Property as Propriety

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I. INTRODUCTION

What is property for? For many, maybe most American lawyers, the question is virtually self-answering. Property has and, at least in our society, always has had one core purpose, one constant meaning: to define in material terms the legal and political sphere within which individuals are free to satisfy their own preferences, free from governmental coercion or other forms of external interference. Property is

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* Professor of Law, Cornell University. This Paper was given at a faculty workshop at Harvard Law School. It was also delivered as a lecture at the University of Utah College of Law, where I was Edward W. Clyde Distinguished Visiting Scholar in March 1999. I wish to thank the participants in both occasions for their stimulating and helpful comments and suggestions. Portions of this Paper are drawn from my book, Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970 (1997).

I am happy to participate in this Festschrift honoring Professor Larry Berger though (regretfully) I have never met him, I have long admired his prodigious and illuminating scholarship in Property.
the foundation for the categorical separation of the realms of the private and public, individual and collectivity, the market and the polity.

The economic expression of this preference-satisfying conception of property is commodity. Property satisfies individual preferences most effectively through the process of market exchange, or what lawyers call market alienation. The exchange aspect of property is so important in American society that many Americans are apt to view "property" as synonymous with "commodity."

It wasn't always so. As the dominant way of understanding property, the commodity conception is, in fact, a relative latecomer in American legal thought. What preceded it was an understanding that I will call "property-as-propriety." The core of this conception is the idea that property is the material foundation for creating and maintaining the proper social order, the private basis for the public good. The proprietarian tradition, whose roots can be traced back to Aristotle, takes seriously the idea that the common good can be defined in substantive terms. That is, it presumes that not all forms of social order are normatively equal but that some are morally superior to others.

Just what the proper social order is has been an enormously controversial issue throughout American history. The existence of different substantive conceptions of the proper social order means that there have been multiple, sometimes contradictory versions of the proprietarian conception of property in American thought. The Puritans' "Shining City on a Hill," for example, was quite unlike the quasi-feudal social order described in antebellum Southern texts defending slavery, yet both were proprietarian. More strikingly, the recent communitarian movement is based on the same proprietarian premise that was the intellectual foundation for the Southern slave system, a social order that modern communitarians otherwise abhor.

What all of these different versions of proprietarian thought share is a commitment to the basic idea that the market order is not necessarily the proper social order. Proprietarians do not understand the public good to be whatever social order emerges from the spontaneous working of the market. They regard the market as a realm in which individuals are too vulnerable to the temptation to act out of narrow self-interest rather than, as proprietarian principles require, for the purpose of maintaining the good of the entire community.

This is not to say that the proprietarian tradition is fundamentally anti-market. Many versions of proprietarian thought sought to reconcile propriety with the existence of the market. Indeed, in some instances, social propriety was used as the basis for treating as a commodity "assets" that our society regards as utterly non-commodifiable on moral grounds. The legal defense of slavery in the antebellum
South again furnishes an example. What characterizes proprietarian thought is commitment to a normative conception of the social good that is prior to the market. Proprietarian regimes are not necessarily non-market regimes, but neither are they laissez-faire regimes. The commitment to propriety requires that the market, to the extent that it is deemed to conflict with or to threaten the social good, be subordinated to the latter. The proprietarian tradition rejected the presumption that the scope of the market should be unlimited, and it did not resort to the familiar market-failure problems of monopoly or externalities to justify collective restrictions on market freedom.

The idea that the central purpose of private property is to protect the proper public order rings oddly in modern ears. We are so used to thinking of property as market commodity that it seems difficult to imagine that property might be intended to benefit anyone other than the owner. We are limited not only by the pervasiveness of market exchange in virtually every sector of modern life but also by the fact that the very notion of the public good seems anachronistic to modern sensibilities. Establishing that property-as-propriety was a prominent idea of American legal thought is one objective of this Paper. Two historical examples, one from our quite recent past, the other more distant, will illustrate the influence of this conception of property. The idea of property-as-propriety sheds new light on these historical episodes of doctrinal development.

Moving from past to present, this Paper has another objective. The second objective is to establish the continued influence of the proprietarian conception in current legal thought and legal doctrine. That conception certainly is no longer the dominant one, but it is present nevertheless.

II. PROPRIETY AND ENTREPRENEURSHIP IN THE NINETEENTH CENTURY: THE VESTED RIGHTS DOCTRINE

One of the stock historical stories about the development of American judicial doctrines concerning property during the nineteenth century is the shift from a “vested rights” conception of property to a “dynamic” conception. Indeed, virtually the entire story about judicial protection of property interests from legislative regulation

throughout the nineteenth century seems to be the cyclical rise and fall of the so-called vested rights doctrine. James Willard Hurst expressed the now-standard theme with his customary succinctness when he stated, "We identify no legal development more sharply with the nineteenth century than the judicial protection of 'vested rights.'"3

Boiled down to its basic outline, the story goes as follows. Implemented by the contract clause of the federal Constitution during the first half of the nineteenth century, the vested rights doctrine at first protected the first wave of American entrepreneurs. These men (for they were all men) invested, with active government encouragement, in enterprises that fueled the nation's economic expansion. Later, as investment in public utilities like bridges, roads, and canals became more potentially profitable and attracted increasing amounts of private capital, courts shifted course, overriding vested rights where they conflicted with the interests of new entrants in enterpreneurial enterprises. Courts sacrificed holders of stable forms of property to protect investors in dynamic forms of property.

In the second half of the century, the story continues, courts reverted back to a strongly pro-vested rights position in order to protect entrepreneurs whose interests by now were well established. The constitutional tool for effecting this second incarnation of the vested rights doctrine was the due process clause of the Fourteenth Amendment, enacted after the Civil War. The key to understanding this phase of the doctrine, like the first, we are told, is a judicial desire to protect particular economic interest groups.

In contrast with this version of the story, I will argue that the emergence and decline of judicial protection for vested rights in the antebellum period reflected a dialectic between two strands of pro-enterpreneurial discourse. One was the discourse of old Federalists like Chief Justice John Marshall and their neo-Federalist heirs such as Joseph Story. These men supported legal protection of entrepreneurial activity that legislatures created by granting to private investors monopoly privileges for the construction of roads, canals, bridges, and other public improvements. Federalist-Whigs welcomed entrepreneurial activity of this sort for political as much as for economic reasons: it was, in their view, conducive to preserving the proper political order against the rising threat of popular democracy. To emphasize the fact that it was not hostile to entrepreneurialism as such, this Federalist-Whig discourse is more accurately termed "entrepreneurial republicanism."4 Standing on the other side were Jacksonian supporters of entrepreneurial activity. The most notable judicial figure in this group was Marshall's replacement as Chief Jus-

3. Hurst, supra note 2, at 23.
vice, Roger Taney. These men, whom I will call democratic entrepre-
neurs, spoke the language of equal entrepreneurial opportunity. They
opposed legal protection of existing monopolistic property interests as
both anti-development and undemocratic.

For all of their differences, these two groups shared two basic be-
liefs. Most conspicuous was their unequivocal embrace of en-
trepreneurial activity. Both sides favored rapid national development
and population growth in the country's unsettled areas. They
dreamed the same dream of unlimited economic growth and of im-
provements in the nation's transportation and communication sys-
tems that would enable that growth. Even Andrew Jackson himself,
for all of his Jeffersonian talk about "independent farmers [as] the ba-
sis of society and the true friends of liberty," was no unambiguous
enemy of economic development. The policies for which his Presi-
dency is best known—opposition to the Second National Bank, the cir-
culation of paper money, and most government aid to internal
improvements—grew out of opposition to unequal privileges and the
loss of personal liberty, not to economic progress as such. Beyond
Jackson and the few remaining true believers in the old Jeffersonian
vision of the agrarian republic, most Americans were bitten by the bug
of acquisitiveness. Looking around at his society, Francis Lieber saw
an "anxiety to be equal to the wealthiest," but few of his contemporar-
ies would have agreed with his Marx-like diagnosis of that condition
as "diseased," or one that would lead to an "appalling frequency of
alienation of mind."

Entrepreneurialism, however, had ambiguous implications for the
legal protection of property. Promoting entrepreneurial activity might
mean protecting existing interests and maintaining the extant hierar-
chy of power. It was plausible to think this way insofar as the existing
economic interests were the very source of the market revolution that
had transformed American culture and society. To destabilize those
interests was to threaten the institution of private property, upon
which entrepreneurial activity and economic growth utterly depended.
This was essentially the argument that was the basis of the vested
rights doctrine. Extant property rights, once they had vested, had to
maintain their positions of power until they could no longer serve
their appropriate function.

