

Chapter 10: Property Rights by General Agreement

The liberty of man in society is to be under no other legislative power but that established by consent.

-John Locke¹

The history of ... consent theory of the last three centuries largely consists of attempts by theorists to suppress the radical and subversive implications of their own arguments.

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The previous chapters rejected unilateral appropriation, concluding that there is nothing one person can do unilaterally to make unowned assets her property without denying equal freedom to the propertyless. If people have equal rights, are equally free, and resources are unowned, they are *equally* unowned by everyone. How then can they become owned by anyone? People who want to own resources have to buy them by paying for the duties their ownership imposes on others.

The justification for private property is the payment of taxes for distribution to those who have less. This chapter argues that one person acquires exclusive property rights by compensating others for the duties her ownership imposes on them. I use the term “acquisition” for any method to acquire property other than unilateral appropriation. Taxation of property, in this theory, is not “interference” with an existing ownership right but a part of the purchase price of property. It interferes as much and for the same reasons as the private portion of the purchase price of property. If a unanimous agreement is reached, the compensation could come in almost any form agreeable to the payers and the recipients—cash or specific goods and services—but without unanimity, this chapter argues that a substantial portion of the redistribution must come in the form of an unconditional basic income to give recipients the widest choice of what to do with their compensation.

Section 1 outlines the theory of property rights by general agreement in ideal theory, arguing that any contract to establish property must be beneficial and agreeable to those who are assigned fewer property rights in external assets—not only for those who assume greater property rights. Section 2 discusses barriers to achieving the ideal property rights agreement, such as overlapping generations, the improbability of unanimity, and the undesirability of irrevocability. Section 3 discusses how to make a non-ideal social agreement to create property given the existence of those barriers. This discussion implies both limits on and protections of property rights.

Section 4 discusses a possible left-libertarian reply, concluding that although the concerns presented in this chapter are left-libertarian, the solutions are not entirely contained in familiar left-libertarian prescriptions. Section 5 answers a right-libertarian query about why people with resource-intensive lifestyles pay higher taxes. Section 6 summarizes and concludes.

¹ STOG, § 22.

² Pateman (1989). *The Disorder of Woman*. Cambridge: Polity, p. 71.

1. Property rights agreement in ideal theory

Suppose A and B are the only two people on an island and neither has any ownership claim to the island's resources. There is nothing (ethically or legally) to stop them from making an agreement that some resources will be used only by A, others only by B, and others may be used by both. They have by voluntary agreement—and without coercion—established something like public and private property. It is not quite property; it is an agreement to treat unowned resources as if they were property. It holds only as long as A and B continue to agree, and it has no bearing on any C who might appear. But this example establishes the kind of agreement necessary to create something like property.

As long as ownership reflects a general agreement, it does not need to involve equal division, collective ownership, or any particular set of incidents of ownership. A and B can hold all resources jointly or designate almost any portion of resources for exclusive use.³ The private resources do not necessarily need to be divided evenly. B could offer to provide a service for A in exchange for a larger share of resources. There is no natural price at which A and B must exchange services for natural resources; the exchange rate is whatever A and B agree to. They can decide that they have stronger or weaker rights to their holdings, but they can't assign full liberal ownership without denying equal access to resources to future generations or future citizens. A's contract with B does not give him true property, only B's agreement to refrain from using those resources that remain unowned. But hopefully, this process gives an example that can be extended beyond the two-person case.

A. Equal division

The most obvious way to establish property by contract is to divide it into equally-valuable portions,⁴ but equal division is by no means the only possible solution or necessarily the best solution. There are at least four reasons why equal division is too restrictive.

First, no fixed portion of available resources should necessarily be divided. Society needs to hold some amount collectively for public spaces and thoroughfares, but people might choose to hold a larger amount for use in collective projects. People can still divide whatever is left equally, but if so, the amount that constitutes an "equal share" becomes variable. Is a person entitled to an equal share of all resources or merely of all privatized resources? This question becomes important if there is no universal agreement about how many resources should be devoted to public projects or about the value of particular public projects.

Second, the argument for ECSO freedom in Part One of this thesis might be thought of as a constraint on the distribution of property that could justify a departure from equal shares. Imagine an island populated by a giant and several dwarves. Imagine equal division provides each dwarf with enough to secure her physical needs and a substantial amount of luxuries, but it does not provide the giant enough to secure her needs. Without ECSO freedom the giant is effectively forced to be a servant of the dwarves. This giant needs a larger share of resources simply to enjoy the same status freedom as everyone else.

Third, simple equal division takes the size of the population as exogenously given. Under simple equal division, an individual is entitled to the total value of natural resources

³ In the two-person case, public spaces are not essential, but they quickly become essential in larger groups.

⁴ George (1976). *Progress and Poverty*. New York: Dutton; Spencer (1872). *Social Statics*. New York: D. Appleton and Company, p. 141; Steiner (1994). *An Essay on Rights*. Oxford: Blackwell.

divided by the size of the population, whatever the population happens to be. The amount of resources a person can claim is subject to everyone else's fertility decisions (or the fertility decisions of the previous generation), and the amount of resources each person in the next generation can claim is subject to our fertility decisions. If the size of the population were to impose serious restrictions on core liberties, conceivably the moral claim could be the other way around, with each person's fertility options subject to maintaining a goal for the size of an equal share. However, both of those options are too restrictive. If human effort increases the value of resources, it might be possible to have a large population with sufficiently large shares available for everyone, but it might necessitate departing from equalizing the value of external assets (see Chapter 12).

Fourth, equal division is not necessarily what everyone wants. Suppose Mr. Howell is more talented, diligent, hardworking, and/or ambitious than the other six castaways on Gilligan's island. He wants a larger share of property and a higher standard of living than everyone else, and he is willing to work for it in ways the others are not. It could be in the interest of all parties to grant Mr. Howell a larger share of property, or even stronger rights of ownership than others have, in exchange for his agreement to perform some sort of service to those who agree to make do with less property. One way to achieve this would be to make everyone's equal share tradable. Another way would be for those wanting large shares and those accepting smaller shares to negotiate. There is not a unique outcome for such a process. The agreed price could vary with the negotiation process and the incidents of ownership. If there is no one right price of external assets relative to services, there is no unique answer for the value of an equal share.

B. Full collective ownership

Conceivably, people could agree to a rule that all natural resources are strictly collectively owned. As Cohen demonstrates that collective ownership with an individual veto over all resource use renders self-ownership merely formal,⁵ it would be inconsistent with any meaningful understanding of maximal equal freedom. But it is too quick to go from that observation to the conclusion that no form of egalitarian ownership of property can be consistent with ECSO freedom. There is room for collective ownership tempered by the rule of unconditional access to a sufficient amount of resources, limiting the collective or individual power over resources. The limitation could be operationalized by giving individuals the right to demand a sufficient share of external assets or equivalent compensation at any time.

