At the birth of societies, the rulers of republics establish institutions; and afterwards the institutions mould the rulers.

Montesquieu

Ethics for Bureaucrats

An Essay on Law and Values

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To Kathy

"There lives the dearest freshness deep down things"

interest of national security was lawful. Support for the legality of such action is found, for example, in the concurring opinion of Justice White in Katz v. United States.

This is not to say, of course, that any action a president might authorize in the interest of national security would be lawful. The Supreme Court's disapproval of President Truman's seizure of the steel mills is an example. But it is naive to attempt to categorize activities a president might authorize as "legal" or "illegal" without reference to the circumstances under which he concludes that the activity is necessary. Assassination of a foreign leader—an act I never had cause to consider and which under most circumstances would be abhorrent to any president—might have been less abhorrent and, in fact, justified during World War II as a means of preventing further Nazi atrocities and ending the slaughter. Additionally, the opening of mail sent to selected priority targets of foreign intelligence, although impinging upon individual freedom, may nevertheless serve a salutary purpose when—as it has in the past—it results in preventing the disclosure of sensitive military and state secrets to the enemies of this country.

In short, there have been—and will be in the future—circumstances in which presidents may lawfully authorize actions in the interests of the security of this country, which if undertaken by other persons, or even by the president under different circumstances, would be illegal.

33. Justice Murphy also dissented in this case. The implication of his position was that if the military situation was as desperate as the army claimed, the proper course would have been to have declared martial law. In this way the burdens of war could have been shared more equitably without disproportionate disabilities being placed upon Japanese Americans.
34. 418 U.S. 683 (1974).
35. 4 Wall. 475 (1867).
36. 1 Cr. 137 (1803).
37. Youngstown Sheet and Tube Company v. Sawyer 343 U.S. 579 at 593-4 (1952).

5

Property

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property and the property in rights.

James Madison

It is only fitting in a book on constitutional values that the chapter on freedom (or liberty) should be followed by one on property. The close connection between these two values was widely recognized at the time of the adoption of the Constitution and the Bill of Rights. Indeed, so closely were they related that in the due process clause they stand next to one another and right behind life itself as the three great values to be protected from arbitrary governmental action. Today, of course, we tend to draw a distinction between property rights and human rights, but such a distinction would have made little sense in the early years of the Republic.[1] Throughout this chapter we shall return several times to this question of the distinction between human rights and property rights as well as to the question of the relation between property and freedom.

To understand property as a regime value, two questions should be kept in mind: (1) What is the function of property and (2) what sorts of things are property? That is, what higher, political goals are promoted by property and what sorts of things might be considered as property for the purpose of promoting these goals? The two major divisions of this chapter—"Old Property" and "New Property"—correspond to these two questions.

OLD PROPERTY

During the early years of the Republic, constitutional issues concerning property usually focused on the contracts clause of Article I, which prohibits the states from "impairing the obligation of contracts." Prior to the adoption of the Fourteenth Amendment in 1868, the Constitution had no explicit due process limitation on state power over life, liberty, or property. Hence, it was the contracts clause that served as the main legal instrument by which the Supreme Court protected property interests from hostile state legislation.

The contracts clause is always associated with the name of Chief Justice John Marshall whose early interpretations of that clause had incalculable effects upon commercial life in America throughout the nineteenth century. Marshall's opinions were politically significant because in deciding just when a state had impaired a contractual obligation, he was defining the limits of state power. Thus his opinions not only developed the law of contracts but, more significantly, developed the constitutional law of federalism.

To understand Marshall's approach to the protection of property through the contractual relationship, one must recall the philosophical milieu of his time, which was permeated with the belief in natural rights antecedent to the formation of civil society. As Marshall put it in one of his rare dissenting opinions:

> If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and although they may be controlled, are not given by human legislation. . . .
>
> [T]he rational inference seems to be . . . that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. . . .[2]

Marshall's philosophical position was confirmed by the profound displeasure he and other conservatives felt at the prospect of unstable property relationships. The economic difficulties following our own Revolution were distressing enough for patriots of a conservative persuasion, but Marshall's experiences abroad in trying to negotiate with the French

during the period of the Directory gave him an abiding conviction of the relationship between secure property arrangements and authentic human freedom. Upon his return from France, he delivered an address in Richmond in which he roundly condemned the excesses of the French Revolution. He scorned the "despotism, which borrowing the garb and usurping the name of freedom, tyrannizes over so large and so fair a portion of the earth." From the sorrows of Jacobin France, said Marshall, "a citizen of the United States, so familiarly habituated to the actual possession of liberty, that he almost considers it as the inseparable companion of man," might well reflect on "the value which he ought to place on the solid safety and real security he enjoys at home."[3]

The constitutional world of Marshall, then, turned on the bedrock principle of a natural right to contract and the prudential calculation that one enters the road to genuine liberty and prosperity by the sure but low path of "solid safety and real security."[4]

Dartmouth College v. Woodward

Marshall's most famous interpretation of the contracts clause came in Dartmouth College v. Woodward (1819).[5] The case involved an effort by the New Hampshire legislature to wrest control of Dartmouth College by altering the terms of a 1769 charter granted by King George III to the trustees of the college. The charter conferred upon the trustees the right to govern the college in perpetuity and to fill vacancies within their own membership. In 1816, New Hampshire tried to bring Dartmouth College under state control by replacing the trustees with a board of overseers appointed by the governor. The trustees turned to the courts for relief. When the New Hampshire courts upheld the state's action, the trustees appealed to the Supreme Court of the United States.

The most important question in the case was whether the royal charter was a "contract" protected by the Constitution. It was generally acknowledged that the contracts clause was intended to protect contracts between private parties. In earlier cases, however, Marshall had held that a land grant by a state legislature[6] and a grant of tax immunity[7] were contracts under the federal Constitution and could not be rescinded by the states. Thus there was some precedent for finding the acts of state legislatures to be within the scope of the contracts clause. These precedents and the Dartmouth College case itself raised critical issues of federalism because the contracts clause was perceived—not altogether incorrectly—by many of Marshall's critics as a vehicle for undermining the power of the states to regulate their own internal affairs.

In Dartmouth College Marshall found that the charter was a contract within the meaning of the federal Constitution:

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by that rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception. . . .

The opinion of the Court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this Court. . . .

As this passage indicates, Marshall's problem in Dartmouth College was whether or not the royal charter was a contract. Although he found it was, candor compelled him to acknowledge that it was quite unlikely that the framers of the Constitution had eleemosynary institutions in mind when they forbade the states to impair the obligation of contracts. In the light of this acknowledgment, he announced as a rule of interpretation that one cannot rest with the mere assertion that a "particular case was not in the mind of the Convention when the article was framed." Instead

one must go further and ask whether the Constitution would have been written differently if the case in question had been considered by the framers. This hermeneutic principle expands the scope of the contracts clause and correspondingly reduces the power of the states to regulate their affairs. Given the political context of early nineteenth-century America, this reduction was not only a defense of contractual obligations, but it was an effort in nation building as well.

Home Building and Loan Association v. Blaisdell

A very different method of interpreting the contracts clause surfaced in Chief Justice Hughes's opinion in the 1934 case of Home Building and Loan Association v. Blaisdell.[8] This case involved the Minnesota Mortgage Moratorium Law of 1933, which provided that under certain circumstances state courts could authorize a limited moratorium on mortgage payments during a declared emergency period, which was not to be extended beyond May 1, 1935. The purpose of the law was to assist farmers and homeowners who, because of the dire economic circumstances of the Depression years, faced foreclosure of their mortgages. The constitutionality of this act was challenged on the grounds that in temporarily suspending the need to meet mortgage payments, Minnesota impaired the obligations of contracts. In a five-to-four decision, Chief Justice Hughes rejected this challenge and upheld Minnesota's power to suspend mortgage payments temporarily despite the effects such suspensions would have on contractual obligations. The following sections of his opinion pertain to our investigation:

> In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.
>
> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of a President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. . . .

A well-known commentary on the Constitution maintains that "Hughes's opinion skirted close to the proposition that an emergency might empower government to do things which in ordinary times would be unconstitutional."[9] Do you agree with this commentary? Does the opinion merely "skirt close" to this proposition or does it, in fact, simply affirm it? What do you think Hughes would say of Marshall's belief that the right of contract is antecedent to the formation of society? Is your own opinion closer to that of Hughes or Marshall?