5. Andrew Jackson, Fourth Annual Message, Dec. 4, 1832, quoted in Harry L. Wat-
(1957); Harry L. Watson, Liberty and Power: The Politics of Jacksonian
7. See 1 Francis Lieber, The Stranger in America 68-69 (London, Richard Bentley
1835).
8. 2 id. at 29-30.
That interpretation, though plausible, was not inevitable. There was another interpretation, at least equally plausible to the first, that was available to Americans at the time. Drawing on Adam Smith's unambiguous attack on monopolies a half century earlier, one could conclude that the cause of entrepreneurial activity was best advanced by exposing established economic interests to competition. Protecting vested property interests against new entrants in a given enterprise was tantamount to maintaining a monopoly, which would rapidly choke economic growth. Stated in the terms just described, the debate between these two views appears to boil down to the well-known debate in economic theory between pre-classical and classical economists like Smith and Ricardo. Alternatively, the debate can be distilled to a clash between established and rising economic interest groups.

Without denying that both of these interpretations have some plausibility, I want to augment them with an account that stresses their relationship to the conflict between the political theories of Federalist-Whigs and Jacksonians. That conflict provides the basis for a second common denominator of entrepreneurial republicans and democratic entrepreneurs.

That common denominator was an understanding of property as serving a social-political function as well as the strictly economic function of increasing wealth. What divided entrepreneurial republicans and democratic entrepreneurs was the identity of that social-political function. For entrepreneurial republicans (Federalist-Whigs), the vision was of property as the basis for a properly-ordered society headed by a natural elite of property owners. For democratic entrepreneurs (Jacksonians), property was linked with democracy, equal opportunities, and the end of old privileges. These two interpretations indicate that the rise and fall of the antebellum vested rights doctrine, culminating in the great Charles River Bridge case, was not simply a clash of economic interests but a clash between two interpretations of what the emergence of an entrepreneurial society meant for the political and social order. They also indicate that although entrepreneurialism thoroughly informed the ways in which legal elites thought about property by 1850, the modern commodified understanding was not yet firmly rooted in American legal consciousness by that date.

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A. Vested Rights as Proper Order: Fletcher v. Peck

The vested rights doctrine, implemented through the contract clause of the federal Constitution, was the principal doctrinal device by which Federalists on the Supreme Court, led by Chief Justice John Marshall and his ideological soul mate, Joseph Story, promoted entrepreneurial republicanism. The doctrine first took shape in the famous Yazoo land case, Fletcher v. Peck.13

The transactional background of the case was typical of the type of entrepreneurial activity that was common at the beginning of the nineteenth century—land speculation. The Georgia legislature in 1795 statutorily authorized the Governor to convey the Yazoo lands, a huge expanse of land in the western portion of Georgia, now constituting the states of Alabama and Mississippi, to four land speculating companies. The deal was incredibly sweet: for $500,000 in specie currency, the companies received two-thirds of the territory between the Chattahoochee River, the present western boundary of Georgia, and the Mississippi, between the Tennessee and Florida borders, a total of thirty-five million acres. The sale has been called, with little exaggeration, “the greatest real estate deal in history.”14 Typical of most land speculation at that time, the sale was corrupted by bribes, mostly cash and shares in the companies.15 A year later, after public scandal over the bribes had broken out and a new legislature elected, the deal was rescinded. In the meantime, the four original land companies had already sold millions of acres of the Yazoo land to other speculators and individual settlers, mostly from New England. The sales earned enormous profits for the original Yazoo companies. In the most important of the sales, the New England Mississippi Land Company, whose investors included prominent Connecticut and Massachusetts politicians, bought most of the Georgia Mississippi Company’s eleven million acres for $1,138,000, yielding the Georgia company a profit of nearly 650 percent on its original investment!

Some of the more legally cognizant of the New England buyers sought the legal opinion of Alexander Hamilton regarding the validity of the original sale after the legislature’s rescission. Hamilton, although emphasizing that he had not had an opportunity to search the Georgia land titles, gave an opinion that was favorable to the New Englanders:

[I]t may be safely said to be a contravention of the first principles of natural justice and social policy . . . to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of

13. 10 U.S. 48, 6 Cranch 87 (1810).
third persons, on every supposition, innocent of the alleged fraud or corruption.\(^{16}\)

With this opinion in hand, two of the New England investors challenged the validity of the legislative repeal through an arranged lawsuit. John Peck nominally sold his holdings to Robert Fletcher, and per their prearrangement, Fletcher sued Peck to try title, arguing that the sale breached the contract's covenant of good title.

The case posed a conflict between the security of land titles, once created by the legislature, and the power of the legislature to correct its prior acts that were the direct result of corruption. In a very real sense this conflict translated into one between entrepreneurialism and republican virtue. From the perspective of republican theory, it would surely appear vital to the integrity of representative self-government that one legislature has the power to correct fraudulent acts of its predecessor. Of course, correction of corrupt legislative action in this context did not necessarily mean annulling the initial sale. The dictates of corrective justice, if that were the sole concern, would have been met by affirming the transfer of title but requiring that the seller reimburse the state, as representative of the people of Georgia, for the amount of the purchase price. But republican ideology is more than corrective justice. Republicanism requires, above all else, that the integrity—the "virtue," to use the preferred term—of elected representatives and the governmental institutions that they constitute not be compromised and that, if and when they are compromised, the acts of corruption be publicly declared void so that there remains no consequences that would possibly symbolize the corruption's efficacy.

From the perspective of promoting entrepreneurial activity, land titles have to be kept clear and simple. It is especially important to the health of the market that innocent buyers be able to rely on the apparent legal soundness of titles when engaging in exchange transactions and that they not be made to bear the risk of loss that they did not create and of which they had no reasonable opportunity to learn. The concern with clarifying land titles was especially important in the context of Yazoo. The Yazoo lands were already subject to a variety of conflicting claims. Spain, the United States government, and at least four Indian tribes claimed title to various portions of Yazoo. These disputes alone were not enough to cool the speculation fever. People were willing to assume the risk of loss because the prospects for gaining their fortunes seemed high enough, just as people today will risk large amounts of money at the race track or on the state lottery even though the odds against their winning are extremely high. Georgia's policy of settling its frontier through favorable land sales would be seriously jeopardized, however, if subsequent purchasers who bought

\(^{16}\) Alexander Hamilton's Opinion on the Georgia Repeal Act, reprinted in Magrath, supra note 15, app. D at 150.
land from land companies with no notice of fraud were subject to losing their titles through legislative repeal of the original legislative grants. Out-of-state land speculators might be foolish enough to buy land sight unseen, but few of them would be willing to assume the risk that the state might snatch their titles away from them at any time. The marketability of land in Georgia's western territory, then, seemed to require that titles, once vested in private hands, be protected against subsequent legislative action.

In addition to the concerns with land titles, one school of economic thought also supported the Yazoo purchasers. Georgia's program of granting the rights to its western lands to a select group of land speculation companies was a product of mercantilist economic theory, an approach to encouraging economic development that most Federalists favored. Mercantilist theory, which was eventually replaced as the reigning theory by the classical economics of Adam Smith and David Ricardo, posited two basic claims: first, economic development requires extensive and active participation by the government in entrepreneurial activities; second, to encourage entrepreneurs to invest in some desired activity, the state must give them exclusive privileges or monopoly rights.17 The Georgia legislation and the governor's subsequent grants illustrated both of these principles. To settle and develop its western territory, the state government did not passively rely on the workings of the market but actively encouraged investment. Beginning in the 1780s, the state had adopted an extremely liberal policy of granting lands to new settlers.18 Successive governors tried to outdo each other in the number of acres they granted per person. This policy, combined with pervasive mania for land speculation throughout the nation, led to countless instances of fraud. Literally millions of acres of non-existent land were sold to gullible investors, many in the North and even Europe. Nearly all of these unfortunate souls paid for ghost titles to what promotion literature made out to be a virtual paradise without ever seeing what they were supposedly buying. (This practice continues today in the sort of land promotion deals vividly depicted in the recent play Glengarry Glen Ross).

The other tenet of mercantilist economics was also met. The bulk of the Yazoo lands were deeded to a few land speculation companies. These companies, in effect, held exclusive privileges to sell and settle Yazoo. The fact that they were able to earn near-monopoly profits from sales was, according to mercantilist reasoning, a necessary consequence of a policy designed to encourage risk-taking.

