subject that he leaves pretty well out of account: I believe his definition has made it easier for him to do so.

His definition of a right need not detain us. It would take another (and I suspect a less useful) book to do full justice to the ques-

tion. Waldron's main concern is to limit his already ambitious undertaking by excluding utilitarian arguments from consideration. To say that a person has a right is to say that that person has a claim that is morally compelling independent of any advantage that may accrue to other people from recognizing it. It is with claims of this kind that Waldron means to deal in the rest of the book.

He divides them into two categories, which he calls special right based arguments (SR) and general right based arguments (GR). SR arguments are to the effect that some particular action, some particular form of appropriation, gives a person a morally compelling claim to a particular piece of property, a particular share of the original common store. Under most SR arguments, that claim passes on to heirs, successors, and transferees, so that people who now own property have as morally compelling a claim as did the people who first appropriated it. GR arguments are to the effect that everyone should have some private property (or at least a good chance to come by some) because people cannot lead a fully human existence without something to call their own.

Waldron examines two SR arguments in detail, Locke's and Nozick's. But his enterprise is philosophical, not historical. He uses his authors and the literature they have generated as starting points for the best case he can make for the rights under discussion. Where he finds a gap in an author's argument, he does not hesitate to fill it in with arguments of his own.

Having made the best case he can for SR, he finds it is not good enough. Being the first person to grow a crop in a field does not give me an obvious moral claim to spend the next growing season on the Riviera while somebody else works the field for subsistence wages and turns over the profit to me. Nor does any obvious moral intuition support passing any claim I have to my layabout grandson or to the person who beats me in a crap game. Waldron takes up all the proffered intuitions, works them through, and argues persuasively for rejecting all of them.

The main GR argument he uses is Hegel's, though here too he fills in the gaps with his own thought. The argument is basically that to be fully developed as a human being one needs to take responsibility for some part of the material universe, and that one takes responsibility for something by making decisions concerning it. It follows that everyone needs something to make decisions about—according to Waldron's definition of property, needs property.

This intuition about human fulfillment is one that Waldron finds appealing—as do I. The main objection to it is that it takes

only one bad poker game or a few shares of worthless stock and some people will end up as propertyless as the day they were born. To make sure that everyone has property, we will have to place restrictions on use and transfer that will be inconsistent with genuine property rights for anyone. The possibility of being a loser is inherent in the power to make decisions.

Waldron considers and rejects the view often put forth that Hegel's requirement for full humanity will be satisfied if everyone has the opportunity to acquire and retain property even though some fail to do so. Whatever values are promoted by the struggle to acquire and retain, they are not the same ones we have in mind when we assert that people all need something to call their own. A lottery ticket is not a bank account.

On the other hand, Waldron is willing—although with some misgivings, it seems to me—to allow enough restrictions on the exercise of property rights to make sure that people are not done out of their property once they get some. It is not clear to him that such restrictions necessarily make the right illusory.

By ending with a bottom line he is not quite sure of, he gives the book a less powerful conclusion than it deserves. But he believes that his most important contribution is not in answering the question private property yes or no, but in organizing and analyzing the arguments that can legitimately be deployed on the subject. In the process he shows us that private property is not a single juridical form supported by a single moral argument, but that different arguments support different forms. It is especially important that SR arguments lead to quite different legal results from GR arguments.

With this distinction, he unmasks a number of specious arguments that have been put forward by a few theorists, and by many politicians, business executives, and possessors of inherited wealth. We are all familiar with the arguments in question; typically, they run something like this: Property, like life and liberty, is a basic human right. Therefore to interfere with my right of property by keeping me from chopping down my forest (making me install safety devices in my factory, giving some of my land to the peasants . . .) is to interfere with a basic human right, thus violating the Judaeo-Christian tradition, the Constitution, the writings of the best philosophers, and the Helsinki accords. Behind the rhetoric is a move to appropriate the intuitively attractive GR argument in such a way that it will rub off on intuitively weak SR based claims, or even on the intuitively repellent claim that if something is my property I can do just as I damn please with it.

Waldron's analysis inexorably refutes this move. It shows first that only SR arguments are inconsistent with redistribution of wealth. GR arguments tend to support redistribution. If everyone needs some property, it seems clearly appropriate to take some away from those who have more than they need and give it to those who have none at all. To resist redistribution, you must show that some primordial appropriation created and some system of transfer passed on to you rights in your particular holdings superior not only to the world in general but even to neighbors in serious need. It is not an easy task, and I believe Waldron has succeeded in showing that it is impossible, at least if one excludes utilitarian arguments.

The argument against interfering with the use of property by the owners is refuted a little differently, but just as inexorably. While Waldron believes, as I do, that such restrictions can be adopted without making the right illusory, he points out that if he is mistaken it is not the restrictions that must be abandoned, but the right itself. If we cannot secure property to everyone without imposing restrictions inconsistent with the nature of property, then the argument for universal ownership, the basic GR argument, is self-contradictory and cannot be maintained.