What is the operational meaning of Hughes's statement that an emergency does not create power, but it may furnish the occasion for the exercise of power? Does the following selection from Hughes's opinion shed any light on this question?

Not only is the constitutional provision [the contracts clause] qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." . . . Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of soverign power is also read into

contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

Counsel for the Home Building and Loan Association argued that because the contract involved in this case was between two private parties, it was precisely the sort of contractual obligation that the framers of the Constitution intended to safeguard from state interference. Whatever criticism one might have of Marshall's far-reaching effort to expand the notion of contract to include agreements to which states are parties, such objections were clearly irrelevant here. Blaisdell presented a garden-variety contractual situation between two private parties—a homeowner and a bank. Hughes's answer to this argument contrasts sharply with Marshall's understanding of how to interpret the contracts clause when situations unforeseen by the framers arise. Marshall addressed the issue of how to interpret the clause in a case involving an eleemosynary institution. Hughes addresses the issue of whether the meaning of the clause might be affected by the drastic economic changes taking place in the 1930s. His position follows:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (McCulloch v. Maryland) . . . "a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." . . . When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended

application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. . . . The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts and there is no . . . reason for refusing to apply this principle to Minnesota mortgages. . . .

It is interesting to note that in offering a method of interpreting the Constitution quite different from Marshall's, Hughes cites Marshall himself! He ignores Marshall's opinions dealing with the contracts clause because these opinions invariably tended to restrict state power. Instead he cites Marshall's opinion in McCulloch v. Maryland, a case that involved a broad, expansive interpretation of governmental power at the national level. This was a clever twist in Hughes's argument and of some interest for our purposes. Later in this chapter we shall see that Marshall's commitment to upholding contractual rights against state regulation was not based exclusively upon a doctrinaire hostility to all government power. Rather his defense of property interests might well be seen as an effort in nation building—strengthening the national government at the expense of the states.

Just as Supreme Court justices differ over the meaning of the Constitution, bureaucrats can differ over the meaning of statutes, executive orders, and statements of agency policy. Both Marshall and Hughes infused the contracts clause with a meaning they thought was appropriate for their times. They justified their interpretations with appeals to widely accepted principles of political philosophy. Can you give examples of value-creating situations that arise in government agencies where the outcome of a decision depends on how bureaucrats interpret authoritative statements? If you have ever done this yourself, did you have any broad principle to justify the interpretation you arrived at? Is your attitude on how authoritative documents should be interpreted closer to that of Hughes or Marshall?

Ramifications of Blaisdell

Hughes's argument in Blaisdell has some interesting ramifications that warrant further examination. Eleven years after Blaisdell, the Supreme Court found the same issue on its agenda once again in East New York Savings Bank v. Hahn.[10] In 1933, New York had passed mortgage moratorium legislation similar to that of Minnesota. Each year thereafter it had been renewed with the result that by the mid-1940s New York banks still could not foreclose for default on payments of principal. While few people indeed, then or now, could become terribly exercised over the problems bankers have in foreclosing on homeowners, the annual reenactment of the mortgage moratorium law does tell us something about what governments do with powers originally justified because of a temporary emergency. For our purposes, however, the most interesting point is the argument the Court adopted in unanimously upholding the New York law against the bank's challenge to the suitability of emergency legislation long after World War II had brought a new set of problems to replace the economic tribulations of the Depression years. Gone are the scholastic niceties of Hughes's delicate distinction between powers created by emergencies and powers whose exercise is occasioned by an emergency. Gone, too, is the soul-searching of how to reconcile the moratorium legislation with either the language of the contracts clause or the intent of the framers. In its place is the following blunderbuss from Justice Frankfurter:

> Since Home Bldg. & L. Assn. v. Blaisdell, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. . . . The Blaisdell case and decisions rendered since . . . yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people," . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.
>
> The formal mode of reasoning by means of which this "protective power of the State," . . . is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize, as was said in Manigault v. Springs, that the power "which in its various ramifications is known as the police power, is an exercise of the soverign

> right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals." . . . Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary." . . . So far as the constitutional issue is concerned "the power of the State when otherwise justified," . . . is not diminished because a private contract may be affected.

In ancient Rome, a popular legal maxim was "salus populi, lex suprema"—"the welfare of the people is the supreme law." Would it be fair to characterize the excerpt from Frankfurter's opinion as an echo of that ancient principle? If not, why not? If so, what happens to the government of limited powers created by the Constitution?

These questions raise the same kinds of problems we saw in the preceding chapter on freedom. Indeed, it is particularly interesting to note that in upholding the New York law, Frankfurter cited a report to the New York legislature warning that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate."

The parallel between Frankfurter's fears of an emergency that might happen and Justice Sutherland's fears in Gitlow[11] of a revolution that might be brought about by a frantic socialist tract is suggestive. If you were critical of Sutherland's opinion in the previous chapter, do you react the same way to Frankfurter's position here? Would you consider formulating a broad rule that governments should never legislate merely on the basis of what might happen? Hardly; if we did this there could be no intelligent planning. What would become of national defense, environmental law, or the elusive national energy policy? Clearly there are times when governments must act on fears or suspicions of what might happen.

Can we distinguish between the two opinions? Is there some legitimate reason for protecting speech more than contractual obligations? Could we stand Marshall's natural rights argument on its head and agree with him that there are natural rights antecedent to the formation of civil society but that the right to contract is not among them? Could we then say that the right of free speech is included in these natural rights? Was this the argument that Justice Jackson used in West Virginia School Board of Education v. Barnette?[12] Did he imply that there is a natural right to be free from coercion against one's religious beliefs or did he say that there are certain kinds of behavior that government is simply incompetent to mandate?

Several Supreme Court justices have spoken of First Amendment liberties of religion, speech, press, and assembly as "preferred

freedoms."[13] The term raises a series of technical questions that need not concern us here. For our purposes the relevant point is that some justices have been willing to acknowledge that certain constitutional rights are more important than others—that freedom of speech is to be preferred to the right to have one's contractual relationships unimpaired by state action. Do you agree with this? If so, can you say why? Is it because—as we hear so often—"human rights are more important than property rights"?

Another interesting ramification of Hughes's opinion in Blaisdell is the fact that it was once cited in a context quite different from that of the Minnesota Mortgage Moratorium Act. Once again, it was Justice Frankfurter who cited Blaisdell. The case is one we have already seen in the previous chapter—Korematsu v. U. S. wherein Frankfurter wrote a concurring opinion upholding the army's power to relocate American citizens of Japanese extraction. Turn back to that opinion in Chapter 4 and look for the similarities between Hughes's attitude toward governmental power in Blaisdell and Frankfurter's attitude on the same issue in Korematsu.

At the heart of Frankfurter's opinion is the principle borrowed from Hughes in Blaisdell—the power to wage war is the power to wage war successfully. Hughes had used the war power simply as an example to support the distinction he urged in Blaisdell between powers created by emergencies and powers whose exercise is occasioned by emergency. Hughes's attention was on the contracts clause, not the war powers. The reference to the war powers was merely by way of illustration. It remained for Frankfurter to apply the war power illustration to a wartime situation to justify the suppression, not of property rights, but of the most fundamental human rights. Does the relative ease with which Frankfurter moves from property rights to personal rights suggest that the distinction between the two types of rights is not really very helpful in the face of an argument that the power to do something (wage war, regulate commerce, protect public health, safety, and morals, and so on) implies the power to do it successfully? Such an argument seems to treat all rights as of a piece—governments may do whatever must be done to discharge their responsibilities.

At times certain rights must be temporarily suspended or their exercise curtailed for the duration of an emergency. In the light of such an argument, it makes little difference in principle whether it is a property right or a human right that is compromised. The principle underlying the Hughes-Frankfurter line of reasoning is the political exigency of the moment rather than the nature of any particular right. What does this kind of reasoning do to the principles of limited government? If you reject this kind of reasoning, what alternatives would you suggest when real emergencies arise—as they will?