The conflict between these two perspectives, republican and entrepreneurial, would seem to have placed John Marshall in a quandary. Though a staunch Federalist and a lifelong opponent of Jefferson and his mode of democratic politics, Marshall, like virtually all other political leaders of his time, firmly believed in the basic tenets of republican ideology. The blatant legislative corruption behind the land deal was especially worrisome to the republican mind, as Marshall explicitly indicated: "That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored." 19

There were two reasons why entrepreneurial interests took precedence for Marshall. First, like most other Federalists in the early republic, Marshall's brand of republicanism had far more in common with Hamilton's thought than it did with Jefferson's. Indeed, from the Jeffersonian perspective, Federalist encouragement of entrepreneurship was a perversion of republic ideals. Marshall and other Federalists had no confidence in the capacity of citizens to act virtuously, in the classical sense of that term. The common good was maximized through policies that appealed to self-interest rather than by expecting individuals to subordinate their self-interest to the good of others.

The second reason is that Federalist-Whigs, whom I have called entrepreneurial republicans, wanted to protect entrepreneurial interests for reasons in addition to the strictly economic concern with increasing social wealth. James Willard Hurst was quite correct in pointing out that the vested-rights doctrine developed primarily to protect venture capital, 20 but the entrepreneurial republicans' protection of venture capital stemmed from political and social concerns as well as economic considerations. It was important to protect this capital not for its own sake but for what it represented: the proper social order, headed by a small number of men who possessed that requisite experience, intelligence, and wisdom to lead. The suppliers of venture capital in the early republic were all community and political leaders, men like Marshall, who himself engaged in land speculation. 21 Actions like the Georgia repeal statute represented the most serious threat to that order—the urge of democratic legislatures to disrupt the natural hierarchy.

19. Fletcher v. Peck, 10 U.S. 48, 72, 6 Cranch 87, 130 (1810).
20. See Hurst, supra note 2, at 25.
21. See Benjamin Fletcher Wright Jr., The Contract Clause of the Constitution 31 n.13 (1938). Albert Beveridge's famous biography of Marshall, however else flawed, was correct in pointing out that Marshall's interest in stability of contractual obligations and land titles in particular stemmed in no small part from legal challenges to his own estates. See Beveridge, supra note 14, at 582.
The rhetoric of the repeal act itself fueled such fears of radical democracy. The repeal act was inspired by democratic hatred of arrangements that conferred privileges on the few. Fully three-quarters of the act consisted of a rambling preamble that linked the state's sovereignty to the protection of democracy. In selling the Yazoo lands to "a few individuals," the previous legislature acted contrary to the interests of

democratical...government founded on equality of rights, and which is totally opposed to all proprietary grants or monopolies in favor of a few, which tend to build up that destructive aristocracy in the new, which is tumbling in the old world; and which, if permitted, must end in the annihilation of democracy and equal rights—those rights and principles of government, which our virtuous forefathers fought for and established with their blood.22

Language such as this suggested to Marshall that what was at stake was the validity of the alleged principle that "a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient."23 That asserted principle set the stage for a conflict between the republican doctrine of political relativism and the entrepreneurial requirement of secure land titles: "Is the power of the legislature competent to the annihilation of such title [that is, of a bona fide purchaser], and to a resumption of the property thus held?"24

Marshall's response to that question began by acknowledging the "correctness" of the principle of political relativism as a general proposition: "one legislature is competent to repeal any act which a former legislature was competent to pass; and...one legislature cannot abridge the powers of a succeeding legislature."25 But although that principle was valid with respect to "general legislation," it did not necessarily apply with respect to an individual who has acted in reliance on a legislative act. This was especially true where title to land has been transferred:

If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.26

Vitiating legislative sales of property whenever facts subsequently disclosed that the sales were tainted by corruption was incompatible with maintaining good order and stability. After all, the line between influence peddling and corruption is exceedingly thin, if not non-existent. One legislature could always find some evidence that the act of a

23. Fletcher v. Peck, 10 U.S. 48, 75, 6 Cranch 87, 134 (1810).
24. Id. at 75, 6 Cranch at 134.
25. Id.
26. Id.
prior legislature was the product of influence peddling. Screaming “corruption,” it could then destroy the property interests that its predecessor had created. The scenario of legislative disruption could be extended to truly nightmarish proportions. Since the repeal act itself would doubtless have been the product of interest-group politics, the next legislature, perhaps recaptured by the ousted property owners, might undo the repeal, creating an endless circle of legislative action and repeal. Marshall was not simply splitting hairs when he asked how much and what sort of corruption would be sufficient to allow the legislature to repeal its prior act.

Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of members? Would the act be null, whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? 27

Maintaining the social and political order required that this sort of legislative sabotage, rationalized under the rubric of democracy, be blocked at the outset. Vested property rights were the device for securing that order. Entrepreneurial policy, understood in these terms, then, must trump the republican principle of legislative self-correction whenever legislative action created property rights. 28

27. Id. at 73, 6 Cranch at 130.
28. The legal basis for this conclusion is not entirely clear from the text of Marshall’s opinion in Fletcher. Scholars have disagreed whether Marshall intended that one basis for the decision was natural law. On the one hand, his opinion is replete with references to “certain great principles of justice.” 10 U.S. at 74, 6 Cranch at 133. Some scholars have interpreted that language as indicating that natural law was the Court’s primary basis for the decision. See, e.g., G. Edward White, The Marshall Court and Cultural Change, 1815-1835, at 604 (abr. ed. Oxford Univ. Press 1991) (1988). David Currie has recently pointed out, though, that Marshall’s statement that legislative repeal cannot “divest” vested property rights is better read as a statement of fact than of law. See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 131 (1985). Moreover, Currie persuasively argues, Marshall may have regarded the “general principles” to which he referred as principles as being properly read into the Georgia state constitution’s delegation of legislative power. See id. at 132.

Whether or not Marshall viewed natural law as an independent basis for the decision in Fletcher, he clearly did base the decision, at least alternatively, on the contract clause of the federal Constitution. Eager to define a broad scope of applicability for this clause, Marshall dismissed the possible objection, based on the familiar common law distinction, that the legislative transfer of land was a “conveyance,” not a “contract.” That distinction might have led the Court to conclude that the legislature’s rescission of its earlier conveyance was an uncompensated taking of title, governed by the Fifth Amendment, and not an impairment of contract. Approaching the case that way, however, would have left the grantee without any constitutional protection since the Takings Clause applied only to action by the federal government. Citing Blackstone, Marshall reasoned that the term “contract” includes those that are executed as well as executory contracts. See Fletcher v. Peck, 10 U.S. 48, 76, 6 Cranch 87, 136-37 (1810). A grant, moreover,
B. Community and Competition: The Charles River Bridge Case

Charles River Bridge was constructed under the authority of a 1785 corporate charter that the Massachusetts legislature granted to a group of local businessmen for the purpose of connecting Boston and Charlestown. The charter initially gave the owners the right to collect tolls for a period of forty years, but the period was later extended to seventy years. The investment was hugely profitable for the owners, due largely to the tremendous population increases of the two communities. For a total outlay of $70,000, the bridge was collecting tolls of $30,000 a year by 1828. By 1814, stock in the Charles River Bridge corporation was selling at more than 600 percent over its initial price.

In 1823, a group of Charlestown merchants petitioned the legislature for a charter to build a toll-free bridge. The petition provoked howls from several quarters, including, predictably, from the Charles River Bridge proprietors, who claimed that the proposed bridge would destroy their property rights. The legislature rejected this and several subsequent petitions. Finally, in 1828, prompted by an anti-monopoly propaganda campaign, the legislature granted the petition to construct the Warren Bridge. The new bridge was located only a few hundred feet away from the Charles River Bridge. The charter authorized the Warren Bridge corporation to charge the same toll as the Charles River Bridge but only for six years. It also provided that after the owners had recovered their costs plus five percent interest, the bridge would revert to the state.

When the Warren Bridge opened, the predictable effect on the older bridge occurred. The Charles River Bridge corporation’s earnings revenues declined by nearly one-half within six months, as the public extolled the virtues of the new bridge. By 1837, when the United States Supreme Court decided the case, the corporation was earning nothing on its investment.

The conflict between two types of legislatively-created property interests, one an established monopoly and the other a prospective com-

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29. The best telling of the case’s story is KUTLER, supra note 11.
30. See HORWITZ, supra note 10, at 130.
31. See KUTLER, supra note 11, at 1-2.
32. See id.
33. See id. at 35.
34. See HORWITZ, supra note 10, at 130.
petition, could not have been more starkly posed, and it left both the
Massachusetts Supreme Judicial Court and the Marshall Court un-
able affirmatively to reach a decision. The Massachusetts court was
evenly split over whether the Charles River Bridge's charter, which
was silent as to whether its owners had an exclusive privilege to oper-
ate a bridge over the Charles River, should be construed to have
granted such a privilege by implication.\textsuperscript{35} The judges dismissed the
complaint in order to permit an appeal to the United States Supreme
Court.