C. Property rights by general agreement

Property rights by general agreement is a simple way to create property rights in unowned resources. It is more flexible and avoids some of the problems with equal division and full collective ownership. It is simply the following: *one person establishes a property right in a natural resource by paying everyone else for the duties her ownership imposes on them.* This is an agreement for "as-if property," an agreement to get everyone else to treat unowned resources as if they were property. The rest of this section discusses it in an ideal form, in which everyone agrees.

⁵ Cohen (1995). *Self-Ownership, Freedom, and Equality*. Cambridge: Cambridge University Press, pp. 94-101.

Imagine a perfect market for acquisition by general agreement using a Walrasian auctioneer,⁶ a nearly omnipotent convener who calls out prices for all goods in a market. The auctioneer uses her powers to observe how much each potential market participant is willing to buy and sell at that price. If the quantity supplied and the quantity demanded of each type of commodity match, she allows trade. If not, she adjusts the prices in whatever direction seems likely to be closer to a match and announces again. She repeats this process until there is a perfect match, and only then allows trade. If the auctioneer fails to find an equilibrium in which the supply of resources is equal to or greater than the demand,⁷ resources remain unowned. However, the only requirement for a property agreement is some set of prices that could establish a set of property rights that everyone would willingly choose over leaving resources unowned and unownable. (Other fallback positions might be equally justifiable, such as equal division or unlimited access to the resources one can use oneself without the right to trade them, but I will use unowned resources as fallback position in my examples.) There might be many different Walrasian equilibriums that satisfy this requirement, and negotiating between them is an important problem, but the discussion here does not require that there be a unique solution.

The Walrasian auctioneer asks the following questions for each natural resource: At price x , for vector of rights y , in resource z :

1. How much are you willing to purchase for your own property?
2. How much are you willing to privatize to others in exchange for 1/nth share of the revenue?

The auctioneer asks these questions for each natural resource including land, minerals, water, clean air, and so on. Once the auctioneer is done, society has several other questions to address:

3. What would you prefer be done with the revenue from the privatization of resources?
4. Of the remaining resources, how much are you willing to make collective property?
5. How much are you willing to leave unowned?
6. How should collectively held resources be used and managed?

These questions are important, and they imply that the establishment and management of collectively held property is an important concern of a society committed to maximal equal freedom. Except for briefly touching on question 3 below, I set these questions aside, because this thesis focuses only on the establishment of private property, which is accomplished by the answers to questions 1 and 2: one person acquires the right to hold a piece of property by paying everyone else for the duties her ownership imposes on them. This means simply that if you want to own property you have to *buy* it from everyone who has to make do with less so that you can have it. That is from the rest of society. You cannot simply appropriate

⁶ The controversies about the Walrasian process are not relevant to the problem at hand. Most of the controversy about Walrasian equilibrium centers on whether a market economy actually approximates this process. Other controversies include whether a Walrasian equilibrium is unique, stable, and efficient. But none of these problems are essential to the way I am using the auctioneer.

⁷ Disequilibrium, in this case, is only a problem if demand exceeds supply. If there is no equilibrium, but there is at least one vector of prices in which the supply exceeds demand, it meets the qualification of establishing property rights by voluntary agreement.

property or buy it from the successor of the appropriator; you have to buy it from the people on whom you want to impose the duty to respect your property rights.

Once an agreement is reached, everybody pays a central authority for the resources they use, and this money is used (somehow) to compensate everyone who has less. Under unanimous agreement, the revenue could be used for anything at all. But without unanimous agreement, there is a strong case for returning a large part of the money to people in cash so that they can use it for whatever they want. The government can divert funds for merit goods and other goals, but the goal of maximal equal freedom gives reason to make sure that an individual has something of her own and to consider cash distribution the default solution.

Assuming that everyone would choose to own something, everyone would both pay into the authority and receive revenue from it. Assuming no funds are diverted for public purposes, those who hold more than an average-sized share pay in more than they receive back, and those who hold less receive back more than they pay in. If funds are diverted for public purposes, there will be more net-payers than net recipients. Net recipients can use the revenue they receive to buy services from others. The consumption of these services is their compensation for holding less property than everyone else. If no one wishes to hold a disproportionately large share, everyone would pay in exactly what they received and no money would need to change hands at all. But as long as people have different desires for property and different willingness and ability to trade services for them, some people will be net payers and some therefore net recipients.

This method of distribution has two similarities with Ronald Dworkin's clamshell auction—both have people bidding for resources and a Walrasian auctioneer.⁸ It is probably more similar to Allan Gibbard's method.⁹ The method here is based on unowned resources and maximal equal freedom while Gibbard's is based on an equal ownership claim to resources. Gibbard spells out the solution in less detail, and seems to fall back onto hypothetical rather than literal agreement.¹⁰ Dworkin's auction is designed to achieve an equal division of resources, while this method is designed to achieve a mutually acceptable division that can deviate from resource equality. Thus, Dworkin uses a special currency (clamshells) that cannot be exchanged for anything but resources, while this method uses currency. No one in Dworkin's auction is a net payer or a net recipient of the auction, although their bundles may be traded. To maintain resource equality over time, Dworkin creates a hypothetical insurance scheme to make sure that the distribution of resources is ambition sensitive and endowment insensitive.¹¹ Endowment insensitivity is not a goal here. People own their endowments as much as they own their ambitions and they are welcome to trade the benefits of those endowments for greater shares of external assets as long as doing so is beneficial and agreeable to people with smaller shares of external assets. They are also welcome not to trade their endowments and to use them only to enjoy their minimum share of external assets.

This method is substantially different and substantially more consistent with maximal equal freedom than the unilateral appropriation favored by right-libertarians. If everyone in

⁸ Dworkin (2000). *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, MA: Harvard University Press, pp. 65-83.

⁹ Gibbard (2000). "Natural Property Rights." *Left-Libertarianism and its Critics*. Basingstoke: Palgrave: 23-30. Dworkin does not cite Gibbard, and both neglect to cite the television show described in Chapter 6 (Schwartz and Crawford (1965). "Plant You Now, Dig You Later." *Gilligan's Island*. Dobkin, CBS Television) even though it also has people on a desert island bidding for resources to which no one has a special claim.

¹⁰ Gibbard "Natural Property Rights.", pp. 27-28.