Nation Building

Earlier in this chapter, it was noted in passing that there were certain nation-building aspects in Chief Justice Marshall's defense of property rights. This consideration will be developed more fully now. The point here is that Marshall and many of his contemporaries at times proposed a view of property that was instrumental. That is, property rights, especially those created by contract, were capable of serving social and political ends. This idea had been developed most elaborately, of course, by Adam Smith. As Arnold Toynbee has noted, "Two conceptions are woven into every argument of the Wealth of Nations—the belief in the supreme value of individual liberty and the conviction that Man's self-love, is God's providence, that in pursuing his own interest he is promoting the welfare of all."[14] Smith, of course, was not alone in making the connection between the pursuit of self-interest and the common good. Blackstone had earlier praised the law of inheritance because "it sets the passions on the side of duty."[15] And The Federalist Papers have long been recognized as championing the wisdom of channeling man's acquisitive passions along socially constructive lines.

The constitutional expression of this principle can be seen in Marshall's eagerness to free commercial enterprises from state regulation in the hope of making real the constitutional promise of a national market that would bring prosperity to the new nation. This was certainly the thrust of his argument in Gibbons v. Ogden[16] where he joined the commerce clause[17] and an Act of Congress licensing ships engaged in the coastal trade to declare unconstitutional a New York statute that had conferred a monopoly on a steamboat company. The effect of this decision was to open the nation's navigable streams to all who wished to compete in the shipping industry.

In overturning the New York steamboat monopoly, Marshall was, of course, simply preferring one kind of property over another—the property of those shippers not favored by the monopoly at the expense of those who had enjoyed a privileged position. The significant point, however, is that it was competitive and dynamic property that was favored at the expense of property that was privileged and static. In so doing, Marshall was contributing to a widespread tendency among American jurists at all levels of government to interpret property rights in a way that would enhance economic development.

This tendency can be seen most readily by following the development of the law of land use and water rights during the first half of the nineteenth century. Legal historians have shown that at the end of the eighteenth century a conservative, static, and gentlemanly view of landed property was dominant in the courts.[18] That is, land was looked upon as a private estate to be enjoyed by its owner rather than as a productive asset. As one commentator observes: "The great English gentry, who

had played a central role in shaping the common law conception of land, regarded the right to quiet enjoyment as the basic attribute of dominion over property."[19] A common legal maxim invoked frequently in eighteenth-century America articulated this conservative viewpoint: "sic utere tuo ut alienum non laedas," "use what is yours in such a way as not to harm what belongs to another." What this meant in practice was that one landowner could not develop his property in a way that would diminish the value of another's property. Thus an upper riparian owner could not dam a river or build a mill that would significantly divert water from lower riparian estates. As a New Jersey Court put it in 1795:

> In general it may be observed, when a man purchases a piece of land through which a natural water-course flows, he has a right to make use of it in its natural state, but not to stop or divert it to the prejudice of another. Aqua currit, et debet currere* is the language of the law. The water flows in its natural channel, and ought always to be permitted to run there, so that all through whose land it pursues its natural course, may continue to enjoy the privilege of using it for their own purposes. It cannot legally be diverted from its course without the consent of all who have an interest in it. . . . I should think a jury right in giving almost any valuation which the party thus injured should think proper to afix to it.[20]

The antidevelopment thrust of the law is clearly seen in the way conflicts between riparian owners were settled. The established principle was that the litigant claiming the more "natural" use of the water was to be preferred. "Natural" meant agrarian, and so preference was given to owners who appropriated water for agriculture or husbandry over those with some commercial enterprise in mind.

In the nineteenth century all this began to change. In what James Williard Hurst has called "The Release of Energy," the law began to find ways to encourage the commercial spirit of the acquisitive entrepreneur at the expense of the landed gentry. The federal Bankruptcy Act of 1841 had the developmental effect of relieving debtors more easily and thereby enabling them to reenter the market. This encouraged men who were willing to take financial risks. In torts, the emphasis upon the "reasonable man" test rather than on the intent of a particular party in litigation provided a more objective standard for liability and, hence, made the precise nature of one's risks more orderly and predictable. This, too, encouraged the commercial spirit. Even the doctrine of "vested rights," which sounds so stuffy and reactionary today, had the effect of releasing creative commercial energy by protecting venture capital.

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*Water flows and should be allowed to flow.

Perhaps the most dramatic example of the legal changes that reflected the changes in broad, societal values came in the refashioning of the law of water rights by mid-century. It will be recalled that in 1795 a New Jersey court could wax eloquent on the principle that the natural flow of rivers and streams must not be disturbed. This doctrine came under severe pressure from the remarkable growth of the textile industry in the 1820s and the 1830s. The need for mills to supply this growing demand rendered the common-law principles of the natural flow of water hopelessly obsolete. An entirely new question arose with the advent of the large integrated cotton mills whose voracious appetite for water power frequently made it impossible for more than one proprietor to develop a stream without destroying the usefulness of the other mills on the same stream. When litigation arose between proprietors over who should be allowed to develop a stream at the expense of his competitor, interested parties wondered anxiously how the courts would decide.

In 1844, a Massachusetts court addressed this issue in a remarkable opinion that shows how dramatically legal thinking had changed since 1795. Chief Justice Shaw maintained that "one of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills and machinery; a use profitable to the owner and beneficial to the public."[21] Morton Horwitz calls this statement the "new utilitarian orthodoxy"[22] that differs strikingly from the gentlemanly use of property that had prevailed just fifty years earlier. For our purposes, it is particularly important to underscore the connection made between what is profitable to the owner and what is beneficial to the public. One of the major factors relied on by the judge in deciding which mill owner should be favored was the public interest consideration of which one could better respond to the "usages and wants of the community" and promote "the progress of improvement in hydraulic works."[23]

With this background on nineteenth-century law in mind, one may be able to see more clearly what is meant by the nation-building aspects of Marshall's jurisprudence. Take, for example, the opinion in which he sets forth the most extreme defense of the rights of contract ever stated by any Supreme Court Justice. So extreme was Marshall's opinion in this case—Ogden v. Saunders[24]—that it was the only time in his thirty-four years as Chief Justice that he was in the minority on a constitutional issue. The case involved a New York Bankruptcy Act passed at a time when there was no federal bankruptcy law in force that would have preempted state action in this area. In an earlier case, Marshall had persuaded his colleagues to strike down a New York Bankruptcy Act that would have affected debts made prior to its passage. The Court found that the retrospective aspect of the act impaired the obligations of contracts.[25] In Ogden v. Saunders, however, a second New York statute had only a prospective effect—that is, it would be operative only upon debts incurred after the passage of the act. The Court upheld this act and rejected the

argument that it impaired contractual obligations. It reasoned that the new Bankruptcy Act could be considered as part of every contract entered into after the act had been passed. Thus no contractual obligations are impaired by the relief the act affords a bankrupt debtor because when the creditor entered into the contract he knew the debtor would be protected by the bankruptcy provisions.

Marshall acknowledged the plausibility of this line of reasoning:

> That there is an essential difference in principle between laws which act on past, and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class, may very well consist with entire legislative freedom respecting those of the other.

Despite this concession, he still maintained the New York Bankruptcy Act violated the contracts clause. He justified his position by appealing to the nationalistic and commercial objectives of the Constitution as a whole:

> Yet, when we consider the nature of our Union—that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated—it would not be a matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

Thus it is the vision of a great commercial republic that undergirds the extremes to which Marshall was willing to go in upholding the inviolability of contractual obligations. Interestingly, the policy argument for bankruptcy laws turned on their effectiveness in promoting economic development because they mitigated the penalties visited upon those who take financial risks. Marshall ignores this consideration, however. Apparently, in the absence of a congressional Bankruptcy Act, Marshall would prefer no bankruptcy act at all. For our purposes, however, the important point is that those on both sides of the bankruptcy argument justified their positions in terms of national economic development. This underscores the instrumental notion of property.

Marshall's successor as chief justice, Roger B. Taney, differed considerably from his predecessor in temperament and political outlook. The

fact that Marshall had been appointed by John Adams whereas Taney was an appointee of Andrew Jackson suffices to establish their differences. Nevertheless, they were quite similar in accepting an instrumentalist view of property which they related to grand national purposes of economic development.