That the Court would hear the case was not in doubt, for the dis-
pute over two bridges had taken on much deeper political and eco-
nomic implications. Politically, the dispute represented the conflict
between aristocrats and democrats. The proponents of the Warren
Bridge portrayed themselves as champions of the common good and
their opponents as exemplars of the old New England aristocracy,
which maintained its power through state-created monopolies.\textsuperscript{36}
Eco-
nomically, there could not have been a clearer example of the tension
between the old view that exclusive privileges were a necessary in-
ducement for entrepreneurs and the ascendent view that such privi-
leges stifled economic growth and that free competition was the
correct path to economic development. At a more concrete level, that
cflict between two economic theories translated into whether specu-
lators in railroad and other new technologies would be able to elimi-
nate the monopolies enjoyed by older forms of transportation, such as
canals.\textsuperscript{37}

Between 1831 and 1837, the Supreme Court was unable to reach a
decision in the case. Part of the reason for the indecision was various
absences and personnel changes on the Court, including Marshall's
death and replacement by Roger Taney. It also appears, though, that
the Marshall Court was deadlocked by a 3-3-1 vote, with Marshall
himself on the side of the Warren Bridge owners.\textsuperscript{38} After reargument,
a divided Supreme Court affirmed the validity of the statute and the
power of state legislatures to grant competing corporate charters.

It is customary to depict \textit{Charles River Bridge} as the watershed
decision that signaled the end of the Supreme Court's protection of

\textsuperscript{35} Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass.
349, 7 Pick. 344 (1829).
\textsuperscript{36} \textit{See} R. Kent Newmyer, \textit{Supreme Court Justice Joseph Story: Statesman of
the Old Republic} 224 (1985).
\textsuperscript{37} \textit{See} Kutler, \textit{ supra} note 11, at 50-53.
\textsuperscript{38} \textit{See id.} at 176-79. Further evidence that Marshall favored upholding the Massa-
chusetts statute comes from Simon Greenleaf's statement that he had been "cred-
ibly informed" that Marshall "held the charter of Warren Bridge constitutional."
2 \textit{William Cruise, Digest of the Law of Real Property} 68 (Simon Greenleaf
vested property rights under the contract clause. It is as if two events alone, Andrew Jackson’s election in 1828 and the choice of Roger Taney to succeed John Marshall as Chief Justice, were enough to turn the Marshall Court’s contract clause jurisprudence on its head. No one would (or should) be foolish enough to suggest that those two events had no effect on the question of political control over property interests. It is beyond disputing that Charles River Bridge did signify a change from the attitude that produced Fletcher v. Peck and Dartmouth College. But continuity accompanied change. The Marshall and Taney Courts shared a commitment to promoting and protecting entrepreneurial activity. More fundamentally, they also shared the insight that entrepreneurialism was valuable for socio-political reasons as much as for the strictly economic purpose of increasing wealth. What principally separates the property thought of the two Courts is the identity of the socio-political role of entrepreneurial activity. While the Marshall Court understood entrepreneurial activity as a means for maintaining the proper social order and, therefore, protected only those entrepreneurial interests that were established and stable, that is, “vested,” the Taney court understood entrepreneurship as a force for undermining hierarchical privileges and opening up opportunities for the broader community. This was the crucial difference between entrepreneurial republicanism to democratic entrepreneurialism.

The two major opinions in the case, Taney’s for the majority and Story’s dissent, perfectly reflected the discourses of these two understandings of entrepreneurialism. Taney’s opinion has been described as “brief, lucid, and to the point.” It was all that, but it was not without rhetoric that disclosed a deep-seated vision of how society and politics ought to be ordered and of the role of entrepreneurial property interests in that socio-political order. Woven into Taney’s technical legal analysis of whether the Charles River Bridge corporation’s charter implied a right to exclude competitors is a recurrent dialectic between two sets of terms, “privilege” and “monopoly,” on the one hand, and “community” and “competition,” on the other. In the course of discussing the English rule of construction against implied grants, for example, Taney stated,

[I]t would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute

41. Currie, supra note 28, at 209.
more unfavourably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.\textsuperscript{42}

The rhetorical force in this passage derives from its juxtaposition of the terms "privileges" and "rights of the community." In using the term "privilege," Taney was drawing on several traditions that had coalesced in Jacksonian political-legal rhetoric. One of those traditions was the English attack on monopolies that was widely associated with the name Adam Smith. This was the basis for Taney's ironic observation that England, that hierarchically-ordered society \textit{extra ordinaire}, had lately adopted a more hostile policy toward monopolies than had the United States. Taney's assault on privilege did not draw only on liberal political economy, however, for another tradition in which "privilege" was a conspicuous target was civic republicanism, particularly its eighteenth-century American incarnation. Attacking legally-created privileges as un-American was established as a common theme in political-legal tracts in the revolutionary era, and it continued to be prominent well into the nineteenth century, especially among Jacksonians. The Jacksonian interpretation of republicanism emphasized its democratic possibilities, in contrast with the Federalist-Whig interpretation, which stressed its belief in social hierarchy and political order. To Jacksonians, the idea that there was a proper order which the government should maintain, among other ways, by extending exclusive property privileges to the certain social groups perverted the basic insights of civic republicanism. The opportunity of all citizens to participate in the nation's economic as well as political life, not maintaining an entrenched hierarchy, was the core of republicanism.

The use of the term "community" is more intriguing because it is more ambiguous. Taney used it several times in his opinion, repeatedly referring to the "rights of the community." In a revealing passage, Taney stated that "while the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."\textsuperscript{43} One possible reading of this statement is that Taney was appealing to the theme, which would become increasingly common in nineteenth-century critiques of private property, that property and democracy are antithetical to each other. But that interpretation is implausible. Taney was no man of the Left, in the modern sense of being opposed to the institution of private property. To the contrary, Taney strongly supported that institution and, more particularly, its entrepreneurial form. Taney had inherited the Jeffersonian understanding of democracy as a polity of property-own-


\textsuperscript{43} Id. at 548.
ing citizens. Property rights might undermine democracy, but it was not inevitable that they would do so. The key was to maintain the opportunity for those without property to gain it.

Taney did not opposed private property as such, but property that was part of an entrenched hierarchy. He drew a sharp distinction between property of the old order and property of the new order. Property of the ancien régime were those interests that the state had granted to a favored few, giving them exclusive privileges. That was precisely the sort of interest that the Marshall Court had protected in *Fletcher v. Peck*, *Dartmouth College*, and other Contract Clause cases, and it was also precisely the type of interest that the Charles River Bridge owners were claiming here.

The old property had been the basis for a socio-political order that was, to Taney's way of thinking, not only rankly hierarchical but also incompatible with progress. Like the Scottish Enlightenment social theorists of the eighteenth century, he rejected the civic republicans' fear of change. Taney regarded change as a positive, "progressive" force, and economic growth was, for him, a crucial aspect of social progress. Economic development, in turn, required competition, not monopolies. This was clear from his celebration of economic development as serving the public good:

> [T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established .... And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth; new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people.

"Monopolies," understood as exclusive property interests, can be attacked from two perspectives. One is economic theory. We have already alluded to the liberal critique of monopolies that began with Adam Smith. That theory gained in the mid-nineteenth century, as it became clearer that more private capital became available for investment canals, roads, and other key aspects of the transportation revolution. Exclusive privileges no longer seemed as necessary a price to pay to encourage entrepreneurs to jump into these ventures.

The other angle from which one can attack monopolies is politics, and this was the basis for Taney's opposition to monopolies. Taney's primary concern was with making democracy, not the market, work. Opening up the market was simply a means to democratic ends, for

economic competition, from his perspective, served the interests of democracy. This is the key to understanding his repeated references to the "rights of the community." He wanted to assure that when it created entrepreneurial interests, the state did not contribute to the imbalance of power that existed under the old hierarchical order. The only way to prevent state-created property interests from serving the interests of powerful elites was for the democratically-elected legislature to retain control over them. The vested-rights doctrine immunized, or nearly so, such interests from politics, and Taney's repudiation of that doctrine—declaring that property rights, while "sacred," are always subordinated to the rights of the "community"—was intended to expose them to democratic politics.

Where, then, does this leave *Charles River Bridge* with respect to corporations and the conception of property as commodity? *Charles River Bridge* can be characterized as consistent with commodificationist thought to the extent that its consequence was to expose state-created franchises to competition and, in that sense, moved them into the realm of the market. But even in terms of effect, the decision only tangentially supported the commodity conception. The critical element of commodificationism is the understanding of an asset's principle function as increasing social wealth through market transfers. *Charles River Bridge* did not effect a transformation of publicly-created franchises into commodities in that sense. No one suggested that corporate franchises should be freely transferable in the market, although shares in the corporation's stock was transferable. Permitting the free transfer of a corporation's franchise would effectively have ceded power to the corporation to determine who enjoys the privilege for which the corporation was created. It would also have given corporations virtually unilateral control over their existence. Despite the growing sense of the privateness of private corporations, neither of these powers could be recognized. The corporation was still regarded as created by the state to serve the state's interest. "A corporation," the leading treatise on corporations declared in 1846, "can have no legal existence out of the sovereignty by which it is created . . . ." 47 The scope of the market's domain may have been widening by mid-century with respect to other institutions, but it had not widened with respect to corporations, at least not in the sense of removing corporations from the sphere of politics.