¹¹ Dworkin *Sovereign Virtue: The Theory and Practice of Equality*, pp. 73-83, 89.

every generation agrees that the system of property rights is just and in their interest, the agreement establishes property virtually without interference. Every liberty a person sacrifices to create property for someone else is exchanged either for similar property of her own or for services provided by others. Therefore, it creates no legal privileges; everything a rich person has is paid for, and paid to the right people. These property rights reflect a general agreement that is in the interest of everyone as they perceive it themselves. If the bargaining process is efficient it will also exhaust all possible opportunities to improve people's welfare relative to their starting point, but efficiency is not an essential justification for it. If such an agreement could be reached, it would not create equality, but it would create a more egalitarian form of property than the full liberal ownership rights favored by right-libertarians, yet more consistent with maximal equal freedom.

If a unanimous agreement is possible, it creates property virtually without that interference. However, there are barriers to a general agreement.

2. Three barriers to a property-rights agreement

There are barriers to reaching the agreement described above, including overlapping generations, the improbability of unanimity, and the undesirability of irrevocability.¹² This section examines the ramifications of these barriers, and the following section examines how society can approximate a general agreement to create property given the existence of these barriers.

A. Overlapping generations

One generation might want to establish permanent, transmissible property rights, but they cannot do so without interfering with the ways future generations might want to use resources and define property. Imagine a world in which humans mate like salmon at the very end of their lives. Suppose members of each generation are born and die together with no overlap between lives at all. Wilt Chamberlain lives in this society, and provides the service of playing basketball for the enjoyment of his contemporaries. Suppose also that there are no cameras or recording equipment, so that only people who see Chamberlain play live benefit from his service. He plays so well that all of his contemporaries sign over the use rights to all natural resources during his lifetime. But now that he owns everything, they have nothing to give him as an incentive to continue to play basketball. Chamberlain offers to keep playing basketball if his contemporaries agree to leave a note for subsequent generations assigning some or all of the property rights at that time to whomever Chamberlain designates. How well must Chamberlain play for generation A to earn the power to decide who is rich and poor in generation B? When the next generation is born they read the note, but nothing binds them to follow it. It is not a voluntary agreement on their part, and amounts to nothing but external interference.

The above does not imply a need for an inheritance tax, but for something stronger. Suppose Chamberlain lived twice as long as everyone else. The earlier generation has assigned him ownership of everything. When the next generation is born, they are propertyless because of an agreement Chamberlain made with the previous generation. This

¹² This is not an exhaustive list. There are other barriers to agreement such as rent seeking, unrealistic beliefs about what agreements are possible, and the existence of entities that have moral value but are unable to make an agreement. But I will set these issues aside.

agreement is not voluntary on their part, and is not binding on them. Chamberlain provided services for people who are now dead, but he has not benefited the people who now must make do with less property so that he can have more.

Of course, people in one generation often create things that directly benefit subsequent generations. Imagine Shakespeare writes great plays in one generation that last to the next generation. If Shakespeare, his descendants, or his trading partners (e.g. his publisher) carry over exclusive rights to his plays into subsequent generations, they have a greater claim on property than other members of the next generation, but they have this greater claim without the agreement of the next generation. If Shakespeare could travel in time and make an agreement with future generations saying that he will only write these plays if they respect his copyright in their generation, he might be able to make a mutually beneficial agreement. But he cannot travel in time. He can only make agreements with his contemporaries, and so he must decide whether the amount he can make from his contemporaries is enough to make it worthwhile for him to write his plays. If not, he does not write plays or he keeps his writing secret. If so, he writes the plays, accepting that they eventually become public domain.

Other people do things that benefit future generations by altering physical property rather than creating purely intellectual property. Suppose Michelangelo alters blocks of granite in ways that make them far more valuable. His contemporaries are willing to give him much larger shares of use rights to goods in his time in exchange for this service. But if they also confer permanent ownership of Michelangelo's sculptures to him or to people in the next generation he designates, they impose interference on subsequent generations in the same way that a permanent copyright would interfere with future, would-be readers of Shakespeare. It is interesting that current law gives Michelangelo and his successors permanent rights to his creation than Shakespeare, when the whole of the value of Shakespeare's work is his intellectual creation while a portion of Michelangelo's work is a natural resource to which he has no more claim than anyone else.

This discussion of the overlapping-generations problem implies that no generation can establish permanent property rights, which in turn implies both that the discussion of the assignment of property rights must be ongoing (see below), and that the discussion applies not only to natural resources, but to all external assets or at least those produced by earlier generations. That is, time limits that are applied to copyrights can be extended to physical improvements to natural resources. A worker can negotiate voluntary rewards in the form of services from her contemporaries, but any rewards she claims from future generations cannot be voluntary. This argument applies not only to Shakespeare and Michelangelo but also to Locke's original appropriator and to the value of any improvements made to the resource value of ordinary goods by past generations. Thus, the property in question is extended from natural resources to external assets (or at least those external assets altered by previous generations), implying limits to property rights discussed below.

B. The improbability of unanimity

A lack of agreement is not necessarily a failure of the Walrasian process; it means simply that no price makes it worthwhile to establish property rights rather than remain in the default position in which all property remains unowned. If property rights make far greater production possible, it is likely that it is possible to make a deal that is better for everyone, but even if there is one, reaching it by unanimity is unlikely. One problem is that the

unanimity rule is not necessarily optimal or free from manipulation.¹³ Another problem is that, in an ongoing negotiation of property rights, it is not possible to return to the default position. If a large number wants an agreement that a smaller number finds objectionable, they can't simply go back to the default position.

Suppose one person or a small group holds out and refuses any price (or every price that anyone else can afford) for accepting property rights of others. Some might genuinely prefer some other social arrangement to the one on offer at a price others are willing to pay; others might have unrealistic beliefs about how much they can get. A society that imposes one kind of property-rights regime on a small group of people who prefer something else interferes with that group's freedom to use resources the way they want. But if the small group forces the large group to remain in the state in which resources remain unowned, they also interfere. It is not certain which of these two actions constitutes the greater interference.

One partial solution to the problem of a lone holdout is that everyone in a like position receives and pays the same amount, making it impossible for one person to hold out for a privileged deal. But it is still possible and even likely that some net recipients will reject something that is acceptable to the majority of net recipients. It is not necessarily morally impermissible to hold out for the best deal possible, if a default position exists. It is the basis of voluntary exchange; the two sides of the transaction do without the benefits of exchange unless or until they come to an agreement. Without that possibility the agreement won't be completely voluntary, and the approximation of a general agreement runs the risk that it will either give too much power to dissenters or force them to accept burdens unwillingly. The section on non-ideal theory discusses how to balance these concerns.