This can be seen in the famous case of Charles River Bridge v. Warren Bridge.[26] In 1785, Massachusetts empowered the Charles River Bridge Company to build a toll bridge between Charlestown and Boston. An earlier grant in 1650 had given Harvard College exclusive ferry rights over this "line of travel," but in the grant of 1785 the college yielded its rights in return for annual payments from the bridge company. In 1828, the legislature authorized the Warren Bridge Company to build another bridge just a few dozen yards from the Charles River Bridge. The Warren Bridge would charge tolls only until the bridge was paid for; thereafter it would be free. This, of course, would put the Charles River Bridge out of business, and so the company brought an action to stop the construction of Warren Bridge. The company argued that in the grant of 1785 it had acquired Harvard College's exclusive rights over the "line of travel" between Boston and Charlestown. Since the grant of 1785 said nothing about an exclusive right to build a bridge, the point at issue in the case was whether such an inference could be read into an agreement between a state and a private party. Taney held it could not. Citing an English precedent on this issue, he said "that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public." Further, "in charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, in their natural power and construction, purport to convey." Finally, he added, "While the rights of private property are sacredly guarded, we must not foget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."

Such language is quite different from the tone of Marshall's opinions on the contracts clause. The emphasis on the needs of the community over and against the rights of the owners of private property heralds an important gloss on the traditional American doctrine on property and considerably qualifies Marshall's concern for vested rights. This qualification stresses the need to limit such rights when the public interest so requires. This aspect of the tradition was eclipsed during the laissez-faire era in American history (1890-1937),[27] but it was salient in the Taney Court and has certainly been salient once again since the mid-1930s. Despite the marked difference between Taney's reading of the contracts clause and that of Marshall, it would be a mistake to contrast the two jurists as simply antithetical. Taney's opinion in Charles River Bridge was similar to Marshall's decision in the New York steamboat monopoly case—Gibbons v. Ogden—at least in the sense that in both cases one form of property was preferred to another. More significant, however, is the fact that in both

cases it was the same type of property that was preferred. Property that is new, dynamic, and competitive gets the nod over that which is old, static, and privileged.

In justifying his decision in favor of the new bridge, Taney announced a strong defense of the need to encourage economic development:

> Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error (Charles River Bridge). Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the state. . . .
>
> And what would be the fruits of this doctrine of implied contracts, on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach, without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchise of the turnpike corporations of no value? Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights

> of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another, had been made, no railroad or canal, between these two points, could afterwards be established. This court is not prepared to sanction principles which must lead to such results.

Taney's opinion in Charles River Bridge did not sway all his colleagues. A lengthy dissent was filed by Justice Story, a distinguished legal scholar whose jurisprudence had been profoundly influenced by many years of close personal association with Chief Justice Marshall. Faithful to the spirit of Marshall, Story predictably condemned Taney's innovative treatment of the contracts clause. The most interesting part of his dissent occurs, however, when he takes up Taney's developmental argument:

> But it has been argued, and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees (Charles River Bridge), it will interpose an effectual barrier against all general improvements of the country. . . . For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security, and as to productiveness. No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. . . .

This dictum in Story's dissent addresses an issue of policy rather than legal interpretation. The policy in question, however, is which choice of the judges is more likely to enhance economic development. Taney chooses the competitive principle that will give us two bridges where we had one and railroads where we had turnpikes. Story opts for security of venture capital that hitherto the contracts clause had cherished so warmly. For our purposes, the significant point is that the entire argument is structured in utilitarian terms of what property can do to promote the public interest. This, I suggest, is a salient value in the American regime.

Some Reflections

The purpose of the foregoing discussion of the relationship between property and nation building has been to redeem the concept of property from the reactionary overtones it inevitably suggests. The same redemptive purpose is at the heart of the remainder of this chapter, which investigates the meaning of the "new property." Of the three regime values examined in this book, only property is in need of redemption. The reasons for this are many and complex but surely among them is the embarrassment most thoughtful Americans feel at the shocking excess that our society in general and our courts in particular manifested in defending property rights during the laissez-faire era. The arguments brought forth ostensibly to defend property rights were vulgar caricatures of the more serious arguments of an earlier day. These shallow incantations defended the abuses of property rather than property itself and in so doing lost sight of the vital link between property and the public interest. This is certainly one reason why today we may become a bit uneasy at the thought that bureaucrats are sworn to uphold property as a regime value. Just what are they going to uphold?

A deeper reason for our discomfort at the thought of property as a salient value is that it is not terribly flattering. John Marshall was probably right when he told the citizens of Richmond to pursue "solid safety and real security," but he was not very complimentary in saying it. Freedom and equality are much more attractive and reassuring values. It is not very exhilarating to think that one lives and may even be called upon to die for the low but solid values conferred by the institution of private property. The reason this prospect lacks appeal is that we know that at times we are capable of responding to higher motives and when we do so the brighter angels of our nature rejoice. Thus we welcome in sober spirit Lincoln's stern but uplifting reminder that the new nation was conceived in, and dedicated to, the higher values of liberty and equality. Regimes, however, cannot be constructed exclusively on principles that apply only to their finest hours. Democratic regimes in particular must look hard at ordinary people acting in very ordinary ways. When one does this, it becomes clear that political wisdom demands a lowering of one's vision from the grand and the noble to the safe, the secure, and the solid. And all this must be done without trailing off into the crass, the base, and the tawdry. It is no easy task. Property renders yeoman's service in this effort, and for this reason it has been and remains an important regime value.

For an exercise in attempting to apply property as a regime value for bureaucrats, consider critically the following statement on the role of bureaucrats in regulatory agencies. If you find it has some merit, try to

apply it to a regulatory agency with which you are familiar. If you find the statement without merit, indicate as clearly as you can just where it is incorrect or offensive.

A Statement on Values

The connection between property rights and the public interest has some bearing upon the discretionary judgments made by contemporary bureaucrats in regulatory agencies. For one thing, it underscores the futility of railing against "corporate greed." Perhaps the problem is not so much that corporations are greedy but that at times the wrong corporations with the wrong kinds of greed have been rewarded by public policy. For bureaucrats in regulatory agencies it might be wise not to fret over how to transform business executives into "industrial statesmen" whose "social awareness" will make them "sensitive" and "responsive" to the needs of the public. Rather, the proper course might be to regard corporate greed as a great national resource and to point this mighty engine in directions that are socially useful. There was a time when we were told that invisible hands and free markets would do this for us. In some instances this may still be true today, but the nature of the contemporary industrial-regulatory-welfare-warfare state seems to suggest that the very visible and at times quite heavy hand of government must pick up where its invisible mate left off. If so, it becomes important for bureaucrats to assume an aggressive stance toward the industries they regulate. They should look upon the interests of these industries, not as ends in themselves, but as instruments related to higher ends of public interest. By no means does this mean that the regulatory agencies need always and necessarily be hostile to the industries they regulate. It does mean they should be selective in the sort of activity that is encouraged, and such selective encouragement may well mean that some companies will prosper handsomely while promoting the public interest.

The ethical significance of all this is that it is not enough for the conscientious bureaucrat to adhere scrupulosuly to conflict-of-interest regulations. Although such fidelity is absolutely essential, it does no more than assure us that the bureaucrat is not the pawn of the companies he or she regulates. While this is a consummation devoutly to be wished, it ignores the more important question of how government can manipulate corporate property interests in a beneficial manner. This is the proper sphere of bureaucratic discretion in regulatory agencies. Not only must the regulatory agencies avoid being captured by the industries they regulate but they must also encourage, cajole, discipline, and exploit the acquisitive passions of the leaders of these industries in a way that will promote

higher national goals. This might well be a sound contemporary application of the principles announced by Marshall, Taney, Story, and Hughes.[28]

NEW PROPERTY

Thus far in this chapter we have stressed the relationship between property and the common good by endeavoring to show how property can at times be directed to higher, political ends. Now it is time to examine the opposite side of the coin of property—its centrifugal aspect that stresses independence and individualism. It is because of its individualistic aspects that property has been so closely associated with freedom during the modern era, and it is this historic association that accounts for the paeans to property that one finds in such abundance in the writings of liberal philosophers and legal commentators up to at least the beginning of the present century.