The Court's rhetoric in *Charles River Bridge* reflected the influence of commodificationism even less than the decision's consequences did. Taney's opinion was filled with the rhetoric of the rights of the community, not the market, of politics, not economics. Fundamentally, it signified a preoccupation with dismantling a social hierarchy sup-

47. JOSEPH K. ANGELL & SAMUEL Ames, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 121 (3d ed. 1846).
ported by stated-conferrer exclusive entrepreneurial interests, not with wealth maximization. Entrepreneurial corporate property, Ta-ney was declaring, might increase individual wealth, but primarily they had to serve the interests of the community as a whole.

Neither the vested rights doctrine of *Fletcher v. Peck* and *Dartmouth College* nor *Charles River Bridge*, then, was premised on the commodity conception of property. None of them reflected an attempt to move entrepreneurial interests into the sphere of the market. The Marshall Court decisions protected certain property interests as the foundation for a particular type of social order. *Charles River Bridge* symbolized an attack on that order by extending democratic control over one of its most powerful institutions. For antebellum lawyers on both sides, the ascendancy of entrepreneurial property posed a problem that was fundamentally social and political in nature, not economic.

### III. PROPRIETY IN THE WELFARE STATE: THE "NEW PROPERTY"

#### A. Institutional Changes in Property

In the mid- to late twentieth century welfarism as a state policy fundamentally changed private property, both as a social institution and as a legal concept. As an institution, property in the welfare state was more obviously public than it had been throughout the nineteenth century. Three characteristics defined the mid-twentieth century American welfare state:

1. A vast increase in the range and detail of government regulation of privately owned economic enterprise;
2. The direct furnishing of services by government to individual members of the national community—unemployment and retirement benefits, family allowances, low-cost housing, medical care, and the like; and
3. Increasing government ownership and operation of industries and businesses which, at an earlier time, were or would have been operated for profit by individuals or private corporations.48

All three of these characteristics overtly shifted the character of property from the private to the public realm. Welfare benefit programs, of which Social Security (first created in 1935) was the prototype, had the effect of identifying the government as the direct source not simply of "services" but wealth for increasing numbers of Americans. To be sure, during the 1930s, Social Security played only a limited role in providing income through its retirement and unemployment insurance programs.49 Still, even during these early years its effect was to challenge the classical liberal principle that people should acquire

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property only through private means—creation, or more commonly, market exchange. The government was now a third source of wealth for millions of Americans.

A related institutional change was that regulation increasingly weakened the prerogatives of private property, particularly business property. Most New Dealers were strongly committed to an “aggressively statist” approach to the economy for the purpose of protecting consumers and workers. New Deal policymakers considered these two groups to be particularly ill-served by unregulated corporate capitalism, and they pushed for legislation that sought to protect vulnerable groups by imposing mandatory contractual terms and creating new regulatory regimes for certain industries. Legislation like the Communications Act (1934), the Railroad Retirement Act (1934), the Fair Labor Standards Act (1937), the Public Utilities Holding Company Act of 1935 (the Wheeler-Rayburn law), and, above all, the Wagner Act (1935) altered many of the prerogatives of private property ownership for employers and business owners, although they were far from producing the radical revision of property relations as many opponents feared they would.51

The social legislation of the 1960s, especially the Great Society programs, deepened this institutional change in property. State as well as federal legislation greatly extended the range of property relationship that were subject to government regulation. Housing is a particularly striking example. The relationship between landlords and their tenants, which traditionally were subject to minimal legal regulation, underwent a massive legal change during the 1960s.52 Federal legislation like the Fair Housing Act of 1968 prohibited discrimination in the private housing market on the basis of race, religion, gender, and national origin.53 At the state level, many states, prompted by court decisions, enacted statutes creating a “warranty of habitability” that guaranteed tenants the right to live in safe and livable conditions. These statutes reversed the traditional legal rule that allocated to tenants the responsibility for the care and condition of rental housing. The most important aspect of this new warranty was that it was nonwaivable; landlords and tenants could not bargain around the new

52. The best overviews of these changes are Charles Donahue Jr., Change in the American Law of Landlord and Tenant, 37 Mod. L. Rev. 242 (1974), and Mary Ann Glendon, The Transformation of American Landlord-Tenant Law, 23 B.C. L. Rev. 503 (1982).
warranty even if they were so inclined. The overall effect of these and other changes was to remove landlord and tenant relations, especially in the residential context, from the realm of private ordering to the domain of public regulation. The new regulatory regime withdrew from landlords many of the traditional prerogatives of property ownership.

B. Changes in the Idea of Property in the Welfare State

The welfare state affected ideas about and attitudes toward property at least as much as it did the institution of property. For Americans, the emergence of the modern welfare state created a legitimacy crisis concerning property in a way that it never did for Europeans, whose legal-political-economic orders had shifted to welfarism considerably earlier. European legal and non-legal thought regarding property was explicitly dialectical even before the appearance of the modern welfare state. Americans lacked the same tradition of consciousness about the dialectic character of property. While American lawyers today recognize that there is no inherent contradiction between the institution of private property and a regulated economy, that point was much less clear to self-styled defenders of private property at the time of the New Deal. Those who associated private property with unregulated markets viewed the growth of the federal government's regulatory apparatus under the New Deal as signaling the end of private property as they knew it.

The most fundamental effect of the social welfare programs on the idea of property was that they undermined the commodity conception. Various types of property which traditionally were regarded as market assets came to be seen as serving other, non-market functions. On those occasions when free market transferability seemed to threaten these functions, the law changed to protect the non-commodified aspects of property arrangements.

Landlord-and-tenant law again provides a clear example. The "revolution," as it has been called, in the law regulating landlord-tenant relations was based on the implicit premise that residential housing should not be treated solely as a market asset, subject to being bought or sold on whatever terms the parties want. At least as important as the economic function is a political-moral function: residential housing is one of the crucial material conditions that determines whether and how people will flourish personally and as citizens. Courts and legal scholars explained the legal changes cre-

55. For powerful expressions of the perception of housing as non-commodity, see Margaret Jane Radin, Residential Rent Control, 15 PHIL. & PUB. AFF. 350 (1986),
ating new rights for tenants as based on a shift from antiquated feudal property law to contract law, but that account was very misleading. The new tenants' rights rules were not entirely consistent with contract law and certainly were not contractarian in the sense of reflecting a commitment to private ordering. The real basis for the overall doctrinal shift was a change in how the legal culture perceived the character of residential housing. Margaret Jane Radin has articulated the new perception that underlies legal protection of the tenant's interest in this way:

A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others. To pursue the parallel with home ownership, there the owner's interest is personal and the mortgagee's interest is fungible. That is why it seems right to safeguard the owner from losing her home even if it means some curtailment of the mortgagee's interest.\(^5\)

That is, while the landlord's interest, like the mortgage lender's, is (usually) strictly financial—a commodity—the tenant's property interest is primarily personal and only secondarily financial. Tenants enter into leases primarily to have a home, a place in which to belong, not as an investment. Protecting that personal interest means treating it as at least somewhat outside the domain of market ordering, in which the rights and duties of the two sides are set through the process of bargaining. The new landlord-tenant rules replaced bargaining with legally-imposed terms regulating the relationship precisely to protect the tenant's non-commodity interest from the possibly corrosive effects of the market.

Welfare programs that created government benefits for the poor, the elderly, and the disadvantaged also made the commodity character of property problematic but in a different way. A critical aspect of commodity ownership is that it liberates the individual owner from dependency on the state, or at least it minimizes the degree to which the owner is subject to state control. Under fully commodified ownership, the owners are free to decide how to use or sell their property so that they may satisfy their preferences as they see fit. Recipients of government benefits generally lack that degree of autonomous control over the wealth that the state transfers to them. The benefits may be subject to various state-imposed conditions and restrictions, but even where they are not, the welfare recipient is still beholden to the state. The most vivid manifestation of that personal insecurity is that the government may, and in some cases, has, terminated the program, and therefore, the benefits altogether. That degree of personal insecurity is, at least theoretically, inconsistent with commodity ownership.