C. Revocability

It is likely that many people will not want to make an irrevocable agreement to create property rights, but will want the power to revise that agreement if it turns out to be less desirable than expected. It is problematic for society to place individuals in the position in which they *must* choose between a permanent, irrevocable agreement and no agreement at all. Also, even if people are initially willing to make an irrevocable agreement (such as marriage without the possibility of divorce), there are agreements that people ought to be able to revoke.¹⁴ But these concerns need to be balanced against the needs for a secure agreement. The more permanent the agreement is, the greater the problem of people who want to revoke it, but the less permanent the agreement is, the greater the insecurity of property. Again the non-ideal solution will involve balancing.

3. Property rights agreement in non-ideal theory

If a unanimous agreement is not possible, it is important to remember that maximal equal freedom for all is not complete freedom for all. The goal is to minimize rather than to eliminate interference caused by the property rights agreement. However, a simple majority rule, with the power to impose whatever it wants on the minority, is not enough. The widest possible agreement with the minimum impact on dissenters achieves the maximal freedom

¹³ Mueller (1989). *Public Choice II*. New York: Cambridge University Press, pp. 43- 53, 96-111,

¹⁴ Revocability would not be a problem if binding agreement were all there was to social justice, but from the standpoint of the greatest freedom, it is not certain that the freedom to make a binding agreement always trumps the desire to get out of a bad agreement.

consistent with equal freedom for all. Although it is beyond the scope of this thesis to specify the exact institutional setting for determining a property-rights regime, I will suggest five limits to the property rights that follow from the above discussion. First, the government must not alienate anyone's status as an effective control self-owner—or aid anyone's self-alienation. Second, the protection of ECSO freedom ensures the consent of net-payers but not net-recipients. Third, there cannot be a dichotomy between a one-time assignment of property rights and subsequent trade. Fourth, any agreement must seek to minimize its impact on people who do not wish to be party to the agreement. Fifth, the government also has a responsibility to protect buyers' access to property.

A. Inalienability of ECSO freedom

Chapter 2 argued that the government has a strong responsibility not to enforce any contract alienating an individual's status as a free person. According to Arthur Kuflik, Kant, Locke, Rousseau, and Spinoza concur for various reasons and to various extents.¹⁵ John Stuart Mill and John Gray have made similar arguments.¹⁶ Those who oppose inalienability do so on the basis of some right of contract¹⁷ or something like a right to waive rights,¹⁸ but such theories effectively put the promotion of positive opportunities ahead of government's primary responsibility to protect the individual's core liberties from interference.

So-called voluntary slavery requires three parties. Call them me, you, and the government. I might want to promise to be your slave. At some point, I might want to renege on that agreement, and you might want the government to enforce that agreement against my (current) will, or you might want the government to waive its protection of me so that you can enforce the contract yourself. Either way, the government becomes involved. What should the government do? If it refuses to enforce the contract, it interferes with no one; it merely denies aid. If the government enforces the contract, it interferes with one of my most important core liberties. Its greater responsibility is clear.

There are many things that I might want the government to help me do. I might want the government to burn me at the stake, let me take the space shuttle out on weekends, let me blow myself up with an old discarded nuclear bomb out in the desert where I won't hurt anybody else. The government has no responsibility to help me do these things, and it has a strong responsibility *not* to help me, even if I want its help. Selling myself into slavery belongs in the same category. There are some positive opportunities that the government ought to help me attain even if it involves some level of force. For example, it might want to make rules to help me cross the street without getting hit by a car. But it doesn't have to help me do everything I might want to do. If I want to burn at the stake, I'll have to do it all by myself, and I can't expect any special treatment from the government to help me. If I want to make good on my promise to be your slave, even after I change my mind, I will have to maintain the willpower to do everything you ask, even though I no longer want to. If it is understood before I agree to be your slave, that I will have the legal right to renege on that contract, you may not trust my willpower, and you might refuse to accept me as your slave. This fact allows me to argue that the government's refusal to help me effectively prohibits me from being a slave. That's true; so's this: the refusal to give me a nuclear bomb

¹⁵ Kuflik (1984). "The Inalienability of Autonomy." *Philosophy and Public Affairs* 13: 271-298.

¹⁶ Mill (1965). *The Essential Works of John Stuart Mill*. New York: Bantam Books, p. 348; Gray (1983). *Mill on Liberty: A Defense*. London: Routledge & Kegan Paul, p. 93.

¹⁷ Nozick (1974). *Anarchy, State, and Utopia*. New York: Basic Books, Inc., p. 331.

¹⁸ Steiner *An Essay on Rights*, pp. 64-65, 71-72, 232-233.

effectively prohibits me from blowing myself up with it—too bad. That is freedom from interference.

The above, I presume, is widely acceptable. My position is more unusual in the high level of functioning that I argue a person must have to be an effectively free person. Along with chattel slavery and involuntary servitude, people may not sell themselves into such severe economic destitution that they are effectively forced to work for others.¹⁹ This responsibility implies a substantial constraint on the property rights agreement: the government cannot enforce any agreement that allows people to become economically destitute. Therefore, certain kinds of agreements cannot be irrevocable, and some cannot be enforced at all.

Modern contract law rightly refuses to enforce contracts that explicitly alienate an individual's status as a free person. Currently, the failure to fulfill a contract cannot be grounds for imprisonment,²⁰ corporal punishment, or any other denial of an individual's status as a free person—except impoverishment. If we recognize propertylessness as a threat to freedom, as argued in Part One, the same kind of economic prohibitions against selling oneself into slavery should also apply to protecting people from severe economic deprivation. The government refuses to assist in self-alienation of ECSO freedom by refusing to honor any contract alienating an individual's claim to the property they need to maintain their free status, and by not imposing any such propertylessness on individuals without their agreement.

This argument does not imply that the defendants should pay no financial penalty at all for breaching an agreement, but they may declare bankruptcy while keeping enough property to secure their ECSO freedom. This justification for a social minimum could be called by a name that might sound oxymoronic—permanent, starting-gate sufficiency. It allows each person the right to return to an acceptable starting point that secures their ECSO freedom. It is equivalent to bankruptcy without destitution. Permanent, starting-gate sufficiency does not imply that no one can be deprived of their status as a free person for *any* reason, just not by contract or trade. Criminal law is still enforceable by imprisonment. Severe violations of civil law such as negligence, accidental bodily harm, and paternity also might be grounds on which a person's ECSO freedom could be alienated, but I do not explore the issue of exactly when the government can deny a person's status as free.