The connections between property, independence, individualism, and freedom have not been made in a way that placed these values in opposition to the common good. Instead, they were seen as contributing to the common good. This contribution went beyond the teleological and manipulative ways in which invisible hands and/or government regulations channel a person's acquisitive instincts to felicitous ends. The freedom that property confers is itself part of the common good. It is valued not because of what it does but because of what it is and, as such, is a constitutive element of the common good.

This point can be seen more clearly by considering the traditional civil liberties of religion, speech, press, and assembly—aspects of freedom that, at least ostensibly, are only marginally related to property. We take considerable pride in claiming that citizens of the Republic may worship as they choose, say or write what they think, and gather together with whomsoever they please. These are not instrumental values. These traditional liberties extend beyond those religions, writings, speeches, and assemblies that hold promise of some greater good for society. We glory in the belief and, indeed at times, the fact that our society produces men and women who speak their minds intelligently and fearlessly. This is an attractive part of man's nature that we have been somewhat successful in developing. It is a particular realization of human excellence and requires no further justification. It is constitutive of the common good because to speak one's mind and to see others do it as well is what the poet would call a thing of beauty, a joy forever.

At a more mundane level, property is capable of generating a type of freedom and independence, that, while perhaps falling short of inspiring the songs of the poet, suffices to give men and women a chance to achieve

a quiet dignity and personal security. These, too, are values that constitute rather than merely promote the common good. To see the importance of property in promoting these human values, it is necessary to look back in history to a period before property succumbed to the division of ownership and responsibility[29] and even to a time before it became associated with "big business," "robber barons," and "sweatshops." There was a time when one spoke of property in connection with "the sturdy yeoman of the middling sort." In those days it was much easier to see the relationship between property and freedom because one's vision was not distorted by the social outrages perpetrated in the name of property during the past century.

The connection between freedom and property was especially clear in the preindustrial era when so much private property was held in land. Indeed, this connection had been clear since the break-up of feudalism where political power and the ownership of land had been inextricably bound together. In the middle ages, the same word, dominium, stood for both ownership and political authority. The feudal lord exercised political authority over his subjects because he owned the land they tilled. They could make use of his land and in this sense they "held" it, but they did not own it. They were entitled to the benefits the land might yield, but only on condition that they met certain demands that the lord might impose. Thus feudalism rested on an elaborate hierarchical structure of land "tenure" (from the Latin tenere, "to hold") as opposed to ownership, and the "tenure" was conditioned upon the fulfillment of specific obligations owed to one's lord.

At the upper echelons of the feudal hierarchy, the "tenure" system was often a mere legal fiction. The king, though theoretically superior to the great barons of the land, was often so dependent upon them for money and supplies, especially soldiers and military equipment, that for all practical purposes they could treat the land they "held" as their own. As one descended the hierarchy, however, the control exercised by lords over vassals became more effective. The end of the Middle Ages and the beginning of modernity coincided with the rise of a middle class whose wealth was based on commerce rather than land alone. These "new men," as they were called, found the static feudal system intolerable. Commercial enterprises created new forms of property that could not be merely "held" conditionally but had to be owned outright. The personal freedom of the "new men" to pursue their commercial ventures was indissolubly linked with the need to establish control over "property" as something that was strictly their own.

New political and legal theories emerged to reflect the dramatic changes of the sixteenth, seventeenth, and eighteenth centuries. Thus John Locke could use the terms "liberty" and "property" almost interchangeably and insist that it was to further these values that men left the state of nature and entered civil society. In the same spirit, Blackstone could put

forth his celebrated definition of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[30] Although these words jar contemporary sensibilities, in Blackstone's time they were accepted because of the obvious connection between property and the supreme value of liberty.[31]

The best American expression of this sort of thinking can be found in James Madison's Essay on Property:

> This term [property] means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." But in its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property dear to him in the safety and liberty of his person. He has equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . If there be a government then which prides itself on maintaining the inviolability of property, which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their person and their faculties, nay more which directly violates their property in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated that such a government is not a pattern for the United States. If the United States mean to obtain or deserve the full praise due to wise and just governments they will equally respect the rights of property and the property in rights.[32]

The close connection Madison made between property and personality helps to explain the esteemed place enjoyed by property in the annals of American law and tradition. It should be noted, however, that although Madison condemns any government that violates the "property which individuals have in their opinions, their religion, their person, and their faculties," he is even more critical of governments that violate men's "property in their actual possessions, in their labor that acquires their daily subsistence." It was, of course, property in the fruits of one's labor that had been denied to the common man in the Middle Ages. Madison was

aware that Locke's definition of property as something a man "hath mixed his labor with" was a hallmark of modernity. Enlightened governments respected rights of property both in the sense of material objects and in the broader sense in which Madison used the word.

Today we feel somewhat uneasy with the language used by Locke, Blackstone, and Madison to defend the importance of property. We know all too well the story of how, during the laissez-faire era, their eloquent defense of property was applied to situations they could not possibly have foreseen. The rights of property were transformed into engines of oppression against the poor. So profound and painful was the struggle against the alleged sanctity of property rights that today we frequently make a sharp distinction between property rights and human rights.

It was in the light of these developments that Charles A. Reich wrote an article entitled "The New Property" in the mid-1960s.[33] Reich was disturbed by what he described as the emergence of a "new feudalism." By this he meant that modern governments create new forms of wealth by taxing severely and rewarding generously through a complex network of institutional and legal relationships that confer not property but "status" upon certain citizens. That is, the income of many depends upon governmental largess as manifested in Social Security benefits, government contracts, occupational licenses, business franchises, public service employment, welfare payments, and so on. The continuous enjoyment of these benefits is contingent upon one's status—that is, upon one's ability to meet certain relevant criteria. Writing in 1964, Reich claimed that the legal status of these benefits was more closely akin to a privilege than a right.[34] That is, because these benefits were based on the largess of government rather than the property rights of citizens, they could be terminated at the pleasure of the government. This was a "new feudalism" because one's security in material goods was "held" at the pleasure of the government rather than owned outright as one's own property. This "new feudalism," like old feudalism, gave those in authority considerable leverage in encouraging the kind of behavior that was officially approved. Thus the absence of property rights in government benefits created a danger of government making serious inroads on one's personal liberties.

Reich cites the Supreme Court case of Flemming v. Nestor[35] to establish this point. Ephram Nestor was an alien who came to the United States in 1913 and, after many years of hard work, became eligible in 1955 for Social Security retirement benefits. He and his employers had made Social Security contributions since 1936. From the years 1933 to 1939 Nestor had been a member of the Communist party. Years later Congress retroactively made such membership a cause for deportation and further provided that those deported for having been members of the Communist party would lose their Social Security benefits. Nestor was deported in 1956, but

his wife remained here. Shortly after his deportation, all payments to his wife were terminated. Litigation ensued and the Supreme Court upheld the government's position on the grounds that Nestor had "no accrued property right" to the benefits.[36]

Reich cites several other examples to show how government uses its power of largess to discipline its citizens in areas that ordinarily would be beyond the sphere of the government's reach. The most famous illustration of this point came in a New York case in which the state denied welfare benefits to an old man who insisted upon sleeping in a barn under what the welfare officials considered unsanitary conditions. The tone of the New York court's opinion is quite instructive:

> Appellant also argues that he has a right to live as he pleases while being supported by public charity. One would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense. This is true even though some of those conventions may be somewhat artificial. One is impressed with appellant's argument that he enjoys the life he leads in his humble "home" as he calls it. It may possibly be true, as he says, that his health is not threatened by the way he lives. After all he should not demand that the public at its expense, allow him to experiment with a manner of living which is likely to endanger his health so that he will become a still greater expense on the public.
>
> It is true, as appellant argues, that the hardy pioneers of our country slept in beds no better than the one he has chosen. But, unlike the appellant, they did it from necessity, and unlike the appellant, they did not call upon the public to support them, while doing it.[37]

Had the eccentric old man been paying his own way, he could have slept wherever he pleased, but because he took the benefit of welfare he had to renounce the right to choose his own resting place.