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Scholars responded to this predicament generally in two ways. Classical liberals, who regarded the minimal state as the only political regime that is compatible with individual freedom, argued that the welfare state had to be dismantled. Beginning in the 1940s, classical liberals like Friedrich Hayek mounted a strong campaign against all forms of government economic planning, in which they included most welfare programs, as undermining the rules of law. The rule of law ideal presupposed, they argued, hard-and-fast rules that minimize the degree of central discretion and intervention. Welfare programs rely on an approach of “administrative coercion and discrimination”\(^5\) that contradicts that requirement.

Welfare rights advocates responded to the traditional liberal critique by treating welfare benefits as property. In effect, these scholars conceded the basic premise of the Hayekian argument, that a discretionary welfare regime jeopardizes the rule-of-law ideal and individual freedom, but they rejected the conclusion that the welfare state had to be sacrificed to protect individual liberty. These reformist liberals, of whom the Yale law professor Charles Reich was the most prominent legal scholar, tried to accommodate the welfare state with the rule of law by doctrinally transforming welfare benefits from largess into legally-protected property.\(^5\)\(^8\)

These two responses defined the parameters of political-legal discourse about property in the welfare state for much of the mid-to late twentieth century. They created a dialectic about the commodity conception of property that was apparent and increasingly contentious by the last quarter of the century.

C. The Origins and Development of the “New Property”

In a retrospective on his article, Reich summarized its basic objective. “The New Property,” Reich stated, “was written twenty-five years ago as a suggestion for the legal effort to build a system of protection for the individual.”\(^5\)\(^9\) Reich thought that the nation was experiencing a “crisis of the individual.”\(^6\)\(^0\) The crisis that he saw reflected the pivotal, Janus-faced character of the time at which he wrote. Looking in one direction, the memory of McCarthyesque government tyranny of individual liberty was still very fresh. Reich cited a wide array of more recent instances in which the government had taken steps to repress dissident behavior by cutting off government benefits or denying government-granted licenses. It was easy to view those cases as latter-day McCarthyism. But the cases could be viewed from a differ-

\(^{57}\) Friedrich A. Hayek, The Road to Serfdom at x (1967) (1944).
\(^{60}\) Id. at 223.
ent perspective, one that required looking to the future. The victims that Reich identified, unlike their McCarthyite predecessors, were all dependent in some direct way on the government for their livelihood. Their personal wealth derived directly from the government, making them insecure even before the government had taken any repressive action against them. That condition—direct personal dependency on the government for the very means of one’s existence—has since become a major feature of American life and the overriding problem associated with the welfare state.

The cases that Reich cited as evidence of the crisis all were instances of a continuing, if less conspicuous, threat to individual freedom by direct government repression: a cut-off of Social Security benefits to a recipient who had once been a member of the Communist Party, a denial of welfare benefits to a mother who was living with a man out of wedlock, and a refusal to admit to the bar a man who refused to answer questions concerning membership in “subversive” organizations. Joseph McCarthy might be dead, but it was still “scoundrel time.”

What connected all these was the growing dependence of Americans of government largess that was subject to substantive conditions. As Robert Rabin has observed:

The major contribution of Reich’s article was to pull together the multiple strands of conditional largess apparent in government programs and activities ranging across the spectrum of jobs, welfare benefits, grants-in-aid, licenses and franchises, and to link these forms of “new property” to the corresponding insistence that recipients meet appropriate behavioral standards.

No case better illustrated this phenomenon, or provoked Reich’s anxiety, than the Supreme Court’s 1960 decision in Flemming v. Nestor. Nestor, who had immigrated to the United States from Bulgaria in 1913, had been receiving Social Security retirement benefits since 1955 when he was deported to his native country for his membership in the Communist Party between 1933 and 1939. Membership in “subversive organizations” at any time was one of the statutory bases for termination of old-age benefits, and the government terminated his shortly after it deported him. He challenged the action as a deprivation of his property under the Fifth Amendment’s due process clause. The Supreme Court held Nestor’s interest in Social Security benefits was not an “accrued property right” protectable against the

62. See Reich, supra note 58, at 761-62.
64. See generally Lillian Hellman, Scoundrel Time (1976).
66. See Reich, supra note 58, at 768-70.
67. See id. at 768.
government's substantive interference. It was a weaker sort of interest that was protectable only against arbitrary government action, which, the Court said, was not involved in the case.

Reich characterized the Nestor Court's theory as "the philosophy of feudal tenure." It treated his interest in Social Security benefits as non-vested, subject to conditions designed to compel the performance of certain duties. "Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty," Reich objected, "so government largess binds man to the state." The bond that it created between recipients and the state, more to the point, was one that deprived individuals of their very freedom, precisely the same objection that Hayek had leveled against the welfare state.

Reich's objection was essentially the same as Hayek's: state welfare officials possessed discretionary power that undermined rule-of-law protections that are the basis of individual liberty. Moreover, like Hayek, Reich argued that conditional welfare threatens individual freedom unequally:

Inequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favors some applicants and recipients over others. The administrative process is characterized by uncertainty, delay, and inordinate expense; to operate within it requires considerable know-how. All of these factors strongly favor larger, richer, more experienced companies or individuals over smaller ones.

Reich's solution to the dilemma of government largess and the rule of law was not to dismantle the welfare state but to add procedural protections that would simultaneously strengthen its rule-of-law character and bolster the welfare state. The key was to treat government largess as "property," and not simply as wealth. Reich's argument for bestowing the legal status of property on government-derived wealth was straightforwardly liberal. The central function of property, he argued, is to "draw a boundary between public and private power." Within the private sphere, "the majority has to yield to the owner." Political rights serve the same function, but political rights are dependent on property. Property rights are, as it were, "the guardian of every other right."

69. See id. at 611-12.
70. Reich, supra note 58, at 769.
71. Id. at 769-70.
72. Id. at 765.
73. Id. at 771.
74. Id.
Reich's category of government largess was broad and extremely varied. Professional licenses, taxicab medallions, AFDC benefits, Social Security retirement benefits were all treated as one piece. Reich did not distinguish between those interests, like AFDC, that the government granted strictly on the basis of need, and those that represented some form of social insurance, to which the beneficiary had made lifetime contributions, the sort involved in *Flemming v. Nestor*. From the perspective of their propertyness, the former was the far more troublesome sort of government largess. The latter type of benefit, an example of which Efraim Nestor was deprived, was not truly largesse. Social Security retirement benefits, like other forms of social insurance, are easily squared with the classical liberal theory of the legitimate means of acquiring property rights. They are a benefit acquired through one's labor; they are an entitlement precisely because they are *earned*. Much more problematic is the true welfare benefit, that is, the benefit that one receives from the government merely by virtue of one's need. Treating benefits of this sort as property cannot be reconciled with classical liberal theory, as Hayek saw. Reich's notable contribution was to revise the liberal theory of property in a way that justified legal recognition of this form of government-derived wealth, the true welfare benefit, as individually-owned property. Due process, procedural and substantive, was Reich's primary tool for transforming largess into property. Procedurally, he called for the familiar due process safeguards—notice, hearing and contest, judicial review—for all government actions affecting largess. Substantively, he suggested that largess should be regulated the same way that traditional property is regulated, and that forfeiture should be used only as the last resort:

The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.

Reich's theory bore fruit quickly but only temporarily. Welfare rights lawyers, eager to find a doctrinal basis for securing their clients' vulnerable interests against government threats, drew on Reich's proposals in litigation involving welfare suspensions and terminations.

77. Reich, *supra* note 58, at 785.

Reich was not the only legal scholar whose ideas influenced welfare rights lawyers. They drew on ideas developed in articles by Jacobus TenBroek, Joel Handler, and others. One whose influence on advocacy lawyers was as least as great as Reich's, if not more so, was Edward V. Sparer, dubbed by some the "wel-
Measured in terms of doctrinal change, the welfare lawyers’ efforts—and the ideas of Reich and Sparer—were rapidly but only temporarily successful. Between 1968 and 1970, the Court decided in their favor in three major decisions. The Court in one of these, Goldberg v. Kelly, held that the Fourteenth Amendment due process clause requires that a welfare recipient be given a pre-termination evidentiary hearing. Speaking through Justice Brennan, the Court explicitly acknowledged the propertyness of welfare benefits, stating that “[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them.” Citing Reich, Justice Brennan endorsed his “new property” thesis: “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.”

Justice Brennan also stated, “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.’” Brennan’s opinion, however, said nothing which indicated that the Court was prepared to recognize a substantive right to welfare.