This argument has implications for the treatment of basic income. Assuming that a basic income is in place and set just at the level that secures a person's basic needs, it could not be used as collateral for a loan, and would be a protected asset in the event of bankruptcy (with the exceptions above noted). However, if the basic income is set higher than that level, a portion of it could be used as security for a loan and could be seized in the event of bankruptcy.

More important than the government's responsibility not to enforce a voluntary agreement alienating a person's effective control self-ownership, is its responsibility not to impose (or force an individual to accept) the loss of ECSO freedom. As long as it is possible to create some property-rights regime that protects everyone's ECSO freedom, the government may not impose a property-rights regime that denies ECSO freedom to someone. If no possible property-rights regime protects everyone's ECSO freedom, the government must limit everyone's ECSO freedom in the same way and to the same extent.²¹

¹⁹ See Part One.

²⁰ Except in the case of criminal negligence.

²¹ See Chapter 12.

B. ECSO freedom assures the consent of property holders

The protection of ECSO freedom has a centrally important role for the rest of the property theory laid out in this chapter. It establishes the maximum amount the government can interfere with an individual's access to external assets. At most, it may limit a person's access to resources to just enough to secure their basic needs as discussed in Chapter 5 but not more than that. So, the person who has the minimum access to resources also has the maximum amount of interference. If a person wants more than that amount of external assets, she must buy them from the government as representative of the people, and she has rights similar to a buyer.

Any person who chooses to buy a greater amount of property has in that sense voluntarily accepted the conditions. If I buy a car for \$20,000, I might think the price was too high but I could have kept my money or I could have chosen to work less instead of earning the money to buy the car. This is what we mean by voluntary trade. It does not mean that I like the price, or I think the price was fair, but it means that I *accept* the price, when I could have said no. This condition makes all of the net-payers in this property-rights regime voluntary taxpayers. If they want to live with a modest amount of property, ensuring a life that is not thoroughly bad in an absolute sense, they may do so, and no one will force them to do anything. If they are more materially ambitious than that, and they wish to hold a greater share of resources, they may choose to accept the terms and conditions of holding a greater share of resources. Participation in the economy needs to be voluntary to that extent, and if it is, it establishes the voluntary agreement for everyone who lives above the minimum. Taxation, then, does not interfere with established property rights or with self-ownership rights. People choose to pay taxes in the same way and for the same reasons that they choose to pay the private purchase price of goods. They might complain that either or both prices are too high, but they accept them willingly as free persons.

This method does not, however, establish the voluntary agreement for those who live at or near the minimum. They hold less property than everyone else, and they receive compensation for that fact in the form of money with which they may purchase services provided by everyone else, but their acceptance of this compensation does not indicate that this level of compensation is enough to make them willingly accept the fact that others have greater shares.

C. No dichotomy between initial assignment of property rights and subsequent trade

The problems of overlapping generations, dissent, and revocability all imply that there cannot be a dichotomy between an initial allocation of property rights and subsequent trade of property. No group of people at any one time in history can confirm full, permanent ownership rights over an external asset in the sense of all of Honoré's eleven incidents.²² To do so would be to attempt to make a contract binding on generations of people who were not signatories to it. The process of maintaining a coalition in favor of the property rights system must be continuous, but this process must be balanced against property owners' need for stable property rights, and importantly, everyone's desire to make long-term plans and to know what their rights are when they agree to purchase property.

One way to create such a balance would be to define all property as fixed-term leases, which have to be renegotiated at expiration. Each person at any time could buy a lease for a one-time fee or a regular rent for a period of say 20, 50, or 100 years or the lifetime of the

²² Honoré (1987). *Making Law Bind*. Oxford: Oxford University Press.

buyer. It is in no one's interest that all property rights terminate after one week or one year. The government could retain some of the right to manage the property (incident 3), and it may or may not sell the right to trade and transfer these rights (incidents 4 and 5). However, these are temporary leases and no matter how many times a piece had been transferred, the lease still terminates at its expiration date. The buyer might not want to buy a temporary lease, and the lack of availability of permanent ownership is interference, but it is no more so than the interference that property holders today impose on people who would like to buy a house but can only afford to rent. The fixed-term-lease solution would be cumbersome and difficult to administer, and its distributional goals could be achieved much more simply through the tax system.

Although the government could create property in almost any combination of Honoré's eleven incidents²³ (with the exceptions noted), it need not make radical changes to achieve the necessary goal. It could simply keep the familiar institution of full liberal ownership of property with only one change: the liability to execution (incident 10) could be explicitly extended to include the responsibility to pay a tax sufficient to maintain the widest possible property rights agreement and/or to minimize interference with dissenters from the agreement. The tax rate would have to be variable to avoid imposing the regime on future generations, but it should not vary widely in a short time to allow owners to make long-term plans.

Perhaps the simplest solution is a wealth tax redistributed in the form of a basic income. A yearly wealth tax is essentially a rental price for holding external assets.²⁴ Each year, people pay a percentage of their wealth into the basic income fund. Potential owners are warned that all property is subject to that tax and that the government may raise or lower that tax as needed, and they may revise their decisions to purchase property based on that knowledge. The government's ability to change the tax rate has to be balanced against the wealth holder's need for security. Therefore, the government must not lead people to believe that taxes will remain low and suddenly raise them to confiscatory levels as soon as owners have improved the property in some way. Perhaps changes in the tax rate should be announced well in advance and phased in over a period of years. If my landlord announces that my rent will go up next year, I can decide to pay or I can move into a smaller house. If the holder of wealth does not want to pay an announced increase in the wealth tax, she can divest herself of her wealth. If the wealth tax is not extremely high or variable, it leaves the private property rights system basically in place and raises enough revenue to end propertylessness and to justify property rights on a contractual basis. If a revisable wealth tax is in place, there is no need for time-limited property rights, confiscatory inheritance or income taxes, or any major disruption of basic market exchange to make the agreement in the interest of people with less property now and in subsequent generations.

D. Minimizing the negative impact on those who are not party to the agreement

Because no system of property relations eliminates interference without unanimous agreement, and unanimous agreement is often not possible, the best possible system attains

²³ Ibid.