Although, as Waldron shows, the arguments for private property cannot carry the freight they are often given to carry, they are not entirely wrong. There is in fact some moral claim arising from prior appropriation: if I am lucky enough to find a plank in a shipwreck, I do not think anyone can rightly take it away from me. In the early history of our country, there were people who bought land grants from state or colonial governments and used them to displace pioneer settlers. Whatever their legal status, those people were considered morally reprehensible.[3] There is certainly a moral claim also for each person to have some space and some objects on which to impress his or her personality, and some place in which to admit intimates, exclude strangers, and on occasion, to be alone. We may not need the legal title, but we need the things and the space.

Waldron suggests that even if these moral intuitions cannot support global systems of ownership and distribution, they can give

3. In Johnson v. Mackintosh, 21 U.S. (8 Wheat) 534 (1823), Chief Justice Marshall had an interesting encounter with the claims of prior appropriation. The litigation was between a person claiming land under a Crown grant and another person claiming the same land under a conveyance from the Indians he found in possession. Marshall held that the Indians had a right under natural law to continue occupying the land that they had been occupying, but that they could not convey that right to English or American settlers except in accordance with English or American positive law.

some guidance as to how we wish to move from the point at which we find ourselves. This seems sound. I would think, for instance, that the persistent tendency to respect prior appropriation and to leave people in possession of what is theirs would suggest caution in committing ourselves to a system of permanent institutionalized redistribution such as Roberto Unger seems to suggest.[4] Also, the idea that property is necessary for full human development might lead us to prefer humane use of property to speculative or generic uses.[5] Preservation of the family farm is an example of what I have in mind. Simone Weil develops a similar idea in *The Need for Roots*, where she points out the danger of allocating ownership and use in such a way that a given resource satisfies no one's need for property. She argues that this is true, for example, of a field that belongs to an absentee landlord and is worked by subsistence laborers. It does not satisfy the laborers' need because they have no stake in it, and it does not satisfy the landlord's need because he never sees it.[6] Her argument could be usefully applied to a number of the manifestations of entrepreneurship that we read about in the papers these days.

It should be apparent from what I have said that Waldron has covered a vast amount of ground in this book. For that very reason, I think a caveat needs to be entered: he has not covered the entire field. There are other approaches to the subject and other kinds of light to be shed on it besides those contained in the great body of material he organizes, digests, criticizes, and builds on so well. A leading example is the Marxist approach, which emphasizes that different classes have different forms of appropriation, and therefore different forms of property. With this approach, we can see the relations between landholding and the performance of services as a form of property characteristic of the feudal landholding class, while the forms of property dealt with in Waldron's book are those characteristic of the bourgeoisie. Expense accounts, executive suites, and company cars would then be, as Milovan Djilas says, the form of property characteristic of the "new class," the managerial elite. Waldron touches on Marxist doctrine only briefly, and on the relation between class and property not at all. I believe his views on both would have been interesting.

I would also have liked to see him take some account of the recent papal encyclicals and the venerable and sophisticated tradi-

4. R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 32-36, 52-56 and *passim* (1986).

5. *See* R. RODES, LAW AND LIBERATION 74-77 (1986).

6. S. WEIL, THE NEED FOR ROOTS 35 (1952).

tion behind them. Rereading John XXIII's *Mater et Magistra* (Par. 104-121) in the light of Waldron's work, I find a nicely nuanced discussion of the need for property as a means of appropriating one's own labor (SR) and as a prerequisite to responsible action in the world (GR). Political developments in recent years have given new importance to this document and to the body of doctrine of which it forms a part. This material is rooted in classical and medieval natural law traditions, and in Christian and Jewish religious traditions stretching back to the passage from Leviticus (c. 25) requiring buyers of land to give it back in the jubilee year. Waldron, who deals with neither natural law nor theology except as Locke appeals to them, could have found considerable support in them for some of the positions he finds most attractive.

But it is not fair to ask that a work so broad in scope should be broader still. It is only because Waldron has handled so well the material he set out to handle that I wish he had handled more. There is in fact no need for him to do so. A book like this is intended to be the beginning, not the end, of thinking about the subject it covers. Waldron has provided insights that can be used in analyzing any theory of private property, whether he has taken it up or not.

HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS. By Philip J. Cooper.[1] New York, N.Y.: Oxford University Press. 1988. Pp. 374. $16.95, paper.

Richard B. Collins[2]

The title of this book suggests an attempt at new enlightenment on the dilemma of the hard case. But Professor Philip Cooper's introduction disclaims any purpose to "sit in judgment on the judges by declaring whether they should or should not have issued the orders in question" (civil rights injunctions). His more modest goal is to present "a rather different view of the judicial process, one that . . . provides a better understanding of the interactions of federal courts and state and local officials." This is to be descriptive and analytical, not prescriptive, except for some "suggestions regarding the ways in which administrators and judges can improve their relationships." Hard choices are the milieu, not the problem.

1. Professor of Political Science, State University of New York, Albany.
2. Associate Professor of Law, University of Colorado.