The victory in Goldberg was short-lived. In the early 1970s many states restructured public assistance programs like AFDC in ways that not only tightened eligibility standards but also made the process
of determining eligibility vastly more bureaucratic and impersonal.85 The responsibility for supplying proof to establish initial and continuing eligibility was shifted from caseworkers to recipients, and the character of required proof became more complex and technical. Moreover, the frontline administrative personnel with whom recipients had to deal for financial assistance matters changed from professionally-trained social workers to non-professional "eligibility technician[s]."86 The combined effect of these changes, along with large federal budget cuts, was, as Sparer put it, "to cut welfare grant levels and remove eligibility for major groups of poor people."87

D. The Dilemma of the New Property and Property-as-Propriety

On the surface, Reich's theory seems to reflect a commodity understanding of property rather than the propriety conception. Explicitly individualist in its premises, the theory lends itself to being interpreted in terms of what Frank Michelman has called the "possessive conception" of constitutional property rights.88 By that, Michelman means the idea that property is a negative claim that the owner has against others, including the state, not to interfere with her use, possession, and enjoyment of her property. Most immediately, the claim includes the right to be free from redistributive actions by the state that take away any portion of one's interest in her property. The possessive conception captures the core of the classical liberal understanding of property that is often attributed to Locke and which C.B. Macpherson labeled "possessive individualism."89

Reich's theory had one foot at least tentatively planted in that tradition. As others have noted,90 his premises were starkly individualist, and the theory stressed the need to protect the right of possession of assets that fell into the new category of property he had identified. Moreover, as William Simon has pointed out, the "new property" theory had anti-redistributive implications that posed a dilemma that

86. Id. at 1215.
Reich apparently did not recognize. While the theory was intended to support the redistributive programs of the welfare state, it in fact undermines their legitimacy. By urging that the old and new property be treated alike, both vested and both entitled to just compensation for any government-induced impairment, Reich unintentionally made it impossible for the state to fund the new property. As Simon succinctly put it, "If all wealth is to be regarded as 'vested,' then there can be no coercive redistribution." Redistributing wealth to provide welfare benefits for some inevitably requires that the state interfere with the putatively vested property rights of others.

However much Reich's rhetoric may have resembled Michelman's possessive conception of constitutional property, the theory's fundamental thrust was in a very different direction, a direction much closer to a non-commodified, civic understanding of property. The fact that Reich's theory was intended to legitimate the redistributive activities of the welfare state itself puts considerable distance between it and the classical liberal outlook on property. The tenets of classical liberalism require, as Hayek saw, not only that property always be available for market exchange but that any transfers of property from one person or group to another occur only through the mechanism of the market. While Reich shared Hayek's concern with the fragile status of individual liberty in the modern state, he clearly did not accept Hayek's commitment to the market as the central mechanism for protecting liberty. More importantly, Reich's purpose in seeking protection of the new property was not the economic goal of encouraging the accumulation of wealth. His central concern was with politics, not the market.

The new property was the currency of the civic realm for welfare rights advocates. Toward the end of his article, Reich focused on benefits like old-age insurance, unemployment compensation, and public assistance as especially needful of protection. He explained the function of these benefits in overtly civic terms. Their purpose, he stated, is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-

91. See Simon, supra note 76, at 31-33. Simon elsewhere speculates, plausibly enough, that Reich failed to consider the distributive aspects of his theory because the inflationary public finance policies that characterized the time at which he wrote his articles obscured the redistributive consequences of welfare. The redistributive effects became apparent later, in the late 1970s—the "zero-sum" society rather than the Great Society—when welfare programs were financed through taxation. See William H. Simon, Rights and Redistribution in the Welfare System, 38 STAN. L. REV. 1431, 1488 (1986).

92. Simon, supra note 76, at 31.
Reich here was restating the familiar American civic argument that good citizenship requires that individuals sometimes sacrifice their private interests for the well-being of the community. A part of that obligation was to provide for the needs of others who were struck by ill-fortune, for the calamities of some were calamities of the entire community. The welfare state is simply a mechanism for fulfilling that collective responsibility.

Within this framework, the role of the new property, as well as for the old, is to satisfy individuals’ needs—not necessarily their wants—so that they can contribute to the commonwealth as independent citizens. Welfare as property, in this sense, is no different than the “forty acres and a mule” that Thaddeus Stevens proposed be redistributed to the newly-freed slaves during the Reconstruction era. Reich’s background principle was the same as Stevens’: in the face of a large class of propertyless citizens, the preservation of the social order requires a scheme of wealth redistribution that confers on all citizens the minimum entitlements necessary for individual self-governance.

Recent commentators have renewed this call for a constitutional scheme of minimum entitlements, drawing support from Reich. Akhil Amar, for example, has argued that section two of the Thirteenth Amendment, properly read, requires such a scheme. That Amendment’s original intent, he contends, was to guarantee every American citizen a minimum stake in society in order to free all Americans of the economic dependence that corrodes citizenship. For Amar, as for Reich, the objective is not equality but individual freedom. In Amar’s words, “the notion of minimal entitlements is not a notion that everyone should have an equal amount of property. . . . It is not an argument that equal protection under the Fourteenth Amendment means equal property, but rather that freedom under the Thirteenth Amendment implies a notion of some minimal entitlement.”

While Reich thought that freedom could be secured primarily through procedural means, Amar, with the benefit of twenty-five
years' hindsight on the failures of the "new property," realizes that the vision of independence for all citizens require substantive guarantees. However, the same dilemma confronts both strategies: How is economic independence secured when the source of entitlements, substantive or procedural, is the state? The development of welfare entitlements as a system of civic property seems as perverse as Hayek thought welfare was for market property. Both the market and civic property systems require individual autonomy (though for quite different reasons), yet welfare entitlements create a social subsystem of direct dependency and hierarchy. The very idea of welfare as property, in this sense, seems self-contradictory.

Amar is acutely aware of the dilemma. This is why he takes pains to distinguish the scheme of minimal entitlements he attributes to the Thirteenth Amendment—forty acres and a mule—from welfare:

[Forty acres and a mule is not a dole. It is not welfare. It is much more like workfare. Forty acres and a mule do not yield a harvest without labor, and in the process of laboring, a citizen can gain self-respect and the respect of others. We must remember that our goal is to create independent citizens. Ironically, many current welfare programs may have moved us away from that goal by perpetuating cycles of dependency. By contrast, the kind of education and job-training programs I am advocating here are designed to promote self-sufficiency and reward hard work.]

Perhaps education and job-training are sufficient responses to the problem of dependency for some welfare recipients, but surely not for all. Some classes of dependents are dependent for reasons that have nothing to do with lack of job skills. To the extent that citizenship requires self-governance, what form of property, what alternative to the Reichian scheme of welfare-as-property might be adequate?

This is not the appropriate occasion to answer that question. Two points, however, need to be made to clarify what the question involves. First, the modern civic conception of property builds on the Progressive-realist insight that no legal property regime can create

99. Id. at 42.

There is, of course, another way of looking at the whole question. A very different cultural outlook on welfare, citizenship, and self-sufficiency is suggested by the following exchange from Barbara Kingsolver's wonderful novel, Pigs in Heaven. The speaker is Annawake Fourkiller, a Cherokee lawyer living on a reservation in Oklahoma:

"One time in law school we were discussing the concept of so-called irresponsible dependents. That a ward of society can't be a true citizen. I wanted to stand up and tell the class about Boma and the bottle tree [Boma is, as Annawake describes her, 'the town lunatic']. That there's another way of looking at it."

"What's that?"

"Just that you could love your crazy people, even admire them, instead of resenting that they're not self-sufficient."

BARBARA KINGSOVER, PIGS IN HEAVEN 231 (1993).

100. For a recent and imaginative attempt to answer that question, see BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).
complete individual freedom from state power. Even in the minimal night-watchman state, private property rights derive from the state as delegated sovereignty. The state logically can and historically sometimes has altered its delegation of sovereignty. The upshot is that the personal security that classical property rights in fact create is inevitably contingent. Ultimately, no property system can eliminate the possibility of state intervention. The real issues are, which exercises of state power against property interests are legitimate and by what criteria is legitimacy determined.

The second point is that the notion of individual independence has a different meaning from the civic perspective than it has in classical liberal thought. In classical liberalism, the core meaning of independence, signified by property rights, is personal security against unwanted interference by others, most especially the state. From the civic perspective, personal independence means not security against material losses, that is, losses of commodities viewed as instruments for satisfying individual preferences, but against political-ethical loss, that is, loss of the self-respect that is the basis for proper citizenship and, ultimately, the proper social order.

Neither of these points resolves or evades the dilemma of independence in the welfare state for the civic conception. In recent years, a number of legal scholars, attempting to develop an explicitly civic understanding of property, have directly acknowledged that dilemma. Indeed, it is no exaggeration to describe the dilemma of independence as the central predicament facing the civic conception of property in late twentieth-century legal discourse. Whether or not the recent responses have been successful at pointing the way past the dilemma, they have underscored the continuing dialectic of property in American legal thought.