²⁴ A natural resource tax could be used instead; an income tax or a combination of taxes are also possible. The argument here does not imply that it must be a wealth tax, and the choice of which type of tax to use depends as much on empirical efficiency concerns. The argument does imply that there should be specific kinds of natural resource taxes, such as taxes for depleting nonrenewable resources or fines and fees for polluters, but these specific issues are beyond the scope of this thesis.

the widest possible agreement and minimizes its impact on the people outside the agreement. There might be some conflict between the goals of achieving the widest agreement and the minimum impact on dissenters, but I will focus on the latter. If people cannot agree on one property system, the first solution to seek is a way to divide resources so that everyone has a proportionate amount of resources to devote to their uses, and diverse lifestyles are possible. Earmarking resources for various uses is not always practical, but if compensation is paid in cash, the cash can be used to buy resources, finished goods, or services to put toward the kind of lifestyle individuals prefer. To minimize the impact of an agreement on people left outside, society should be careful not to set compensation payments too low or give them in a form that people don't want. These issues provide an argument not only for a basic income in cash but for the highest sustainable basic income.

The property-rights regime that supports the highest basic income allows the most resources and creates the most real options for those who do not want to be a part of the agreement. Therefore, it has the minimum interference with dissenters. Suppose a substantial majority wants to move to a market economy with reasonably strong private property rights, but a small group wants something else (e.g., a hunter-gatherer economy or a socialist cooperative society). If the majority merely imposes their system on everyone else without compensation, they substantially and significantly interfere with everyone else's attempt to lead their lives in their own way. If they make resources available to dissenting minorities, giving them some ability to lead their chosen lifestyle, they do not eliminate interference, but they reduce its significance.

Distributing compensation in cash as a basic income gives dissenting minorities the widest opportunities to use it to pursue their chosen lifestyle. If all net-recipients were willing participants, they could choose to accept compensation in the form of specific services or public goods. But if there are unwilling people who are being compensated, cash becomes the only reasonable option. Otherwise there is the possibility that people would be forced to accept less of everything and who are given "compensation" in the form of something they do not want. Imagine the government appropriates your backyard and compensates you by promising to subsidize a public center for Greco-Roman wrestling (assume you don't like Greco-Roman wrestling). This does not mean that there can be no collective projects, merely that they do not necessarily perform the compensatory function of basic income.

E. Protection of property owners

The above discussion rules out permanent, full ownership rights without compensatory taxation for the (otherwise) propertyless, but it leaves the general agreement free to define property in a wide range of ways. As I stated above, property could be anything from fixed-term leases to permanent ownership subject to adjustable tax rates. In other words, property does not naturally entail transmissibility, the absence of term, and residuary character,²⁵ but all of these can be bought by the liability to taxation (strong version of incident 10). The social agreement to create property could retain some of the right to manage (incident 3) and the right to income (incident 4). For example, society could privatize the land along a river subject to the restriction that owners maintain a footpath along the river, do nothing to pollute the river or disturb traffic on the river, and make no loud noises that would disturb others in the area. The rights of the private holder here are similar to the rights of a potential renter of property. I might want to rent a house with the right to tear out

²⁵ Incidents 7, 8, and 11, from Honoré *Making Law Bind*, see chapter 6 of this thesis for details.

the walls, repaint it, and remodel it, but I cannot force the owner of the house to rent it to me under those conditions.

However, potential buyers should have more rights than a renter in the private housing market today; restrictions on property rights have to be balanced against the potential owners' equal freedom to use resources to satisfy their needs and wants, which requires both security and equal access to property. Laws regulating property should not be used to make any particular lifestyle impossible unless it uses more resources than the potential buyers are willing to pay for or unless the lifestyle poses a danger to others who are not willing to accept it. For example, society can prohibit outright an activity that releases plutonium into the atmosphere because it creates a cost that the polluter cannot possibly pay for. It can prohibit an activity that releases a harmless substance into the atmosphere that will turn the sky orange, simply because the person who wants to do this cannot pay others enough to make them willingly to accept an orange sky. But if someone wants to live a loud lifestyle, society should try to find an area where people can be loud without disturbing others.

Like cases must be treated alike. Society can charge more for uses of property that take up more resources or have more harmful activities. It cannot charge more for people who want to use resources to build a temple to Isis than it charges for people who want to use the same amount of resources to build a temple to Zeus, simply because the majority wants to promote the worship of Zeus. If a person or a group of people do not demand a disproportionate amount of external assets (or are willing to pay the required compensation) and are not posing a danger to others, they must not be prohibited from the assets they need to practice their lifestyle in a society that provides the maximal equal freedom. These protections for property buyers and holders are strong enough to ensure that extensive markets cannot be prohibited.

There is, of course, a Coase Theorem problem in determining what constitutes harm,²⁶ especially in *advance* of the assignment and definition of property rights. This is an involved legislative issue, but I will suggest two guides. First, the default is to leave the environment alone. People who want to change the sky from its natural blue to an artificial orange have more to prove than those who want to leave it as we found it. Second, whoever gets their way compensates those who do not. Part of an individual's basic income compensates her for the fact that she cannot turn the sky orange or release plutonium into the atmosphere, which she could do if she was alone or in a world of like-minded people.

4. A left-libertarian reply?

A left-libertarian might reply that the concerns with property rights expressed in these chapters are contained in left-libertarian theories of justice and they can be solved by left-libertarian policy prescriptions. This section argues that the concerns I have expressed are broader than the concerns of better-known, left-libertarian theories and that while left-libertarianism implies a unique solution, the negotiated solution proposed here could have many different, but equally legitimate, outcomes.

According to Peter Vallentyne's definition, "Left-libertarian theories of justice hold that agents are full self-owners and that natural resources are owned in some egalitarian manner."²⁷ By that definition, the theory presented in this chapter is arguably left-libertarian.

²⁶ Coase (1960). "The Problem of Social Cost." *Journal of Law and Economics* 3: 1-44.

²⁷ Vallentyne (2000). "Introduction: Left-Libertarianism - A Primer." *Left-Libertarianism and Its Critics: The Contemporary Debate*. Basingstoke: Palgrave: 1-20, p. 1.

Although the theory does not begin with the assumption that external assets are naturally collectively owned, it shows that beginning with the assumptions that they are equally unowned by everyone and that society is committed to maximal equal freedom leads very much to the same outcome. Most left-libertarians agree that the equal right to use external assets is consistent with maximal equal freedom for all and that unequal ownership of natural resources without compensation is inconsistent with equal freedom. But I would like to outline several ways in which this theory differs from the better-known forms of left-libertarianism.

Left-libertarianism is most often associated with the idea that natural resources are the only legitimate tax base. The government may (and should) tax away all of the resource value of assets, but it should not tax labor or improvements made to natural resources.²⁸ Therefore, many left-libertarians would reject the arguments above that extended the tax base from natural resources to all external assets and extended the possible forms of taxation from eco-taxes to income and wealth taxes. Some left-libertarians might argue that the lack of a dichotomy between resource taxes and wealth or income taxes implies a rejection of full self-ownership, but that is not the case. The theory in Part One proposes ECSO freedom as the primary concern of government policy, but neither part of this thesis rejects full self-ownership as an important concern.