These examples will suffice to illustrate what Reich means by the "new feudalism." His response is to call for a new understanding of property that will reestablish its old connection with personal liberty. By this he does not mean that we should simply return to the pre-New Deal days, for such a reaction would do precious little for the values Reich has in mind. Instead, he maintains, we must bring new forms of wealth and possessions under the old constitutional protection reserved for property. There is no good reason, Reich argues, why a man's home should be considered property but his Social Security benefits should not. As Reich puts it, it is now time "that largess begin to do the work of property."[38]

In the remainder of this chapter we shall examine the Court's reaction to Reich's proposal over the past decade.

Sniadach v. Family Finance Company

Sniadach v. Family Finance Company (1969)[39] involved Wisconsin's procedure for garnisheeing wages. Sniadach owed the Family Finance Corporation $420 on a promissory note. Her failure to pay prompted the company to initiate the state's garnishment procedures. Sniadach's employer was notified by the clerk of the court to withhold one-half of her wages. A court order was issued at the request of the company even though Sniadach had no opportunity for a hearing in which she might explain her failure to pay the note.

Justice Douglas delivered the opinion of the Court, which upheld Sniadach's claim to a hearing prior to garnishment proceedings:

> A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.
>
> A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress, § 304 of which forbids discharge of employees on the ground that their wages have been garnisheed, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss:
>
> > The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level.
> >
> > Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congress Sullivan, Chairman of the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:
> >
> > > What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides. . . .
> >
> > The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:
> >
> > > The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of "payment schedule" which incorporates these additional charges.
> >
> > Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner is "generally insufficient to support the debtor for any one week."
> >
> > The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process.

Notice that Douglas bases his argument on human need and hardship. Would you find his argument more persuasive if he had stressed the fact that the case dealt with wages—something Sniadach had earned by her work? Had he done so, he would have been following more closely the influential teaching of John Locke—that property is something a person "hath mixed his labor with." If, however, he had stressed the earned character of Sniadach's property, what sort of precedent would he be creating for a case involving the termination of welfare benefits without a hearing?

Justice Black dissented in Sniadach. He maintained that the Wisconsin procedure was constitutionally sound because the kind of property involved in garnishment proceedings is somewhat different from the more conventional property that the Constitution protects. In support of this position, he cited a statement from the Supreme Court of Maine. The court's syntax is a bit garbled but the point is clear enough. "But although an attachment may, within the broad meaning of the definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction

of debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution."

Does this statement suggest a two-tier theory of property? Is the property of the poor—items like garnisheed wages—less worthy of constitutional protection than the more conventional forms of property held by the more affluent? If so, would it be fair to say that American law has not been excessively dedicated to property interests but merely one-sided in the types of property it has protected?

Goldberg v. Kelly

In Goldberg v. Kelly (1970)[40] the Supreme Court declared unconstitutional the procedure used by New York City in terminating welfare benefits. Following one of several options allowed by state regulation, New York City adopted a termination procedure requiring that notice be sent to a welfare recipient at least seven days prior to the date of termination. The notice had to state the reasons for the proposed termination and also had to advise the recipient that upon request a review would be granted by an officer holding a position superior to the supervisor who had originally approved the termination. The recipient also had an opportunity to submit a written statement explaining why his welfare payments should not be terminated. Once the payments had stopped, the recipient could request a full evidentiary hearing before an independent state hearing officer. The recipient could appear personally at this hearing, could be represented by counsel, could offer oral evidence, could confront and cross-examine adverse witnesses, and could request that a written record be made.

Thus the full panoply of due process was accorded the recipient after the payments had been discontinued. If the post-termination hearing should vindicate his claim, all benefits would be restored retroactively.

The point at issue in the case was whether the truncated procedures followed by New York prior to termination met constitutional standards of due process. Welfare recipients maintained the process was constitutionally defective because prior to termination there was no opportunity for a personal appearance before the reviewing officer where oral evidence could be presented and adverse witnesses could be cross-examined. As Justice Brennan stated at the outset of his opinion: "The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment."

The case came to the Supreme Court from the Federal District Court for the Southern District of New York where the termination procedures had been found unconstitutional. The Supreme Court of the United States

upheld this judgment. In so doing, the Court provided a fascinating debate between Justice Brennan and Justice Black on the relationship between welfare payments and the property that is protected by the due process clause.

Justice Brennan maintained that welfare payments should be considered as property. His position on this point is stated most clearly in a footnote that quoted extensively from the writings of Charles Reich on the "new property."

> It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that
>
> > [s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced. Riech, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L.J. 733 (1964).

Having suggested that welfare entitlements are more like property than a gratuity, Brennan continued:

> [W]e agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. . . . For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

In the preceding paragraph, Brennan follows Douglas's reasoning in Sniadach and stresses the connection between the need for due process and the degree of hardship visited upon the person who has suffered some deprivation. He then shifts the grounds of his argument to the question of the government's interest in granting a pretermination hearing. This is a bold and quite unusual argument. New York had argued that its interest in denying a pretermination hearing outweighed Kelly's need for such a hearing. Brennan now tells New York that to grant such a hearing is in its own best interest! Do you find the following paragraph persuasive?

> Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pretermination evidentiary hearings are indispensable to that end.

Brennan goes on to state New York City's position that it would be too expensive and time-consuming to grant full hearings prior to termination. In the paragraph that follows he rejects this position. Is Brennan's view of welfare administration realistic?

> We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." . . .

Justice Brennan then takes up the main requirements of due process—personal appearance, oral evidence, representation by counsel, cross-examination of adverse witnesses—and shows why welfare recipients should be accorded each of these before any payments are terminated. The quotation that follows deals with the presentation of oral evidence and the right to cross-examine adverse witnesses:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.
>
> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally. Informal

procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, § 6400 (a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . What we said in Greene v. McElroy is particularly pertinent here:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

Justice Black, in dissenting sharply from the Court's opinion, seemed particularly vexed by the idea that welfare is property:

> The more than a million names on the relief rolls in New York, and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing" even though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them. . . .
>
> The Court . . . in effect says that failure of the government to pay a promised charitable installment to an individual deprives that individual of his own property, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment. . . .
>
> The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision is no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

Whose position do you find more persuasive—Black's or Brennan's? Is welfare "property," a "gratuity," or a "promised charitable installment"? If welfare bureaucrats should agree with Brennan that welfare is property, what practical effect might this belief lead to at the behavioral level in a welfare agency? In the past decade we have had occasion to hear a great deal about racist and sexist language. Is there a form of antipoor ("classist") language as well? Could there be a use of language within a welfare agency that tends to demean the recipients in the eyes of the caseworkers and their supervisors? If so, would professional ethics suggest

that such language be avoided? If welfare is property, would it be morally and prudentially advisable for the director of a welfare office to insist that the money distributed by his office not be referred to as a "gratuity" or a "benefit"? If so, what would be a suitable substitute? Is "debt" too strong? What about the more neutral term "payment"? What other language changes might follow if welfare is property?[41]

Personal Rights and Property Rights

Earlier in this chapter, we had occasion to comment briefly on the distinction that is often made between personal (or human) rights and property rights.[42] The Supreme Court addressed this question directly in 1972 in Lynch v. Household Finance Corporation.[43] Like Sniadach, this case involved a garnishment statute, but the precise point at issue before the Supreme Court was a question of federal jurisdiction.

Dorothy Lynch, a citizen of Connecticut had directed her employer to deposit $10 of her weekly $69 wage in a credit union savings account. In 1969, Household Finance Corporation brought a suit against her in a state court for $525; the company alleged nonpayment of a promissory note. Before she was served with process, the company "garnisheed her savings account under the provisions of Connecticut law that authorize summary pre-judicial garnishment at the behest of attorneys for alleged creditors."

Lynch brought a class action in a federal district court against Connecticut sheriffs who levy on bank accounts under the garnishment statutes. She based her action on two federal statutes that give federal courts jurisdiction in cases in which a state official, acting "under color of a State law," subjects any citizen of the United States "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The statute further provided that the offending parties "shall be liable to the party injured in an action at law."

The federal district court in Connecticut never reached the merits of the case. Instead, it dismissed Lynch's complaint on the grounds that it lacked jurisdiction. The court reasoned that the federal statute Lynch relied upon was not concerned with property rights but only with personal rights. The Supreme Court of the United States rejected this distinction and remanded the case to the district court for a rehearing on the merits.