IV. THE TWITCHING CORPSE OF PROPRIETY

If I am right that the idea of property as the foundation of propriety has in the past exerted a significant, and at times major, influence on legal thought and legal doctrine, then the question becomes, what happened to that idea? No one today seems to have heard of it, so what led to its apparent demise?

The balance of this Paper provides some evidence indicating that the proprietarian conception in fact is not dead. Both legal theory and legal doctrine are filled with examples of property norms that are best

understood as resting on the views that the preference-satisfying, or commodity, function of property at times threatens the well-ordered society and that in such situations, wealth-maximization must be subordinated to the non-economic interests at stake.

In one sense it should hardly be surprising that propriety-maintaining considerations still exert considerable influence in our property law system. There are many instances in our legal property system of what Calabresi and Melamed called “inalienability rules.” Some of these have been the subject of heated debates in which the conflict of moral and social visions is explicit; others are much more prosaic. Obviously those that have been defended in terms of social morality reflect the continuing appeal of proprietarian ideas.

The controversy over Judge Posner's proposal to legalize baby-selling provides a clear example of these inalienability rules or, what Michael Walzer calls "blocked exchanges" and Margaret Jane Radin calls "market-decommodification." The more sophisticated arguments made against his proposal articulated a normative conception of the moral society and then explained from the perspective of that conception why the extension of the market to humans would constitute an "impropriety" of the grossest sort. To these critics, Judge Posner's responses to objections seemed question-begging precisely because they presupposed a social order that the critics found morally repugnant. It is completely beside the point that baby-selling might increase social wealth, the critics in effect said. There are just some things that a proper society does not submit to market forces.

The legal prohibition of baby-selling is only one example of an inalienability rule that is best explained as based on the conception of property as the foundation of the proper social order. Many of the most controversial instances of market-inalienability (and alienable commodities that some people would like to decommodify—consider the case of pornography) are controversial precisely because they implicate strongly-held views about just what the properly-ordered society is.

But not all instances of property rules resting on a concern with maintaining the proper social order rather than maximizing prefer-

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104. See generally Margaret Jane Radin, Contested Commodities (1996).
105. This is not to say that all controversies over proposals to extend the reach of market exchange are controversial because they deviate from widely-shared visions of social propriety. Some people may object to commodifying a particular asset on the basis of their belief that doing so would not maximize preference-satisfaction in the aggregate.
ence-satisfaction are quite so controversial. Consider the case of historic preservation law.

One of the more controversial questions in modern land-use regulation is the role of aesthetic values. Until quite recently, courts seldom sustained aesthetic zoning measures, such as local regulations requiring approval of building plans by a city architectural board, on the basis of their aesthetic purposes alone. Where such measures were sustained, the courts usually cited protection of property values as the primary reason.\(^{106}\) Despite the fact that, analytically, the decline in market value must be epiphenomenal rather than primary,\(^ {107}\) courts rarely admitted that protection of aesthetic values was itself a sufficient basis for regulation. The reasons are obvious. Aesthetic values, many believe, are inherently subjective (even if moral values are not), so that any regulation of land use on that basis will be arbitrary and subject to familiar regulatory abuses. There is evidence in the case law that this judicial attitude has relaxed somewhat in recent years,\(^ {108}\) but zoning for purely aesthetic reasons remains controversial.\(^ {109}\)

By contrast, courts have been much more strongly inclined to sustain historic zoning and historic preservation legislation. The distinction between "purely" aesthetic zoning and historic preservation may seem clear enough in the context of older cases such as United States v. Gettysburg Electric Railway Company,\(^ {110}\) in which the question was whether condemnation of land for the creation of a national battlefield memorial at Gettysburg served a "public purpose."\(^ {111}\) But preservation for the sake of architectural merit alone, without reference to particular historical events or personalities, blurs the line between "aesthetic" regulation and "historic" regulation. Why, then, have courts been much less reluctant to sustain the latter? Several possible explanations might be offered, but one basis for distinguishing between the two forms of regulation that has been particularly prominent is the very propriety-sounding idea that architecture has a political role. It both creates and expresses some substantive vision of how the political order of its society should be constituted. Now, that idea can and has been used to defend radically different images of the proper social order, ranging from Albert Speer's National Socialist plans to neighborhood preservation efforts

\(^{106}\) See State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305, 308 (Mo. 1970).


\(^{110}\) 160 U.S. 668, 681 (1896).

\(^{111}\) See id. at 679.
by groups like Washington, D.C.'s Don't Tear It Down. More recently, American preservation law has been shaped by the idea that "[a] major public purpose underlying [historic] preservation law is the fostering of [local] community cohesion, and ultimately, the encouragement of pluralism."\textsuperscript{112} It is precisely the fact that preservation law is seen as constitutive of the social order that has led courts to be more sympathetic to the argument that collective deliberation, rather than market transactions alone, should be the basis for such land-use decisions.

A final example of the continuing vitality of the propriety function of property is takings law. Without getting too deeply into the details of takings law, suffice it to say that the widely-shared perception is that the state of the Supreme Court's takings jurisprudence today is a mess.\textsuperscript{113} I don't purport to be able to reconcile all of the Court's recent cases, but I do think that some of the more controversial decisions can be understood as implicitly premised on what I have called a proprietarian conception. The well-known \textit{Penn Central} case\textsuperscript{114} provides an example. That case involved a constitutional challenge to the decision of the New York City Landmark Preservation Commission denying the owners of Grand Central Terminal (which had previously been designated a landmark) permission to construct a 55-story office structure on top of the original Terminal building. The Supreme Court, in a 6-3 decision, held that the Commission's decision did not effect an unconstitutional taking of property.\textsuperscript{115} One of the arguments that the Terminal's owners had emphasized was that they had been unfairly singled out. The Landmark Preservation law is unlike zoning or historic district laws in the sense that it does not impose the same restrictions on all structures within a particular physical area. Conceding that this means that the law had a more severe impact on some building owners than others, Justice Brennan, writing for the majority, observed that "[l]egislation designed to promote the general welfare commonly burdens some [people] more than others."\textsuperscript{116} Expanding on that point, he indicated that the preservation law was reasonably designed to implement a policy expected to produce "a widespread public benefit." That public benefit was the recognition and protection for the public of "sensibilities and ideals reflected in landmark legislation like New York City's."\textsuperscript{117} It doesn't seem hard to figure out that from Justice Brennan's point of view, landmark designation does not rest on subjective taste. It may be true that \textit{de}


\textsuperscript{115} See \textit{id.} at 138.

\textsuperscript{116} \textit{Id.} at 133.

\textsuperscript{117} \textit{Id.} at 134 n.30.
gustibus non est disputandum, but that is quite beside the point. The point is that buildings like Grand Central serve civic functions, and those functions are too important to be left to the vagaries of the market.

Now, one obvious response to this view is confession-and-avoidance. Let's assume for the sake of argument that buildings like Grand Central do perform such functions and that it is uncertain whether or not the market would adequately recognize them. That only justifies the use of eminent domain, not uncompensated regulation. That response fails to recognize (or more likely, to concede) the proprietarian premise. The premise implicit in Justice Brennan's reasoning is just that citizens may legitimately be required to bear private sacrifices in the interest of creating and maintaining the healthy social order, that is, propriety.

But, the skeptic wants to ask, how does Justice Brennan or anyone else for that matter know what constitutes the healthy social order, especially in relation to matters as subjective as architecture? Obviously, I can't fully answer that on behalf of Justice Brennan, but his opinion does provide some possible clues. It is not insignificant, I think, that he talks about the need to recognize "the development in sensibilities and ideals reflected in landmark legislation like New York City's."118 The sensibilities and ideals that constitute the proper social order are neither immanent nor immediately apparent. They "develop." Moreover, they are "reflected" in legislation. Conceding the familiar flaws in the political process that public-choice theory has emphasized, it still remains, Justice Brennan might have said, the case that politics is a deliberative process, and public deliberation is the basis of democratic legitimacy of such judgments.119

This is, obviously, a very incomplete answer, and it certainly does not respond to all the objections that might be raised to cases like Penn Central, let alone to the proprietarian tradition tout court. The objective of this paper is less to defend the proprietarian conception of property than to establish its influence in legal thought, past and present.

Perhaps the most important implication of the rediscovery of a property tradition that has competed in American legal thought with the commodity idea is to undermine claims that history privileges one conception among all others. History provides no conversation-stoppers in debates over property. Every conception of property is contestable and must be defended on its own merits. Propriety requires that we at least acknowledge that there's no easy way out.

118. Id.