Rather than rejecting full self-ownership, it rejects the belief that income or wealth taxes infringe full self-ownership. They infringe property ownership, not self-ownership. The income aspects of self-ownership entail a right to negotiate with others for property. If society as a whole has a legitimate claim to all external assets, it is a party to any transaction, and therefore, it can tax any transaction involving external assets or claims on external assets. The right to mix one's labor with an asset, increase the asset's value, and resell the asset for a higher price is an incident of ownership of *the asset* that the holder must buy from others. If I live in a rental house, and I alter the rental house, increasing its value by 100 fold and then resell it, the owner can sue me to have his entire house back. If I want the right to alter and to own the alterations I make to the rental house, I must negotiate this with the owner of the house. We might agree that I will receive 99% of the value of my alterations, or only 1% of the value of my alterations. We might not come to any agreement at all and I might have to choose not to rent the house. If I am capable of increasing the value of the property and the owner is wise, she will give me a good incentive to do so, but there is no fixed "value" of my labor.

Most left-libertarians do not focus on the need for social agreement, but view the taxation of natural resources as an application of the Lockean proviso on unilaterally appropriated resources rather than the rejection of unilateral appropriation altogether. Therefore, most left-libertarians (1) do not argue that the incidents of ownership are subject to social agreement, (2) take the quantity of privately held natural resources to be approximately fixed, and (3) believe the legitimate tax revenue is determined by the market value of natural resources (variously defined). If 1 and 2 become subject to agreement, 3 is no longer fixed. Applying Christman's observation more broadly,²⁹ there is no unique solution to the question of what is the value of human effort relative to the value of natural resources, only the opportunity to negotiate.

²⁸ George *Progress and Poverty*; Spencer *Social Statics*; Vallentyne "Introduction: Left-Libertarianism - A Primer."; Steiner *An Essay on Rights*, pp. 235-236.

²⁹ Christman (1994). *The Myth of Property: Toward an Egalitarian Theory of Ownership*. New York: Oxford University Press.

Without a need for social agreement, the policy implications of left-libertarians are relatively clear, if not unique, as can be shown from the following graph. The horizontal axis shows the percentage of resources held privately. Point 0 on the left corresponds to a society with no private ownership of property and Point 100 on the right is the point at which all external assets are private property. The vertical axis shows the price of holding resources privately. The downward sloping line labeled with the large D is a demand curve relating the price of holding resources privately to the quantity of resources private citizens are willing to hold. Under the normal assumptions the demand curve generally slopes down from left to right, showing that the lower the price the more people are willing to buy.³⁰

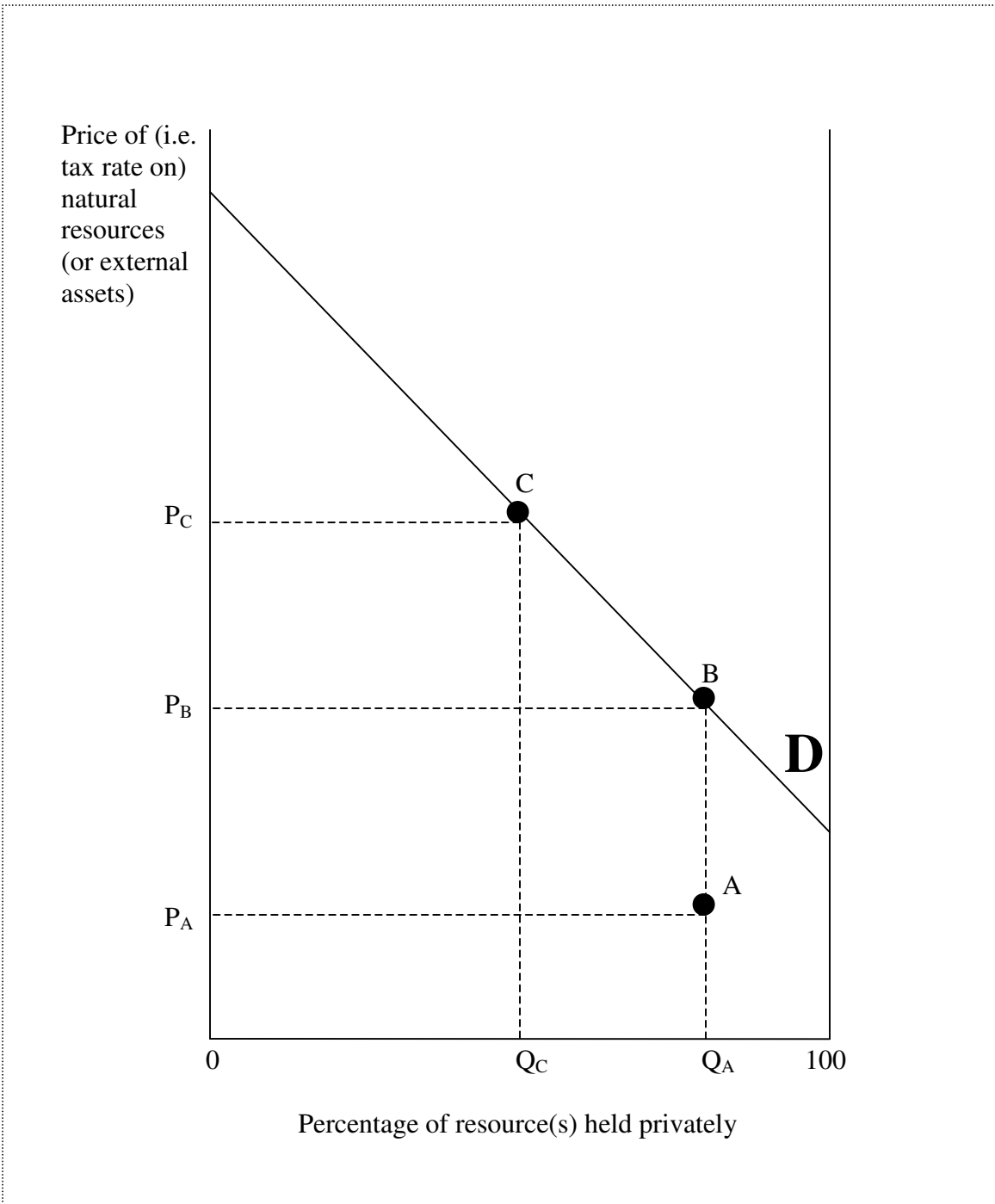
The left-libertarian complaint is that the price for holding natural resources privately (the resource tax) is less than the market price. Graphically, current property law puts society at a point like A inside the demand curve on the graph. Property owners hold Q_A and pay only P_A for it in taxes, although a competitive market or an auction would force them to pay P_B . Point A would not necessarily violate equality of access to natural resources, if holdings of resources were rationed so that everyone had an equal amount. But, of course, resources are not rationed. Some people have more access to them than others. People who control resources resell them to the rest of society and realize gains equal to the difference between the market price and the actual resource tax multiplied by the quantity.³¹ These excess gains are attributable to the scarcity value of natural resources rather than to some valuable service provided by the people who own them. If society charged P_B (reaching point B on the demand curve), and used the proceeds to fund public projects, a welfare state, or a basic income, it would achieve equal access to resources and freedom as noninterference more fully than right-libertarianism.