The Court's opinion was given by Justice Stewart:

> This Court has never adopted the distinction between personal liberties and property rights as a guide to the contours of § 1343 (3)[44] jurisdiction. Today we expressly reject that distinction.
>
> Neither the words of § 1343 (3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of §§ 1983[45] and 1343 (3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law. . . .
>
> A final, compelling reason for rejecting a "personal liberties" limitation upon § 1343 (3) is the virtual impossibility of applying it. The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a good example of the conceptual difficulties created by the test.
>
> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. . . .

Do you agree with Justice Stewart's rejection of the "personal-property" distinction? If so, can you explain why the distinction is so commonplace in ordinary parlance? Do you agree with Stewart's statement that the interdependence between the personal right to liberty and the personal right to property is so fundamental that neither could have meaning without the other? Can you think of any exceptions? Would you want to qualify Stewart's statement?

Public Service Employment

The final aspect of the "new property" we shall examine is that of employment in the public sector. Does one who works for government—state or federal—have a property interest in his job and, if so, does this mean he cannot be dismissed constitutionally without the full benefits of a due process hearing before his dismissal becomes effective? Some light was shed on this question in two cases decided on June 29, 1972—Board of Regents v. Roth[46] and Perry v. Sinderman.[47]

The cases were quite similar in that both involved the failure of state colleges to renew contracts of nontenured professors. Roth was in his first year as an assistant professor of political science at Wisconsin State University at Oshkosh. During that year he was told his one-year contract would not be renewed. No reasons were given for the decision, and no review or appeal was allowed.

Sinderman was in his tenth year as a teacher in the Texas state college system. He had taught for two years at the University of Texas, for four years at San Antonio Junior College, and for four years at Odessa Junior College. As president of the Texas Junior College Teachers' Association, Sinderman had become involved in a public dispute with the Board of Regents over the question of whether Odessa Junior College should be elevated to four-year status. Because the college had no tenure system, the Board of Regents decided not to renew Sinderman's contract at the end of the academic year in which he had publicly challenged the Board's policies. He was never given any formal statement of why his contract was not renewed, nor was he given an opportunity for a hearing to challenge the basis of the nonrenewal. The Board of Regents did, however, issue a press release charging Sinderman with insubordination.

Despite the similarities in the two cases, the Court was far more sympathetic to Sinderman's claim of a property interest in continued employment than it was toward Roth.[48] Justice Stewart delivered the Court's opinion in both cases and, in so doing, drew some interesting distinctions between Roth's situation and that of Sinderman. The two opinions together give some insight into just when, in the absence of explicit statutory provisions, one acquires a constitutionally protected property interest in public service employment.

In Roth, Stewart gave the following analysis of when one's public employment becomes property:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions . . . and college professors and staff members dismissed during the terms of their contracts . . . have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. . . .
>
> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.
>
> Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.
>
> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

In Perry v. Sinderman, decided the same day as Roth, Justice Stewart continued his analysis of when property interests emerge in public employment:

> The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College . . . is . . . relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in Board of Regents v. Roth that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In Roth the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in Roth, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure. Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in Roth . . . that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." . . . A person's interest in a benefit is a "property" interest for due process if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. . . .

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." . . . Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." . . . And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." . . .

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, . . . so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. . . .

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." . . . Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

After reading these excerpts from Stewart's opinions, how would you describe the Court's understanding of when a property interest arises in government employment? Among the criteria Stewart mentions are the following: (1) property is "a safeguard of the security of interests that a

person has already acquired in specific benefits"[49]; (2) the purpose of "the ancient institution of property is to protect those claims upon which people rely in their daily lives"; (3) a property interest must be more than a "mere subjective expectancy of continued employment"; (4) the fact that Roth had an "abstract concern" in being rehired did not give him a property interest; (5) the complex network of informal understandings at Odessa Junior College could add up to a property interest even in the absence of "an explicit contractual provision."

What other criteria would you add either from the excerpts given above or from your own opinion? Do you think the job of a career civil servant should be looked upon and protected as a form of property? Would this protection tend to encourage bureaucrats to use their discretionary authority in an independent way without worrying about "signals" they were receiving from the elected leadership? If so, would this be good? If it is true that historically property has given persons a sense of security, is it also true that it has given some persons a sense of arrogance as well? It is usually individuals and corporations with great property holdings that we associate with the attitude—"the public be damned." Would the principle that a government job is a form of property tend to create (or reinforce) this attitude in bureaucrats? What would Andrew Jackson say about all this?[50]

Regardless of what Andrew Jackson might say, Justice Thurgood Marshall did not think Justice Stewart went far enough in covering public service employment with the protective mantle of property. In his dissenting opinion in Roth, Marshall had this to say:

> I would go further than the Court does in defining the terms "liberty" and "property."
>
> The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer is different. The government may only act fairly and reasonably.
>
> This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." . . . It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." . . .
>
> In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.
>
> This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. . . . Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.
>
> Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action. . . .
>
> It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. . . . The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to a person most directly affected by the government's action.
>
> Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

Do you agree with Justice Marshall that "every citizen who applies for a government job is entitled to it unless the government can establish some

reason for denying the employment"? Does Marshall's view differ from that of Stewart, who says that property rights arise only in interests that have been already acquired? Is there any significance in the fact that Marshall speaks of a citizen's property in a claim on a job he does not yet have? Does this mean that by his citizenship he has already acquired a property right to public employment? If citizenship is the basis of the property right, does it follow that a less qualified citizen must always be preferred to a more qualified noncitizen when the two are competing for the same job?[51]

What significance is there in Marshall's reference to a government job as a "reward"? A reward for what? Marshall says, "Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." Are terms like "benefit" and "reward" compatible with his position on government jobs as property? If government employment is a "benefit" or "reward," do we delude ourselves when we talk about careers in public "service"? What sort of image does Marshall have of the bureaucracy? Is his position a call for a "new patronage" instead of a "new property"?

Some Reflections

The "new property" cases studied in this chapter have all raised procedural questions. The reason for this, of course, is that property is protected by the two due process clauses of the Constitution. Hence, once it is determined that the goods or claims pertinent to the case are property, the only remaining question is whether a person was deprived of this property by a process that was "due."[52] Although it is well known that there can be little substantive justice where unfair procedures prevail, it is still wise to underscore the strictly procedural and therefore quite limited nature of our investigation. Although it might improve the tone of a welfare agency to encourage caseworkers to think of welfare payments as property, such wholesome reflections do not absolve welfare bureaucrats from also reflecting on the more substantive question of whether they are achieving the statutory objectives of their program.[53]

Despite its emphasis on procedure, the questions of attitude triggered by the "new property" have the capacity to channel the thinking of bureaucrats along the lines of a substantive regime value and, hence, are useful for our purpose. The kind of issue raised by the "new property" has something for everyone. Liberals will delight in its egalitarian and redistributive thrust, while conservatives will note with pleasure that it takes seriously their perennial fear that the welfare state will destroy personal liberty. Conservatives have always maintained that in a welfare state the government will manipulate the behavior of the citizens by threatening to withhold certain public benefits. Welfare will then become a form of

bribing the citizen into tame submissiveness, and the welfare state itself will become a place of dull and drab conformity.

These fears are not the product of reactionary disingenuousness. The appalling violation of the privacy and dignity of welfare recipients is all too familiar. The "new property" takes the conservative argument seriously and offers a serious response. In so doing, the "new property" could broaden the sense of a "stake in society" that conservatives have always held so dear. This would tend to build confidence in existing institutions, and in this way the "new property," like the "old property" of contracts, would be aimed toward higher political ends. The likelihood of such happy results remains, of course, a matter of pleasant conjecture. It is no flight of fancy, however, to expect that at the educational level a serious analysis of the issues raised by the "new property" will offer bureaucrats the basis for some solid reflection on how our traditional values can be applied to changing circumstances. By accepting the discipline of investigating a current problem in the light of traditional regime values, we can hope that bureaucrats will find in these values intellectual and moral resources that will give them sound guidance on just how the goods and services of our society might be distributed in a more equitable way.