If Q_A is taken as given, left-libertarianism implies that achieving point B is the unique solution to the problem of private property. A tax rate of P_B fully satisfies the requirements of left-libertarian justice. In the introduction to the principle anthology on left-libertarianism, Vallentyne writes, "For natural resources, there is a fixed supply, so we can here focus solely on how the competitive value is determined by demand."³² Supply, or the willingness to designate natural resources as private property, plays no role, and the empirical question of the competitive value of natural resources becomes extremely important. However, although the amount of natural resources in the world is approximately fixed, the amount of natural resource in private hands could be highly variable and subject to discretionary government policy. This fact gives the social agreement enormous price-setting power, which is usually ignored by left-libertarians. Estimates for the value of natural resources currently in private hands vary enormously from 0.5% to 20% of gross domestic product. The latter figure gives great leeway for redistribution and the former figure leaves very little, but much left-libertarian literature hinges on that empirical question.

³⁰ People are not always willing to buy more at lower prices, but that assumption is not essential for the process here.

³¹ $Q_A(P_B - P_A)$ to express it mathematically.

³² Vallentyne "Introduction: Left-Libertarianism - A Primer.", p. 16.



My criticism of left-libertarianism is that the legitimate tax is not determined by the empirical question of the market value of natural resources. If the actual market value of natural resources (or the relevant external assets) is close to the higher figure, the left-libertarian solution is sufficient. However, an argument for redistribution sufficient to free people from abject poverty does not hinge on that fact, because **the price of privatizing natural resources is a key subject for social agreement**. If government policy achieved point B, but P_B was not sufficient to make people with lesser shares accept the agreement to establish property, maximal equal freedom for all would not be realized. P_B *might* be sufficient to establish a general agreement, but if not, there is room to negotiate a higher price, which might involve moving to a point like C (or any point along the demand curve) at which the price of (tax on) resources is higher, fewer resources are held privately (more being unowned, used collectively, or kept in reserve for future generations), and the share of income attributed to human resources is lower. Q_A is merely the percentage of resources that are currently in private hands. It is not certain that the amount of resources currently held privately is the optimal amount to hold privately. The arguments above imply that the government should use its price-setting power to obtain the widest-possible social agreement in favor of the property-rights regime and to minimize interference with those who dissent from the agreement.

In other words, the solution is more complex than equalization of the current market value of privately held natural resources, but there are several reasons why the question is more complex still. First, it is not simply a matter of choosing what percentage of all external assets to privatize, but the percentage of each asset to privatize. A social agreement might result in privatizing 90% of society's copper, 50% of its zinc, 20% of its oil, 1% of its ancient artifacts, and 0% of its plutonium. Flexibility in the quantity of each resource to privatize implies flexibility in the price of each resource. The social agreement might choose to use much more of its price-setting power for some resources than others. Second, as argued above, there are different rules under which external assets can be privatized. The incidents of ownership that potential owners are bidding for will affect the price they are willing to pay, and therefore the outcome is very far from being tied to the current market price of natural resources or external assets.

If ECSO freedom is a constraint on the process the government should, if necessary, use its price-setting power to ensure that everyone has at least enough income to secure their basic needs. Thus it is different from much left-libertarian literature, such as that of Van Parijs and Steiner, who argue that the just amount of distribution is a purely empirical question that has nothing to do with whether it provides enough to live on.³³ It is possible that the government will be unable to raise sufficient revenue to achieve that goal even using its price-setting power. This issue is discussed in Chapter 12.

5. A right-libertarian reply?

This property theory provides an answer to Nozick's question about "redistributive" taxation:

Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such good

³³ Van Parijs (1995). *Real Freedom for All: What (If Anything) Can Justify Capitalism?* Oxford: Oxford University Press; Steiner *An Essay on Rights*.

unnecessary for his happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not?³⁴

The man who wants to earn extra money works for the tax authority for the same reason that he works for the employer, client, or landlord: he wants a larger share of external assets and these are the people who can reward him with it. If he does not want to own a relatively large share of external assets, he need not work for his employer and he need not be a net-taxpayer. If he wants to own a relatively large share of external assets, he must pay for them through “redistributive” taxation. If he wants to hold a large share of property without paying that tax, he simply wants something for nothing. He wants to take more without doing anything for those who must therefore make do with less.

One cannot use the theory presented in this chapter to justify any kind of tax, such as an arbitrary tax or a confiscatory tax designed to make a certain lifestyle impossible. Libertarians of all stripes are correct to argue against such taxation. But this theory counters the assertion that taxation in general is freedom-inhibiting. Quite the reverse: unequal ownership of property without redistributive taxation is freedom-inhibiting.

6. Conclusion

This chapter has argued that a justification for property consistent with maximal equal freedom for all requires property rights to be established by an agreement between those who assume rights of property and those who thereby assume duties. The contract must be mutually beneficial in the sense that those who assume larger shares of property must compensate those who accept smaller shares sufficiently to make property in both parties’ interest. This objective can be achieved by subjecting property to a wealth tax used for redistribution in the form of a basic income.

In a modern economy or in a right-libertarian ideal state, the person who holds property claims ownership, saying, “This is mine, because I have paid for it,” but she knows that she paid only the person who held it before her, connecting through a long line of exchanges to a person who arbitrarily appropriated and by doing so forced other people to have less without their consent or compensation. She may have worked hard for her property, but she has paid the wrong people. Property rights by general agreement, as proposed here, allows a person to claim ownership, saying, “This is mine, because I paid for it. Everyone who is less fortunate than I am has benefited from the services I provide. I have received the consent or paid compensation to everyone who must make do with less because I have more.” It is her property because she has paid the right people. She has a far stronger ethical claim to ownership than under any theory of unilateral appropriation.

³⁴ Nozick *Anarchy, State, and Utopia*, p. 170.

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