NOTES

1. Although the distinction between property rights and human rights has a decidedly contemporary flavor, it should be noted that in The Federalist Papers, No. 54, Madison distinguishes between personal rights and property rights. This, however, is by way of exception. It is more common for Publius to speak of liberty and property together.
2. Ogden v. Saunders 12 Wheat. 213 at 344-345 (1827).
3. From "General Marshall's Address to the Citizens of Richmond, Virginia," cited by Robert K. Faulkner, The Jurisprudence of John Marshall (Princeton, N.J.: Princeton University Press, 1968), p. 13. The entire text of the speech can be found in Albert J. Beveridge, Life of John Marshall, 4 vols. (Boston: Houghton Mifflin, 1919), vol. 2, p. 572.
4. See Faulkner, The Jurisprudence of John Marshall, for a thorough discussion of Marshall's philosophical and jurisprudential thought. The main points of his book are summarized in Faulkner's article, "John Marshall," in The Philosophic Dimension of American Statesmanship, ed. Morton J. Frisch and Richard G. Stevens (Dubuque: Kendall-Hunt, 1971), pp. 71-98.
5. 4 Wheat. 518 (1819).
6. Fletcher v. Peck 6 Cranch 87 (1810).
7. New Jersey v. Wilson 7 Cranch 164 (1812).
8. 290 U.S. 398 (1934).

9. Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 3rd ed. (New York: W.W. Norton, 1963), p. 773.
10. 326 U.S. 230 (1944).
11. See pp. 136-143 above.
12. See pp. 156-159 above.
13. The doctrine has its origin in a famous footnote to Justice Stone's opinion in Carolene Products Co. v. U.S. 304 U.S. 144 (1938).
14. Cited by Francis S. Philbrick, "Changing Conceptions of Property in Law," University of Pennsylvania Law Review 86 (May 1938): 711.
15. William Blackstone, Commentaries, bk. II, chap. I, p. 11.
16. 9 Wheat. 1 (1824).
17. U.S. Constitution; Article I, Section 8.
18. Morton J. Horwitz, "The Transformation in the Conception of Property in American Law, 1780-1860," University of Chicago Law Review 40 (Winter 1973): 248-290; James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1964).
19. Horwitz, "The Transformation in the Concept of Property," p. 253.
20. Merritt v. Parker 1 N.J.L. 526 at 530. Cited by Horwitz, "The Transformation in the Conception of Property," p. 252.
21. Cary v. Daniels 49 Mass. (8 Met.) 466 (1844). Cited by Horwitz, "The Transformation in the Conception of Property," p. 260.
22. Horwitz, "The Transformation in the Conception of Property," p. 260.
23. Ibid.
24. 12 Wheat. 213 (1827).
25. Sturges v. Crowninshield 4 Wheat. 122 (1819).
26. 11 Pet. 420 (1837).
27. I do not believe there are any commonly accepted dates for when the laissez-faire era began and ended. As far as constitutional history is concerned, I would suggest the era began with Chicago, Milwaukee and St. Paul Railway Co. v. Minn. 134 U.S. 418 (1890). In my opinion, laissez-faire collapsed with West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937).
28. An excellent treatment of the potential of acquisitiveness to lead to certain forms of human excellence can be found in Martin Diamond, "Ethics and Politics: The American Way," (Paper delivered at the 1976 meeting of the American Political Science Association). This paper was reprinted in Robert Horwitz, ed., The Moral Foundations of American Democracy (Charlottesville: University of Virginia Press, 1977).
29. See Adolph A. Berle and Gardiner C. Means, The Modern Corporation and Private Property (New York: Macmillan, 1932); and Adolph A. Berle, Power Without Property (New York: Harcourt, Brace, 1957).

30. Blackstone, Commentaries, bk. II, chap. I.
31. This sketchy discussion of the role played by property in the transition from the feudal era to modernity probably raises more questions than it answers. Those interested in pursuing this question should consult the following: Philbrick, "Changing Conceptions of Property in Law," pp. 691-732; Richard McKeon, "The Development of the Concept of Property in Political Philosophy," International Journal of Ethics 48 (April 1938): 298-374; Morris R. Cohen, "Property and Sovereignty," The Cornell Law Quarterly 13 (December 1927): 8-30; Neil Hecht, "From Seisin to Sit-In: Evolving Property Concepts," Boston University Law Review 44 (Fall 1964): 435-466.
32. Cited in Alphaeus T. Mason and William M. Beaney, American Constitutional Law, 5th ed. (Englewood Cliffs, N.J.: Prentice-Hall, (1972), p. 292.
33. Charles A. Reich, "The New Property," Yale Law Journal 73 (April 1964): 733-787. This article was followed by a sequel: "Individual Rights and Social Welfare: The Emerging Legal Issues," Yale Law Journal 74 (June 1965): 1245-1257. Reich became a well-known public figure with the publication in 1970 of his best-seller, The Greening of America. The Yale Law Journal articles, however, were certainly written in a "Consciousness II" period.
34. Since Reich's article appeared, courts have become increasingly reluctant to stress the distinction between rights and privileges.
35. 363 U.S. 603 (1960).
36. Reich, "The New Property," pp. 768-769.
37. Ibid., p. 758; citing Wilkie v. O'Connor 25 N.Y.S. 2d 617 (1941).
38. Ibid., p. 778.
39. 395 U.S. 337 (1969).
40. 397 U.S. 254 (1970).
41. For further development of the principles in Goldberg v. Kelly, see Bell v. Burson 402 U.S. 535 (1971) and Fuentes v. Shevin 407 U.S. 67 (1972). The latter, however, was severely qualified in Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974). For a limitation on the reasoning in Goldberg see Richardson v. Belcher 404 U.S. 78 (1971).
42. See p. 191 above.
43. 405 U.S. 538 (1972).
44. 28 USC § 1343 (3). This section was the basis of Lynch's action.
45. 42 USC § 1983.
46. 408 U.S. 564 (1972).
47. 408 U.S. 593 (1972).
48. The Court did not actually say that Sinderman had a property interest in a renewed contract. Instead it remanded the case to a lower court with new guidelines to apply in rehearing Sinderman's claim of a property right.

49. Emphasis added.
50. See pp. 16 and 18-19 above. For further discussion of public employment as property, see Arnett v. Kennedy 416 U.S. 134 (1974) and Bishop v. Wood 96 S. Ct. 2074 (1976). On the relationship between the due process clause and the right to a hearing prior to suspension and removal, see Victor G. Rosenblum, "School Children: Yes; Policemen: No," Northwestern University Law Review 72 (March-April 1977): 146-170.
51. See Hampton v. Mow Sun Wong 96 S. Ct. 1895 (1976).
52. It is possible, of course, that the "new property" may contain more than a hint of "substantive due process."
53. On this point see Joel F. Handler, "Controlling Official Behavior in Welfare Administration," California Law Review 54 (May 1966): 479-510.

Conclusion

[The responsible administrator] must be fully familiar with the difficulties and obstacles in the way of administrative achievement; he must realize how to strive for efficiency without losing sight of other and more important objectives. Above all, he must know the inherent limitations which the American Constitution imposes upon administrative work. Such knowledge and experience will make it possible for him to guide the development of American governmental services without getting them embroiled in insoluble conflicts with the American governmental tradition and Constitution as a whole.

Carl J. Friedrich

The purpose of this concluding chapter is to present a brief review of the argument of this book and then to examine in detail some important issues touched upon only in passing in the previous chapters.

REVIEWING THE ARGUMENT

The governing authority exercised by bureaucrats through their discretionary powers is the most appropriate starting point for analyzing ethics for bureaucrats. This, in brief, is the main point of the Introduction and Chapter 1 of this book. The Introduction examined and rejected as "false starts" such considerations as conflict of interest, Watergate, resignation in protest, and basic decency. Although each of these starting points was rejected for somewhat different reasons, they all failed to meet the twofold criterion of raising ethical issues that are (1) peculiar to government managers and (2) likely to occur frequently in one's own career in public management.

Chapter 1, "Stating the Problem," attempted to do what its title indicates. The ethical problem for bureaucrats is how they should use their discretionary authority to share in governing a democratic regime. The historical foundations of the present personnel system were examined to highlight the normative considerations that were raised when "merit" began